The Legality of Deportation and Removal of Migrants in the United Kingdom within the context of Liberal Democracy

By: Cosmas Ukachukwu Ikegwuruka

Thesis Submitted in Fulfillment of the Requirement for the Degree of Doctor of Philosophy in Law at Newcastle Law School, Newcastle University

April 2017

Abstract

The main question that this thesis seeks to examine is whether the United Kingdom complies with its substantive and procedural obligations under International Human Rights Law in the deportation and removal of migrants and ancillary to the above, is whether the United Kingdom complies with its treaty obligations in the detention of migrants pending deportation. The thesis explores the substantive and procedural application of immigration legislation with respect to deportation and/or removal of migrants in the United Kingdom within the framework of International Human Rights Law in the context of liberal democracies. To that effect, it queries the availability and the exercise of rights of migrants in the face of deportation and/or removal.

The standards established for the protection of the rights of individuals in the State's territorial jurisdiction with specificity to detention and deportation will be employed to measure the United Kingdom's compliance with its obligations with emphasis laid on the safeguards provided by international legal instruments and extending to the right of legitimate expectation, in addition to the demands, salient features and values established by liberal democracies.

The thesis concludes by asserting *inter alia* that prolonged detention-indefinite detention, pending deportation and/or removal as practiced by the United Kingdom is at variance with its status as a liberal democracy and its obligations under International Human Rights Law which illuminates the finding that through their laws and practices, liberal democracies rather than comply with their commitments and obligations appear to wield unbridled power against migrants in enhancing deportation and/or removal. The thesis raises the query as to whether legislation associated with deportation and removal are in an unconstrained manner, constantly enacted, revised and re-enacted to achieve deportation and/or removal in contrast to the doctrine of legitimate expectation encapsulated under the principle of legal certainty. In addition, the research found that crimmigration heightened the velocity of deportation by expanding deportability grounds by way of triggering broader, harsher, and more frequent criminal consequences leading to conviction, thereby creating a suitable avenue for deportation and reducing the scope for challenging deportation decisions.

Acknowledgment

I appreciate my main Supervisor, Dr. M T Gil-Bazo for all her assistance, guidance and mentorship towards making this project a reality. I am grateful for the time, constructive criticisms, invaluable advice and support she provided me during these years and for allowing me to tap into her wealth of intellectual knowledge and wisdom.

I equally appreciate the role of my secondary supervisor, Prof Richard Collier for his wonderful and ebullient feedback and encouragement and to my ex- supervisor, Mr. A Wilton for those thought provoking contributions during the initial stage of this rigorous academic pursuit.

I am very thankful to members of staff of the Law School Office; Gemma, Suzanne and Catherine, their genuine willingness to assist is immeasurable and their support, excellent.

On a rather personal note, I am indeed grateful for the background support received from my family, the Queen of my heart- Chidi Ikegwuruka and my children- China, Chinma, Mobi and Chiaka; but for your prayers, this project would have been more difficult to accomplish. To my brother, HRM Eze R.A. Ikegwuruka, my sisters Tina (Adannem) and Nelly, I appreciate your untiring encouragement.

To my friends, Dr. Grace Osoata, Titus Ojo, Emma Osebor; thanks for your time in proof reading this thesis, and Dr. Linus Okere (academic prophet), Dr. Uchechukwu Nwoke, Dr. K C Anyanjor, Emmanuel Ajala, many thanks for your encouragement. To these Reverend gentlemen: Pastor Adisa Oladunni, Apostle John Dike, Ogbonnaya Nwafor, Rev Uzoma Opara, Pastor Innocent Ikechukwu, many thanks for your pastoral support and prayers. And to Mr. Victor Duru, Hilary Nwaogwugwu, Ben Anozie, Samson Orji, Onyema Ibekwe, Chidi and Sonny Emenike, I am grateful for all your support. To many others whose contributions, critique and prayers buoyed my efforts, I say thank you.

This thesis is dedicated to the memories of my late parents, HRH Eze F O Ikegwuruka and Lolo Juliana Ikegwuruka, at your transition; the flag continues to fly at full mast. God in his infinite mercy has made this work possible; to Him I give all the glory.

Table of Contents

Chapter 3. Immigration Control in the UK

Chapter 4. The Detention Estate

Chapter 5. Deportation, Removal and the Contrivance of Deportability

Chapter 6. Research Findings and Conclusions

List of Abbreviations

ACHR	American Convention on Human Rights
CAT	Committee Against Torture
CERD	Convention for the Elimination of All Forms of Racial Discrimination
CJEU	Court of Justice of the European Union
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CRC	Convention on the Rights of the Child
ECHR	European Convention on Human Rights and Fundamental Freedoms
ECommHR	European Commission of Human Rights
ECRE	European Council on Refugees and Exiles
ECtHR	European Court of Human Rights
ETS	European Treaty Series
EU	European Union
ExCom	Executive Committee of the High Commissioner's Programme
GAOR	General Assembly Official Records
HRC	Human Rights Committee
HRW	Human Rights Watch
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ILC	International Law Commission
LNTS	League of Nations Treaty Series
MoU	Memorandum of Understanding
PCIJ	Permanent Court of International Justice
Refugee Convention	Convention Relating to the Status of Refugees

UDHR	Universal Declaration of Human Rights
UN	United Nations
UN Charter	United Nations Charter
UNGA	United Nations General Assembly
UNHCHR	United Nations High Commissioner for Human Rights
UNHCR	United Nations High Commissioner for Refugees
UNTS	United Nations Treaty Series
Vienna Convention	Vienna Convention on the Law of Treaties
WGAD	Working Group on Arbitrary Detention

For legal journal abbreviations, refer to Cardiff Index to Legal Abbreviations: http://www.legalabbrevs.cardiff.ac.uk/

For non-legal journal abbreviations, refer to Journal of Economic Literature Abbreviation List: http://www.aeaweb.org/jel/abbrev.html

Chapter 1. Introduction, Purpose and Methodology

1. Introduction

Immigration control is arguably, a 'necessary feature in the maintenance of liberal democratic states that implies two capacities: one is to block the entry of individuals to a state and the other is to secure the return of those who have entered'.[1] In essence, the notion that every State by reason of its territorial supremacy is competent to exclude non-nationals partly or wholly from its territory is supported by international law,[2] the sovereign power to deport is an extension of the sovereign right to exclude.[3] Therefore the fundamental principle of State sovereignty is that States enjoy the discretion over the admission, residence and expulsion of non-nationals from the State-exercising jurisdiction.[4] Although the prerogative authority of States in this regard exists, it is rather subject to a cluster of international law and treaty obligations.[5] In short, while it is conceded that States can maintain sovereignty over their internal affairs, they are nonetheless accountable to upholding acceptable principles and standards under International Human Rights Law (IHRL) in the exercise of sovereignty thus inviting a reconciliation of sovereignty with universality of human rights law.[6]

'Citizens, unlike non-citizens, typically are not usually deported or expelled as they have the right to leave and enter the state at will',[7] therefore the nature and scope of the

---

[1] Matthew Gibney and Randall Hansen, 'Deportation and the liberal state:the forcible return of asylum seekers and unlawful migrants in Canada, Germany and the United Kingdom' New Issues in Refugee Research Working Paper No.77 <http://www.unhcr.org/3e59de764.pdf > accessed 14 August 2015

[2] Robert Jennings and Arthur Watts (eds), *Oppenheim's International Law* (9th edn, Longman 1992) 849; Ian Brownlie, *Principles of Public international Law* (7th edn, OUP 2008) 105-113, see generally *Abdulaziz, Cabales and Balkandani v UK* (1985) 7 EHRR 471 para 67; *Vilvarajah v UK* (1991) 14 EHRR 248 para 102; *Soering v UK* (1989) 11 EHRR 449

[3] Bridget Anderson, Matthew J Gibney and Emmanuel Paoletti, 'Citizenship, deportation and the boundaries of belonging' (2011) 15 *Citizenship Studies* 547

[4] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) 1950, CETS no 005 Art 1 requires State parties to 'secure to everyone within their jurisdiction the rights and freedoms'.

[5] Ian Bryan and Peter Langford, 'The Lawful Detention of Unauthorised Aliens under the European System for the Protection of Human Rights' (2011) 80 *Nordic Journal of International Law* 193, 194

[6] Ryszard Cholewinski and Patrick Taran, 'Migration, Governance and Human Rights, Contemporary Dilemmas in the era of Globalization' (2010) 22 *Refugee Survey Quarterly* 1, 3

[7] Matthew Gibney, 'Precarious Residents: Migration Control, Membersip and the Rights of Non-citizens' (2009) *UNDP Human Development Reports Research Paper* 10; See Guy S Goodwin-Gill, ''Temporary Exclusion Orders' and their Implications for the United Kingdom's International Legal Obligations' <http://www.parliament.uk/documents/joint-committees/human-rights/GSGG-Counter_Terrorism_JCHRFinal.pdf> accessed 25 March 2015; <http://www.ejiltalk.org/temporary-

right of states to control the admission of non-citizens to their territory is one that engages the attention of this research even as refusal of entry, deportation and/or removal sit uneasily with liberal principles.[8] Moreover, the further question of obligations owed to those already in the state in the context of immigration lying in a continuum with the protection of the interest of its citizens is even thornier and requires anxious scrutiny.[9] The debate is that it is legitimate for migrants to claim rights of residence in the host State under certain conditions either by way of liberal philosophy of fairness and/or as an exercise of their fundamental human rights.[10]

The thesis therefore examines the legality of deportation and removal of migrants in the United Kingdom (UK) within the context of liberal democracy, which invites the question as to whether the UK complies with its substantive and procedural obligations in the deportation and removal of migrants. Ancillary to the above is the question of whether the UK complies with its treaty obligations under International Human Rights Law (IHRL) in the detention of migrants for the purpose of deportation and/or removal.

I.1 Hypothesis and Problem Statement

The argument has been made that the growing popularity of exclusionary measures against migrants amongst liberal democratic states is common.[11] Therefore, the research would test whether contemporary deportation and/or removal regime in the United Kingdom is the emergence of a new legal framework of State power.

I.2 Research questions

1. Does the United Kingdom comply with its treaty obligations under International human Rights Law (IHRL) in the deportation and removal of migrants?

a. Does the United Kingdom as a liberal democratic state comply with its substantive and procedural obligations in the deportation and removal of migrants?

---

exclusion-orders-and-their-implications-for-the-united-kingdoms-international-legal-obligations-part-ii/> accessed 25 March 2015

[8] Gibney and Hansen (n1) 5

[9] Home Office, 'Fairer, Faster and Firmer -A Modern Approach to Immigration and Asylum' <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/264150/4018.pdf> accessed 05 May 2014

[10] D Jackson and others, *Immigration Law and Practice* (4th edn, Tottel Publishing 2008) 973

[11] An idea first canvassed by Gibney and Hansen, 'Deportation and the liberal state' (n1) 2, 6

b. Are immigration laws in the UK constructed in an unconstrained manner, which as a consequence enhances deportation and/or removal?

2. Ancillary to deportation and removal is the power to detain. Does the United Kingdom comply with its treaty obligations under International Human Rights Law in the detention of migrants for the purpose of deportation and/or removal?

a. Are the United Kingdom detention practices at variance with its liberal democratic ideology of fairness?

b. Can necessity of detention be defined devoid of rationality and due diligence?

1.3 Terminology

Migrants or aliens: These may be used interchangeably to describe non-citizens of a State. It may be extended to include refugees (except when the term refugee is specifically used) for the purpose of analysis of outsiders within a State's territorial jurisdiction.

Deportation: Deportation in the United Kingdom refers to a process where a non-citizen can be forcibly removed from the UK and prohibited from returning unless the deportation order is revoked.[12] A distinguishing feature of deportation from other compulsory or forced removal is that deportation brings a particular application or entry to an end but may create further difficulties for a migrant seeking future re-entry.

Removal: Removal on the other hand refers to all enforced departures thus describing the actual embarkation, which is preceded by a removal direction.[13] With the coming into force of the 1999 Immigration Act, s 10, removal became known as 'administrative removal', which strictly speaking distinguishes removal from deportation. This is embedded in the fact that prior to the coming into force of the 1999 Act, deportation applied to persons who had leave to enter or remain whom the Secretary of State

[12] Immigration Act 1971, Section 5 (1) and (2) and paragraph 362, as a process where a non-citizen can be forcibly removed from the UK by virtue of an order and prohibited from returning unless the order is revoked.
[13] Immigration Act 1971 Sch 2, para 9

intended to remove or those recommended for deportation by a court following criminal conviction, whereas administrative removal applied to those who had no leave to enter or irregular migrants.[14]

Expulsion: This is a generic term used in this research to describe either deportation or removal of migrants, which is the act of expelling someone from a State. Expulsion is used when necessary to describe either deportation or removal but with the understanding that all successful deportation or removal results in the actual removal of a migrant from the territory of the State. [15]

Detention: Detention as a matter of law means deprivation of liberty.

Legality: Legality is a principle of law binding on States as per ECHR standards with the purpose of protecting individuals against arbitrary State action and allows for accountability of the State in the exercise of its powers. It ensures that States make laws that have foreseeable legal basis for its action without inhibiting the power of the courts to check the display of arbitrary power.[16]

Legal certainty: In this thesis, legal certainty is used to describe the rule of law as possessing the characteristics of procedural and legal transparency in addition to predictability in order to avoid arbitrariness given that certain laws may still be legal but arbitrary.[17]

Legitimate Expectation: This is described as an aspect of legal certainty where an individual is said to hold a public authority accountable to its words and actions to the extent that the public authority cannot be allowed to change its mind having led the individual to believe that a certain decision would be made.[18] The doctrine of legitimate expectation operates as a control over the discretionary powers conferred upon a public authority.[19]

---

[14] David Jackson and others, *Immigration Law and Practice* (4th edn, Tottel Publishing 2008) 974
[15] Anderson, Gibney and Paoletti (n3) 549
[16] John Wadham and others, *Blackstone's Guide to the Human Rights Act 1998* (OUP 1999) 32
[17] *Fothergill v Monarch Airlines* Ltd [1981] AC 251
[18] A W Bradley and K D Ewing, *Constitutional and Administrative Law* (14th edn, Pearson 2007) 753
[19] Philip Sales, 'Legitimate Expectations' (Lecture for ALBA, Legitimate Expectation, London, 7 March 2006) 1

Crimmigration: Crimmigration was developed by the American Migration jurisprudence to connote the 'convergence of two critical regulatory regimes-criminal justice and immigration control where the two systems intersect at multiple points notably at points that violations of the immigration laws trigger broader, harsher, and more frequent criminal consequences even leading to migrants and/or refugees being prosecuted for illegal [irregular] entry'.[20] 'Crimmigration narrows the decision whether to exclude the migrant out of the State to a single moment in time-the moment of crime, compelling enough, to trigger the potential for deportation or detention for an immigration offense'.[21]

1.4 Purpose of study and Key Research Aims

This research will explore the substantive and procedural application of human rights with respect to deportation and/or removal of migrants in the UK within the context of liberal democracies. Furthermore, ancillary to the power to deport is the power to detain hence the depth given to the examination of detention by this thesis. As it has been expressed, 'the burgeoning phenomenon of immigration-related detention sits uncomfortably on the fault line separating the prerogatives of State sovereignty from the rights of non-citizens regardless of the broad discretion of States to control immigration'.[22] It will be argued that, there is in existence, a tension between the right to liberty of migrants against the broadly unfettered rights of States to control the admission and expulsion of migrants conferred on States by national and international law.[23] In this connection, the research will seek to unravel the legitimacy of detention and the extent of its unlawfulness, if at all, thereby querying the availability of the rights of migrants in the face of deportation and/or removal and any attendant obstacles militating against the exercise of these rights.[24] This thesis contends that the legality of

[20] Nora V. Demleitner, 'Immigration Threats and Rewards: Effective Law Enforcement Tools in the "War" on Terrorism' (2002) 51 *EMORY Law Journal* 1059, 1059; Daniel Kanstroom, (2004) 29 *North Carolina Journal of Int'l Law and Commercial Regulation* 639, 640

[21] Juliet P. Stumpf, 'Doing Time: Crimmigration Law and the Perils of Haste' (2011) 58 *UCLA Law Review* 1705, 1710

[22] Michael Flynn, 'Who Must Be Detained? Proportionality As A Tool For Critiquing Immigration Detention Policy' (2012) 31 *Refugee Survey Quarterly* 40, 40

[23] This right is entirely unfettered, see G Goodwin-Gil, 'The Limits of the Power of Expulsion in Public International Law' (1975) 47 *British Yearbook of International Law* 55, 156; cf the dictum of Lord Atkinson in *AG for the Dominion of Canada v Cain* [1906] AC 542 [546] on supreme State power; see generally *Abdulaziz, Cabales and Balkandani v UK* (1985) 7 EHRR 471EHRR 471; *Soering v UK* (1989) 11 EHRR 449; *Vilvarajah v UK* (1991) 14 EHRR 248; *Amur v France* (1996) 22 EHRR 533

[24] Reference to removal or deportable migrants is to undocumented migrants, irregular migrants, precarious migrants, stranded migrants or those with criminal convictions.

detention requires that the law, which authorizes detention, must accord with international human rights law standards and in view of that, presents the argument that a State wishing to detain migrants must do so in conformity to international human rights standards. This invites the need to examine the legality of detention both from the substantive and procedural limbs, as a law may be substantively sound but procedurally unfair, giving rise to the tension between substantive legality and procedural illegality or impropriety. The idea is to assess whether the UK's detention practices pending deportation and/or removal are in compliance with its treaty obligations as one of the key questions set out to be answered in this thesis. In short, detention is a precursor to deportation and/or removal.

This thesis prefers the expression 'irregular migrant' or 'undocumented migrant' as against 'illegal immigrant' given that State boundaries that delineate citizens and non-citizens do not justify the 'illegal immigrant' stereotype.[25]

In addition, the research will critically appraise the nature and legal basis for decisions bordering on deportation and removal and their effects on migrants with a view to unravelling whether such decisions are in conformity to the United Kingdom's international treaty obligations and other applicable international legal instruments. As Macdonald and Toal opined, 'of the numerous international human rights instruments, to which the UK is a party, the European Convention of Human Rights (ECHR) had already become the most significant and the most frequently cited source of rights outside the common law […]'[26]. Therefore the various ways in which courts may have regard to international obligations are relevant for this study. This is accentuated on the understanding that Article 6 of the Treaty on European Union requires the Union to respect fundamental human rights as guaranteed by the ECHR which result from the constitutional conditions common to the Member states as general principles of the Union's Law.[27]

[25] Julian M Lehman, 'Rights at the Frontier: Border Control and Human Rights Protection of Irregular International Migrants' (2011) 3 *Goettingen Journal of International Law* 733, 739; Antje Ellerman, 'Undocumented Migrants and Resistance in the Liberal State (2010) 38 *Politics & Society* 408

[26] I Macdonald and R Toal, *Macdonald's Immigration Law & Practice* (7th edn, LexisNexis 2008) 400

[27] Treaty on European Union (Consolidated Version), Treaty of Maastricht [2002] OJ C 325/5 Article 6 (2); Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community [2007] OJ C 306/01 Article 6 (3)

In the light of the United Kingdom's international treaty obligations, the research will assess compliance by the UK to international legal instruments such as the International Bill of Human Rights notably the Universal Declaration of Human Rights (UDHR) 1948,[28] and the International Covenant on Civil and Political Rights (ICCPR) 1976.[29] Further references will be made to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) 1984[30] and the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) 1965.[31] The emphasis will be on the safeguards provided by these instruments vis-à-vis the rights of migrants. With specificity to the interplay of the right of liberty and detention, the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) 1950,[32] will be relevant while mention will be made of the American Convention on Human Rights (ACHR) 1969[33] as applicable. Of further relevance will be international soft laws such as the U.N. Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment 1988,[34] the U.N. Standard Minimum Rules for the Treatment of Prisoners 1955[35] and Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention 1999 and the 2012 Guidelines.[36] It is re-emphasized that the above legal instruments do not guarantee a right to be free from detention, deportation and/or removal but provide and impose acceptable standards, procedural safeguards and limits in the exercise of sovereign power.

---

[28] Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A (III) (UDHR)
[29] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR)
[30] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 (CAT)
[31] International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195 (ICERD)
[32] The European Convention for the Protection of Human Rights and Fundamental Freedoms. (ECHR)
[33] American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) OAS Treaty Series No 36
[34] UNGA, 'Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment 1988 (76th plenary meeting 9 December 1988) UN Doc No A/RES/43/173 http://www.un.org/documents/ga/res/43/a43r173.htm accessed 14 November 2012
[35] Standard Minimum Rules for the Treatment of Prisoners, adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolution 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977 (13 May 1977) UN Doc E/5988
[36] UNHCR 'Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers' (Geneva 1999) www.unhcr.hr accessed 26 August 2012. This Guideline has now been replaced by UNHCR 'Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention' (Geneva 2012) < http://www.unhcr.org/refworld/docid/503489533b8.html > accessed 14 November 2012

The research will discuss some of the legal rights that irregular long term resident migrants and other irregular migrants possess in the United Kingdom by virtue of being in the host State as against those possessed by citizens or legal residents as rights cannot simply be forfeited on account of irregularity.[37] In general, the rights of migrants in a State includes but are not limited to security of person and fair hearing (effective remedy) and extends to legitimate expectation as an aspect of legal certainty, procedural and substantive due process rights as encapsulated under the ECHR.

The effect of crimmigration (over-criminalization), an intersection between criminal and immigration law, which creates deportability via criminal convictions culminating in sheer increment of deportation targets and numbers, is further explored by the research.[38]

The research will contribute to scholarship and knowledge in the area of migration as it concerns international human rights law given that wider matters within the boundaries of immigration and nationality laws do have effect on individual possession of rights to be in the United Kingdom, by way of lawful presence or as a matter of discretion.[39] Gaps do exist on the legality of deportation and removal as being practised by liberal democracies and this research aims to fill it. This research will contribute to debates on deportation, removal and detention and by so doing will espouse the vagaries of human rights issues incidental and ancillary to immigration decisions such as proportionality and margin of appreciation and their effect on international treaty obligations.

With the heat generated by recent trends in immigration control across liberal democracies, this research will readily become a major reference material for everybody who works on immigration, providing a guide for academics and practitioners, the offer of invaluable insights into likely developments in this dynamic and expansive area of law.

---

[37] Joseph H Carens, 'The Rights of Irregular Migrants' (2008) 22 *Ethics & International Affairs* 163, 166

[38] Jennifer M Chacon, 'Managing Migration Through Crime' (2009) 109 *Columbia Law Review Sidebar* 135, 136; Nora V. Demleitner, 'Immigration Threats and Rewards: Effective Law Enforcement Tools in the "War" on Terrorism' (2002) 51 *EMORY Law Journal* 1059, 1059; Daniel Kanstroom, (2004) 29 *North Carolina Journal of Int'l Law and Commercial Regulation* 639, 640; Juliet P. Stumpf, 'Doing Time: Crimmigration Law and the Perils of Haste' (2011) 58 *UCLA Law Review* 1705, 1710

[39] See generally Tom Hickman, 'The Courts and Politics after the Human Rights Act: A Comment' (Spring 2008) *Public Law* 1, 84; Alice Donald, Jane Gordon and Philip Leach, *The UK and the European Court of Human Rights* (Human Rights & Social Justice Research Institute 2012) 25, 44, 120; Eric Fripp, Rowena Moffatt and Ellis Wilford (eds) *The Law and Practice of Expulsion and Exclusion from the United Kingdom* (Hart Publishing 2015) viii

This research is limited to legality of deportation and removal of migrants in the United Kingdom and does not extend to the treatment of migrants in the country of destination, which will require a change of research methodology from qualitative to quantitative.[40]

1.5 Methodology

This research will apply the doctrinal research methodology in focusing on International Human Rights law with respect to deportation and/or removal. Doctrinal research is library-based and reliance will be placed on primary and secondary materials such as legislations, case laws, soft laws on the one hand, and textbooks, journals, articles, legal encyclopaedia, databases and many valuable websites on the other hand. The method of data collection would be the use of the above-mentioned primary sources and secondary sources of law.

Hutchinson defines doctrinal research as 'research which provides a systematic exposition of the rules governing a particular category, analyses the relationship between the rules, explains the areas of difficulty and, perhaps predicts future development'.[41] Doctrinal research is concerned with the 'formulation of legal doctrines through the analysis of legal rules usually found in statutes and cases within the common law jurisdiction which do not in themselves provide a complete statement of the law in any given situation but may be ascertained by applying the relevant legal rules to the particular facts of the situation under consideration'.[42] It is qualitative rather than quantitative and qualitative legal research is non-numerical. By applying legal doctrines, in doctrinal research, ambiguities within rules are clarified which thus places them in a coherent structure and by so doing describe their relationship to other rules.[43]

In essence, the doctrinal research method is colloquially described as 'black-letter law' due primarily to the study of legal texts which ultimately is concerned with the discovery and development of legal doctrines for publication in textbooks or journal articles and its research questions take the form of asking 'what is the law?' in particular

[40] Matt Henn, Mark Weinstein and Nick Foard, *A Short Introduction to Social Research* (Sage 2006) 1
[41] Terry C. Hutchinson, *Researching and Writing in Law* (2nd edn, Thomson Lawbook Co 2006) 7
[42] Paul Chynoweth, 'Legal Research' in Andrew Knight and Les Ruddock (eds) *Advanced research methods in the built environment* (Blackwell Publishing 2008) 29
[43] ibid

contexts,[44] thus identifying applicable legal rules. For Kelsen, legal rules are *normative* in character given that they dictate how individuals *ought* to behave, making no attempt either to explain, predict, or even to understand human behaviour but only function to prescribe it.[45] Epistemologically theorizing, Hart stressed that doctrinal research is not typically concerned '*about* law at all, rather it is concerned with 'what is the law?' thereby taking an internal, participant-orientated epistemological approach to its object of study'.[46] The doctrinal research is simply research into the law and legal concepts lying at the basis of common law.[47]

By applying this methodology, I will examine the relevance of international legal instruments to the protection of migrants' rights mentioned above, in addition to legislation, case laws, journal articles and written commentaries. This is aimed at a proper analysis of the law and how it has been implemented; bearing in mind that it is possible to make a law but the implementation may go against the spirit and letter of it or against the intention of the lawmakers. By so doing, I will aim to provide an analysis of Immigration law to demonstrate how it has developed in terms of judicial reasoning and legislative enactment within the remit of International Human Rights Law.[48] Therefore, consideration of the existing practice in the deportation and removal regimes as currently practiced by the United Kingdom will be followed by consideration of issues emanating from the implementation of the law and if there are substantive or procedural defects with the implementation of the law, the research could reach a tentative conclusion or recommendations for a change in either the law itself or enforcement.

It has been argued that the doctrinal research methodology has the limitation of only analysing factual materials and legal issues without sometimes the discussion of

[44] ibid
[45] Kelsen, H, *The Pure Theory of Law* (M Knight tr, University of California Press 1967) 20; see also Kelsen H 'The pure theory of law: Part II' (1935) 51 *Law Quarterly Review* 517; Kelsen H, 'The pure theory of law: its method and functional concepts' (1934) 50 *Law Quarterly Review* 474
[46] H.L.A Hart, *The Concept of the Law* (Clarendon Press 1961) 1, 18, 27; see also W.T Murphy and S Roberts, 'Introduction to the Special Issue on Legal Issue on Legal Scholarship' (1987) 50 (6) *Modern Law Review* 677, 678; Pierre Legrand, 'European Legal Systems Are Not Converging' (1996) 45 (1) *The International and Comparative Law Quarterly* 52,56
[47] Duncan N.J and Hutchinson T, 'Defining and describing what we do: Doctrinal legal research' (2012) 17 (1) *Deakin Law Review* 83, 85
[48] Wing Hong Chu, 'Qualitative Legal Research' in Mike McConville and Wing Hong Chui (eds), *Research Methods for Law* (Edinburgh University Press 2010) 47

contributions of empirical research to legal issues.[49] This can however be overcome by somewhat reliance on anecdotal evidence (involving personal experience of the affected people derived from some empirical research as documented by other studies) in order to critically evaluate the attendant legal issues relevant for our study.

References in this thesis will equally be made to three other selected liberal democratic states-the United States of America, Australia and France whose deportation reality offers significant similarities with the UK in immigration control, detention pending deportation and/or removal. This is in order to put the analysis of deportation issues in the UK within the broader context of other liberal democracies by way of convergence, divergence, diffusion and dilemmas of practices in immigration control. The reason for the above selection is that the UK, USA, Australia and France are major receiving countries in terms of immigration. They are equally liberal democratic countries given their constitution and democratic practices. While USA and Australia are outside the European Union, the UK and France are within the European Union. It has been argued that Europe over time has become the western target of immigrant flows. As a result, migration policies seem to have increased rapidly with the reaction that they have adopted deportation and detention as standard practices.[50]

Furthermore, the issue of deportation and removal cuts across jurisdictional divides, which therefore turns on the analysis of the implementation of these laws in order to determine whether the behaviour of these States is 'necessary in a democratic society'. The identification of common themes across these different legal systems given that deportation has international dimensions and/or a determination of whether a law reflects a consistent manner of dealing with issues, necessitated the selection of the United States, Australia and France.[51]

1.6 Research Framework and Chapter Outline

The thesis is divided into six chapters. Having discussed the general introduction in this chapter One, Chapter Two discusses the legal framework of the research in general and

[49] ibid
[50] Kees Groenendijk, Espeth Guild and Halil Dogan, *Security of Residence of Long-term Migrants: A comparative study of law and practice in European Countries* (Council of Europe 1998) 20-58
[51] Robert Cryer and others, *Research Methodologies in EU and International Law* (Hart Publishing, 2011) 28

in doing so, explores the normative background for the recognition of individual rights given that the legality of deportation and/or removal of migrants cannot be fully addressed without a commensurate understanding of individuals' rights and the corresponding obligations of IHRL incumbent on States. Therefore, the standards established by IHRL for the protection of the rights of individuals in the State's territorial jurisdiction with specificity to detention, deportation and/or removal will be employed to measure the UK's compliance with its obligations as represented by treaties, conventions, case law and soft law. The idea is to critically appraise the nature, character, rationality and legal basis for any decision affecting the rights of migrants thus unraveling whether such decisions are in conformity with the UK's international treaty obligations and other applicable international legal instruments.

With regards to liberal democracy, the chapter conceptualizes liberal democratic ideologies as producing liberal norms-a *sine qua non* in fostering integration and securing migrants' rights whilst arguing that the rule of law is the lifeblood of any liberal democratic State. It discusses that liberal democracies emphasize the importance of the rule of law and sees itself as inseparable from international human rights with the aim of applying the rights effectively and properly matched with individual and collective responsibilities.[52] In essence, the rights of migrants with respect to detention pending deportation cannot be secured if the rule of law is not respected given the vulnerable nature of such migrants in detention pending deportation.

The chapter further discusses the liberal democratic paradox-the analysis of tension between respects for international human rights on the one hand and the protection of citizenship on the other hand which places the liberal state in a difficult position to make decisions between the respect of public opinion against the deportation of aliens and due process.[53] On that plank, it will be argued that the relationship between sovereignty and external legal commitments for a liberal democracy should lie in a continuum amplified by the fact that liberal democracies are required to comply with their obligations in international law whether deriving from treaty or customary international law. See chapter two of this thesis for full details of this discussion in particular and the discussions on the legal framework of the research in general.

[52] Bertrand Ramcharan, *The Fundamentals of International Human Rights Treaty Law* (Martinus Nijhoff 2011) 63
[53] Gibney and Hansen, (n1) 1

Chapter Three considers the interplay of immigration control and the exercise of sovereignty noting that the fundamental principle of State sovereignty is that States enjoy the discretion over the admission, residence and expulsion of non-nationals in its territorial jurisdiction but that such a discretion is not unfettered.[54] This is given that States remain accountable to upholding certain principles and standards in the exercise of sovereignty- a reconciliation of sovereignty with universality of human rights law, a point further canvassed by the UN General Assembly.[55] The UN General Assembly had reaffirmed that 'the rights of States to enact and implement migratory policies and border security measures must be in tandem with their compliance to their obligations under international law, including international human rights law, in order to ensure full respect for the human rights of migrants'.[56] The chapter therefore chronicles immigration control thematically with the purpose of laying the background for the discussion of why and how deportation and its corollary detention became a weapon of immigration control. This raises the argument that immigration control has a strong reliance on spectacle for the State to act powerfully in the defense of its borders,[57] but little attention is paid to their international human rights obligations,[58] hence the debate on the bifurcation and firewall argument.[59]

Chapter Four engages the issue of detention as ancillary to the power of immigration control. The discussion revolves around the contours and detention powers, legality of detention in the light of the principles of necessity, due diligence, arbitrariness and proportionality within the remit of liberal democracy. It argues that detention is now used far more routinely than before, to discourage entry and for immediate practical purposes with the building of new detention centres, a development that has led to a tension between the right to liberty of migrants against the broadly (supposedly) unfettered rights of States to control the admission and expulsion of migrants conferred on States by national and international law. It discusses that the legality of detention

[54] *Abdulaziz, Cabales and Balkandani v UK* (1985) 7 EHRR 471
[55] Ryszard Cholewinski and Patrick Taran, 'Migration, Governance and Human Rights, Contemporary Dilemmas in the era of Globalization' (2010) 22 *Refugee Survey Quarterly* 1, 3
[56] UNGA Res 61/165 (19 December 2006) UN Doc A/Res/61/165
[57] Bridget Anderson, "Illegal Immigrant": Victim or Villain? (2008) *ESRC Centre on Migration, Policy and Society Working Paper* 64/2008, 3 <http://www.compas.ox.ac.uk/fileadmin/files/Publications/working_papers/WP_2008/WP0864%20Bridget%20Anderson.pdf > accessed 17 January 2014
[58] Steve Peers, 'Free Movement, Immigration Control and Constitutional Conflict' (2009) 5 *European Constitutional Law Review* 173
[59] Joseph Carens, 'The Rights of Irregular Migrants' (2008) *Ethnic and International Affairs* 163, 166

requires that the law, which authorizes detention, must accord with international human rights law standards.

It further argues that an assessment of legality of detention should encompass a broader test of substantive arbitrariness to include decisions which are unreasonable, unjust, delayed and unpredictable which hitherto turns on the issue of proportionality underpinning the ECHR in Art 8-11 ECHR with respect to the 'necessary in a democratic society' test. The chapter in turn highlights the test for the legality of detention in congruence to substantive and procedural duties that gives rise to the tension between substantive legality and procedural illegality or impropriety.

The debate on the necessity of detention is illuminated where the ECtHR attempted to separate notions of necessity from arbitrariness and proportionality, a development that tilts to deference to state sovereignty than legitimacy.[60] The chapter therefore presents the argument that Strasbourg jurisprudence seems to have thrown proportionality to the winds by its decision in *Saadi v UK* despite the fact that proportionality is in essence a balancing exercise underpinning the ECHR in Art 8-11 ECHR with the 'necessary in a democratic society' test.

Chapter Five discusses the deportation and/or removal regime and the contrivance of deportability and/or removability. It situates the debate within the remit of grounds and rationale for deportation and removal, the trends and turns in contemporary deportation regimes. An inquiry was made as to whether contemporary deportation regime in the United Kingdom and by extension in liberal democratic states is the emergence of a new legal framework of State power. In doing so, the chapter discusses the role of the ECtHR on removal in order to ascertain their relevance in promoting or inhibiting removal of migrants in a liberal democracy given the necessary in a democratic society adjunct. The purpose is to test whether deportation and/or removal practices conform to the rule of law and minimum procedural safeguards as encapsulated by international human rights law. The putative question in the debate is whether the United Kingdom complies with its treaty obligations under International Human Rights law in the act of deportation and removal of migrants?

[60] See *Saadi v UK* (2008) 47 EHRR 17; Galina Cornelisse, 'Human Rights for Immigration Detainees in Strasbourg: Limited Sovereignty or a Limited Discourse?' (2004) 6 *European Journal of Migration and Law* 93, 110, see also James Hathaway, *The Rights of Refugees under International Law* (CUP 2005) 433; Atle Grahl-Madsen, *The Status of Refugees in International Law* (Sijthoff Leiden 1972) 148

In order to answer the question, analysis will be made of recent increase in deportation and the conditions in which migrants are deported or removed, submitting that the conditions of deportation are sometimes inhumane and degrading which have led directly to a number of deaths in recent years, yet the United Kingdom and other liberal states continue the practice of deportation and removal with more force than ever.[61] The trend in deportation is exemplified by the construction of deportable subject using the springboard of securitization, criminalization and race,[62] which according to the chapter, gives rise to the setting of deportation targets. This, in turn, raises crucial questions for the preference of deportation and/or removal by States well and above their compliance with substantive and procedural safeguards as required by international human rights law. The chapter discusses that laws on deportation and/or removal must be fair, precise, sufficiently clear and proportionate to aims pursued, which as argued, remains a mirage.

On the contrivance of deportability and/or removability limb, the chapter queries whether legislation associated with deportation are constantly enacted, revised and re-enacted, in an unrestrained manner to achieve deportation in contrast to the doctrine of legitimate expectation encapsulated under the principle of legal certainty. The chapter discusses legitimate expectation as an aspect of legal certainty where an individual is said to hold a public authority accountable to its words and actions and the extent where the public authority cannot be allowed to change its mind having led the individual to believe that a certain decision would be made.[63] It contends that State contrivance of deportability or removability is anchored on clear violation of the doctrine of legitimate expectation through the instrumentality of laws (legislative architecture) or mass volumes of case laws (judicial activism) regarding immigration matters, which gives rise to deportation, and/or removal of migrants from the State. The debate is that the more the 'laws' are enacted, the easier it becomes to achieve deportation and or/removal, the more complex the laws, the easier it becomes to attract violation.

[61] Liz Fekete, 'Analysis: Deaths during Forced Deportation' (2003) Institute of Race Relations <http://www.irr.org.uk/news/analysis-deaths-during-forced-deportation/ > accessed 30 June 2013
[62] Anderson, Gibney and Paoletti, (n3) 552
[63] A W Bradley and K D Ewing, *Constitutional and Administrative Law* (14th edn, Pearson 2007) 753

Therefore 'migrant irregularity is produced and sustained as an effect of the law within the realm of discursive formation and lived through a palpable sense of deportability'.[64]

To heighten the velocity of deportation, the chapter further discusses the criminalization of immigration (hereinafter 'crimmigration') its effects and implication for the migrant in a deportation regime. It posits that a primrose path to the contrivance of deportability is crimmigration.[65]

In addition, the chapter analyses the growing nature of deportation and/or removal in liberal States and constructs that liberal states by way of convergent and divergent practices as exemplified by either legal transplant or policy transfer accomplish deportation enforcement goals. The conclusion is that States through the display of keenness in meeting deportation targets and quotas indulge in the enactment of laws, albeit arbitrarily, in disregard to its international human rights obligations. The unfettered discretion to control immigration fettered by its obligations under international human rights law queries the source and rationality of the emergence of this new legal framework of State power.

Chapter Six presents the conclusions and findings of the study.

[64] Nicholas P. De Genova, 'Migrant "Illegality" and Deportability in Everyday Life' (2002) 31 *Annual Review of Anthropology* 419, 439

[65] Jennifer M Chacon, 'Managing Migration Through Crime' (2009) 109 *Columbia Law Review Sidebar 135, 136*

Chapter 2. Research Background and Legal Framework of the Research

2.1 Introduction

The notion that every State by reason of its territorial supremacy is competent to exclude non-nationals partly or wholly from its territory is supported by international law.[66] Therefore the fundamental principle of State sovereignty is that States enjoy the discretion over the admission, residence and expulsion of non-nationals from the State-exercising jurisdiction.[67] Although States' prerogative authority in this regard exists, it is rather subject to a cluster of international law and treaty obligations.[68] While it is conceded that States can maintain sovereignty over its internal affairs, they are nonetheless accountable to upholding acceptable principles and standards under International Human Rights Law (IHRL) in the exercise of sovereignty thus inviting a reconciliation of sovereignty with universality of human rights law.[69]

The recognition of human rights to all persons and not only to citizens of a State has been expressed in the United Nations Charter, which in its Art 55 provides for a duty to promote 'universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language and religion'.[70] Art 1 ECHR on its part requires State parties to 'secure to everyone within their jurisdiction the rights and freedoms as defined in the Convention'.[71] In essence, States are required to 'respect and ensure rights to all individuals'.[72]

The obligations of States under IHRL do also apply extraterritorially. This statement finds steam in the Human Rights Committee's (HRC) assertion that the enjoyment of the Covenant's rights to all individuals regardless of their nationality 'applies to those within the power or effective control of the forces of a State party acting outside its

[66] Robert Jennings and Arthur Watts (eds), *Oppenheim's International Law* (9th edn, Longman 1992) 849; Ian Brownlie, *Principles of Public international Law* (7th edn, OUP 2008) 105-113; *Abdulaziz, Cabales and Balkandani v UK* (1985) 7 EHRR 471 para 67, *Vilvarajah v UK* (1991) 14 EHRR 248 para 102

[67] ECHR (n4) Art 1, see also *D v UK* (1997) 24 EHRR 423, para 48,

[68] Ian Bryan and Peter Langford, 'The Lawful Detention of Unauthorised Aliens under the European System for the Protection of Human Rights' (2011) 80 *Nordic Journal of International Law* 193, 194

[69] Ryszard Cholewinski and Patrick Taran, 'Migration, Governance and Human Rights, Contemporary Dilemmas in the era of Globalization' (2010) 22 *Refugee Survey Quarterly* 1, 3

[70] United Nations 'Charter of the United Nations' (adopted 24 October 1945) 1 UNTS XVI Article 55 (c)

[71] ECHR (n4) Art 1

[72] ICCPR (n29) Art 2

territory, regardless of the circumstances in which such power or effective control was obtained'.[73] The HRC had held severally that the ICCPR has extraterritorial effect.[74] In *Loizidou v Turkey* the ECtHR stated 'although Article 1 (art. 1) sets limits on the reach of the Convention, the concept of "jurisdiction" under this provision is not restricted to the national territory of the High Contracting Parties'.[75] In essence, under the extraterritorial effect of the ECHR as it has been suggested, whenever a State exercises its authority abroad, it leads to accountability of its officials.[76] Scholarly debates abound on the meaning of 'jurisdiction' and 'territory' and the extent to which States Parties owe their human rights obligations abroad. These will be discussed further at section 2.3 of this chapter.

The thesis in itself investigates the legality of deportation and removal of migrants in the UK within the context of liberal democracy, which invites the question as to whether the UK complies with its substantive and procedural obligations in the deportation and removal of migrants. Ancillary to the above is the question of whether the UK complies with its treaty obligations under International Human Rights Law (IHRL) in the detention of migrants for the purpose of deportation and removal.

In this connection, this chapter will show that the legality of deportation and removal of migrants cannot be fully addressed without a commensurate understanding of individuals' rights and the corresponding obligations of IHRL incumbent on States. Therefore, the standards established by IHRL for the protection of the rights of individuals in the State's territorial jurisdiction with specificity to detention, deportation and/or removal will be employed to measure the UK's compliance with its obligations as represented by treaties, conventions, case law and soft law. The idea is to critically appraise the nature, character, rationality and legal basis for any decision affecting the rights of migrants thus unraveling whether such decisions are in conformity with the

[73] HRC ' CCPR General comment no. 31: The nature of the general legal obligation imposed on States Parties to the Covenant' UN Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004) para 10
[74] See the Committee's conclusion regarding Israel's responsibility for human rights abuses in the Occupied territories in HRC, *'Concluding Observations of the Human Rights Committee: Israel'* CCPR/CO/78/ISR (21 August 2003) para 11, See also the Committee's decision regarding the USA's detention camp in Guantanamo Bay in Cuba in HRC, *'Concluding Observations: US'* CCPR/C/USA/CO/3 (15 September 2006) para 10, cf CAT, *'Consideration of Reports Submitted By State Parties Under Article 19 of the Convention: Comments by the Government of the United Kingdom of Great Britain and Northern Ireland to the Conclusions and recommendations of the Committee against Torture'* CAT/C/GBR/CO/4/Add.1 (8 June 2006) para 13
[75] *Loizidou v Turkey (Preliminary Objections)* (1995) 20 EHRR 90 para 62
[76] ibid

UK's international treaty obligations and other applicable international legal instruments.

In the main, the recognition of rights accorded to individuals under international human rights law (IHRL) appears to have emerged from four different law-building stages[77] namely: the international concerns expressed about human rights in the U.N Charter[78]; the recognition of those rights in the UDHR[79] and the expansion of those rights in the ICCPR[80]; and the ICESCR.[81] Other applicable human rights instruments include but are not limited to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)[82] and the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).[83]

The normative background provided by the UDHR for the recognition of these rights will be discussed at section 2.2 of this chapter. For the purpose of this thesis, general discussions will be made of the normativity of Art 3,[84] Art 5,[85] Article 8,[86] Article 9, [87] in addition to Art 12 of the UDHR. [88] As will be shown subsequently, the purpose is to examine the contribution of the UDHR to the protection of IHRL as a blue print for the recognition by States that individuals have rights because they are human beings. This will include the exploration of how the UDHR has opened the way in the recognition of its rights in the legally binding treaties such as the ICCPR and ICESCR.

In the light of the above, this chapter will explore the interpretation and scope of application of the right to liberty as enshrined in Art 5 ECHR and in Art 9 & 10 of the International Covenant on Civil and Political Rights (ICCPR).[89]

---

[77] Louis B. Sohn, 'The New International Law: Protection of the Rights of Individuals Rather Than States' (1982-1983) 32 *American University Law Review* 1, 12
[78] United Nations 'Charter of the United Nations' (n70)
[79] UDHR (n28) Art 3 & Art 9
[80] ICCPR (n29)
[81] International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR)
[82] CAT (n30)
[83] ICERD (n31)
[84] UDHR (n28) Article 3 UDHR states: 'Everyone has the right to life, liberty and security of person'
[85] Article 5 UDHR provides: 'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment'.
[86] Article 8 UDHR: 'Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law'.
[87] Article 9 UDHR: 'No one shall be subjected to arbitrary arrest, detention or exile'.
[88] Article UDHR 12 provides: 'No one shall be subjected to arbitrary interference with his privacy, family home or correspondence […]'
[89]Article 9 (1) ICCPR provides **'**everyone has the right to liberty and security of person. No one shall be

Furthermore, the prohibition of torture, inhuman or degrading treatment or punishment as enshrined in Art 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)[90] will be examined alongside the interpretation and scope of the principle of *non-refoulement* in Art 3 CAT-the prohibition of expulsion of persons to another State where they would be in danger of being subjected to torture.[91] Art 7 ICCPR[92] on its part makes provision relating to the prohibition of torture or to cruel inhuman or degrading treatment or punishment. All of these provisions are relevant for this study.

Other international soft laws such as the U.N. Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment 1988[93], the U.N. Standard Minimum Rules for the Treatment of Prisoners 1955[94] and Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention 1999 and 2012 are of key importance.[95]

Against this background, this chapter will assess whether the UK's detention practices are in compliance with its treaty obligations as one of the key questions set out to be answered in this thesis. In advancing the argument that detention may be provided by law but arbitrary if it is not in compliance with acceptable international standards, the above instruments will be of relevance in providing answers to the question of legality of detention pending deportation. This is with the objective of assessing whether detention as practiced by the UK meets the requirement of the principles of legality, necessity and proportionality.

---

subjected to arbitrary arrest or detention' Article 10 (1) provides 'All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person'.

[90] ECHR Art 3 provides: 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment'.

[91] Art 3 (1) CAT states 'No State Party shall expel, return ("*refouler*") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture', see also Jane McAdam, *Complementary Protection in International Refugee Law* (OUP 2007) 9

[92] Art 7 ICCPR provides 'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment […]

[93] UNGA, 'Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment 1988 (n34) Principle 1: 'All persons under any form of detention or imprisonment shall be treated in a humane manner and with respect for the inherent dignity of the human person'. Principle 2: 'Arrest, detention or imprisonment shall only be carried out strictly in accordance with the provisions of the law and by competent officials or persons authorized for that purpose'. Principle 8: 'Persons in detention shall be subject to treatment appropriate to their unconvicted status. Accordingly, they shall, whenever possible, be kept separate from imprisoned persons'.

[94] Standard Minimum Rules for the Treatment of Prisoners (n35)

[95] Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers (36)

In addition, by applying standards laid down under Article 8 of the ECHR (right to private and family life) the thesis will argue that mere irregularity of the migrant does not necessarily warrant deportation as other factors such as the length of residence, proportionality, insurmountable obstacles should be considered in the balancing exercise required in the assessment of Article 8 ECHR.

Consideration will be had to domestic legislation regarding detention and deportation. The idea is to examine how immigration laws in the UK bring their provisions to bear on the detention and deportation of migrants. The provisions that lay down entry and stay of non-nationals in addition to penalties for irregular entry will be examined.[96]The criminalization of immigration offences as grounds for deportation will be extensively discussed in the light of State practice given that the power to deport a non-national convicted of a criminal offence is adjudged to be conducive on grounds of public good. The UK Borders Act 2007 (2007 Act) s 32 makes provisions for the commission of criminal offences that may lay grounds for deportation (automatic deportation).[97]

With specificity to detention, attention will be paid to the norms and legislations forming part of State practice governing the detention of migrants with a view to examining their application in the context of fairness and arbitrariness. This examination is supported by the position that prior to the coming into force of the Immigration and Asylum Act 1999 the detention of migrants was not subject to supervision by the courts as there was no presumption of a right to bail in comparison to someone charged with criminal offence who has right to bail.[98] Furthermore, while the Immigration, Asylum and Nationality Act 2006 (2006 Act) increased the immigration officers' powers of arrest; the UK Borders Act 2007 (2007 Act) gave them increased powers of detention.[99] The concern therefore is how to ensure that the UK's State practice and legislation regarding detention conforms to acceptable international standards.

Furthermore, the consideration of the legality of detention pending deportation and or removal of migrants in the UK in the context of liberal democracy demands a

[96] See Immigration Act 1971, s 24 on immigration offences.
[97] See also Immigration Act 1971 s 3 (5) regarding deportation on conducive grounds of public good.
[98] Gina Clayton, *Textbook on Immigration and Asylum Law* (4thedn, OUP 2010) 16
[99] See UK Borders 2007, Act s 2 and s 36

discussion on liberal democratic ideologies. The idea is to restrict the exploration of such matters within the confines of liberal democratic ideologies. To achieve this, this chapter discusses liberalism in order to identify the defining elements of a liberal democracy. The definition of these elements will lead into the categorization of the UK as a liberal democratic state. It will then assess the UK's deportation practices within the meaning of liberal democracy. This will involve a discussion of the rule of law as an indispensable part of a liberal democracy in the light of its normative value on the international plane and specifically for liberal democracies. The analysis will equally be relevant in answering the question as to whether the UK in an unconstrained manner creates migrant irregularity through State practice regarding deportation.

The Chapter will also argue that in a liberal democracy, tension exists in establishing boundaries between individual and collective rights. This is with respect to international human rights (relating to detention, deportation and/or removal of migrants for our purposes) on the one hand and the protection of the rights of others on the other hand. The tension therefore is between the right of individuals and the protection of the rights of others such as the protection of society as a whole. This, as I will argue, places the liberal state in a difficult position when making decisions affecting the rights of non-nationals, which may be deemed incompatible with acceptable standards under the IHRL in the context of the exercise of sovereignty resulting from immigration control. Gibney and Hansen have argued that the restrictiveness of the liberal State's policy towards non-nationals attempting to secure their immigration status in the State 'can be seen as flowing from the liberalism (intentional or otherwise) of its policy towards foreigners inside the state. Inclusion and exclusion are two sides of the same liberal coin' (emphasis added).[100]

2.2 The Universal Declaration of Human Rights (UDHR) as a Blueprint for the Development of Human Rights

The UDHR is unarguably the foundation of much of the post-1945 codification of human rights and the 'international legal system is replete with global and regional

[100] Gibney and Hansen, 'Deportation and the liberal state' (n1)

treaties, based in large measure on the Declaration'.[101] The preamble of the UDHR explains that it was adopted as a 'common standard of achievement for all peoples and all nations' exerting moral, political and legal influences.[102] The UDHR was not viewed as imposing legal obligations on States at the time of its adoption by the General Assembly in 1948 but it 'remains a primary source of global human rights standards, and its recognition as a source of rights and law by states throughout the world distinguishes it from conventional obligations'.[103] As McDougal and Bebr stated 'despite the UDHR's lack of status as enforceable treaty obligation or even as an authoritative interpretation of such obligation and despite the imprecision of some of its language, the UDHR, due to its authoritative community origin and eloquent formulation of growing common demands of peoples throughout the world, exercised an important influence on subsequent decision making and prescribing in many world arenas'.[104]

The 1993 UN World Conference on Human Rights described the UDHR (including the UN Charter) as 'the source of inspiration and the basis for the United Nations in making advances in standard setting as contained in the existing international human rights instruments'.[105] Eleanor Roosevelt, the Chair of the UN Commission on Human Rights during the drafting of the Declaration emphasized that 'the Declaration is not a treaty, or an international agreement rather a declaration of principles of human rights and freedoms which will serve as a common standard of achievement for all peoples of all nations'.[106]Against this background, 'rights historically seem to emerge in contexts of extreme and widespread violations where radical forms of human dignity have created human rights as a discursive pattern'[107] as some big States such as the US, USSR and the UK in the opinion of Buergenthal, 'all had serious human rights problems of their

[101] Hurst Hannum, 'The UDHR in National and International Law' (1998) 3 (2) *Health and Human Rights* 144, 145; Hilary Charlesworth, 'The Mid-Life Crisis of the Universal Declaration of Human Rights' (1998) 55 WASH & LEE L. REV 781
[102] See the Preamble of the UDHR
[103] Hannum, 'The UDHR in National and International Law' (n101) 146
[104] Myres S McDougal and Gerhard Bebr, 'Human Rights in the United Nations' (1964) 58 *The American Journal of International Law* 603, 614 citing Schwelb, 'The Influence of the Universal Declaration of Human Rights on International and National Law' (1959) Am. Soc. Int'l L 217
[105] UNGA, 'Vienna Declaration and Programme of Action, World Conference on Human Rights' (25 June 1993) UN Doc No A/CONF.157/23
[106] Hannum (n101) citing M. M Whiteman, *Digest of International Law* (Dept of State Publication 1965) 243, see also Mary Glen Johnson, 'The Contribution of Eleanor and Franklin Roosevelt to the Development of International Protection of Human Rights' (1987) 9 *Human Rights Quarterly* 19, 20
[107] Jochen von Bernstorff, 'The Changing Fortunes of the Universal Declaration of Human Rights: Genesis and Symbolic Dimensions of the Turn to Rights in International Law' (2008) 19 *The European Journal of International Law* 903, 907

own at the time and were therefore not prepared to agree to strong commitments in the area of human rights'.[108] This is contrary to the position of smaller States that favored the inclusion of a bill of rights in the Charter even though they lacked the political influence to prevail which to him explains why the human rights provisions of the Charter, as adopted in San Francisco, were purposefully drafted to be weak and vague'.[109]

But evidence suggests that the UDHR was intended differently. The *travaux preparatoires* revealed that the moral outrage about human rights violations of World War II and the Holocaust specifically was a recurring decimal on the drafters' mind forming the real catalyst for the UDHR.[110] An examination of the *travaux preparatoires* will assist in the understanding of the scope and application of Art 8 & Art 9 UDHR. Art 8 of the UDHR[111] deals with effective remedy while Art 9[112] deals with detention. During the discussions on detention, it was emphasized that 'every one detained should have the right to immediate judicial determination of the legality of his detention stating that the State has a duty to provide adequate procedures to make this effective'.[113] The discussions of Art 8 UDHR[114] dealing with the right to effective remedy focused on two issues namely whether the judiciary should be authorized to review decisions of the executives and whether the article had any international implications.[115] In essence, the UDHR was a negotiated text constructed with great deliberation even with Small states remaining very vocal and emphasizing universality during the proceedings of the General Assembly's Third Committee.[116] Therefore universality of human rights as canvassed at the time became part of the Declaration as captured under Art 2 UDHR.[117]

---

[108] Thomas Buergenthal, 'The Normative and Institutional Evolution of International Human Rights' (1997) 19 *Human Rights Quarterly* 703, 706

[109] ibid

[110] Johannes Morsink, *The Universal Declaration of Human Rights: Origin, Drafting, and Intent* (Philadelphia 1999) 12 cited in Antoon De Baets, 'The Impact of the Universal Declaration of Human Rights on the Study of History (2009) 48 *History and Theory* 20, 21

[111] See Art 8 UDHR (n28)

[112] ibid Art 9 UDHR

[113] Panama asserted this which emanated from the American Law Institute, see David Weissbrodt and Mattias Hallendorff, '*Travaux Preparatoires* of the Fair Trial Provisions-Articles 8 to 11 - of the Universal Declaration of Human Rights' (1999) 21 *Human Rights Quarterly* 1061, 1084

[114] Art 8 UDHR (n28)

[115] Nehemiah Robinson, *The Universal Declaration of Human Rights: Its Origin, Significance, Application and Interpretation* (World Jewish Council 1958) 114 see also Weissbrodt and Hallendorff (n117) 1090-1093

[116] Susan Eileen Waltz, 'Universalizing Human Rights: The Role of Small States in the Construction of the Universal Declaration of Human Rights' (2001) 23 *Human Rights Quarterly* 44, 55

[117] Art 2 UDHR states: 'Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind […]', see Susan Waltz, 'Reclaiming and rebuilding the history of the Universal Declaration of Human Rights' (2002) 23 *Third World Quarterly* 437,444

2.2.1 The Universal Declaration of Human Rights as a Reflection of International Customary Law

At the time of its adoption, the UDHR was merely an international agreement on common standards with primarily moral authority, but with time, the UDHR acquired for itself significant legal status.[118] As Henkin remarked, 'some see it as having given content to the pledges in the Charter, partaking thereof of the binding character of the Charter as an international treaty. Others see both the Charter and the Declaration as contributing to the development of a customary law of human rights binding on all States'.[119] Brownlie adds that some of its provisions either constitute general principles of law or a representation of elementary consideration of humanity.[120] He further observed that the adoption of the UDHR by the General Assembly was in order to clarify the content of the Charter of the United Nations.[121] In the view of Cassidy, the UDHR has 'provided evidence of, and has helped to crystallize emerging principles of customary international law recognizing individual human rights in international law'.[122] The UDHR in the opinion of Sohn is an authoritative recognition of human rights, which has become a basic component of international customary law, binding on all states (due to its customary nature) regardless of their membership of the United Nations (emphasis added).[123]

Arguably, the nature and character of the UDHR can be said to reflect international customary law. Some scholars agree that some violations of the UDHR are simply violations of international law. In this regard, Ramcharan has argued that some parts of the UDHR represent international customary law.[124] He asserts that the UDHR provides the United Nations General Assembly's interpretation of human rights and that some parts of the UDHR and the International Convention represent international customary law and, to that extent, remains binding upon all States.[125] Furthermore, the constant

[118] Louis Henkin, The Age of Rights (Columbia University Press 1990) 19
[119] ibid
[120] Ian Brownlie, *Principles of Public International Law* (7th edn, OUP 2008) 559
[121] ibid
[122] Julie Cassidy, 'Emergence of the Individual as an International Juristic Entity: Enforcement of International Human Rights' (2004) 9 (2) *Deakin Law Review* 534, 555
[123] Louis B Sohn, 'The New International Law: Protection of the Rights of Individuals Rather Than States' (1982-1983) 32 *American University Law Review* 1, 17
[124] B G Ramcharan, 'The Legal Status of International Bill of Human Rights' (1986) 55 *Nordic Journal of International Law* 366, 380
[125] ibid

and widespread recognition of the UDHR in the opinion of Robertson and Merrils means that many of its principles can now be termed as part of international customary law.[126]

Humphrey in support argues that abundant references in later UN documents and State practice meant that the UDHR has gradually acquired the status of international customary law.[127] These discussions bring together congruent of ideas affirming that the UDHR has succeeded in laying down acceptable standards of IHRL, and with the subsequent creation of the ICCPR and the ICESCR as offshoots of the UDHR, precise obligations with binding effects on States who are parties to the treaties such as the United Kingdom were created.[128] The ICCPR appears to be more specific in the delineation of rights and even stronger in its statement of the obligation to respect the specified rights. This, as can be found at Art 2 (1) ICCPR makes a firm stipulation requesting State parties to respect and ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant.[129] The ICESCR's obligations as Brownlie observes, is "programmatic and promotional" except in the case of provisions relating to trade where Parties are required to undertake steps to the achievement by progressive realisation, the rights recognised in the present Covenant.[130]

In short, as much as it cannot be said that the UDHR is in itself customary international law but some of its provisions such as prohibition of torture might have acquired the status of customary international law. As Glendon observed, 'though the Declaration as such is not binding, most of its rights had already received a significant degree of recognition by 1948 in the constitutions of many nations if not in their practices'.[131]

---

[126] AH Robertson and J G Merrils, *Human Rights in the World* (3rd edn, Manchester University Press 1989) 27

[127] John Humphrey, 'The Universal Declaration of Human Rights: Its History, Impact and Judicial Character' in B G Ramcharan (ed) *Human Rights, Thirty years after the Universal Declaration* (Martinus Nijhoff 1979) 21-28; see Jochen von Bernstoff (n111) 909; See also Hannum's observation on the UDHR (n101) 150

[128] Multilateral Treaties Deposited with the Secretary-General: Status of parties to the treaty as at 19 June 2014 -the United Kingdom acceding to the ICCPR & ICESCR on 20 May 1976 <https://treaties.un.org/pages/Treaties.aspx?id=4&subid=A&lang=en > accessed 19 June 2014

[129] See ICCPR Art 2 (1)

[130] Brownlie, *Principles of Public International Law* (n120) 566; and ICESR Art 8 (1)

[131] Mary Glendon, 'The Rule of Law in the Universal Declaration of Human Rights' (2004) 2 *Northwestern Journal of International Human Rights* 1, 5

2.3 The Territorial Reach and Application of International Human Rights Law

The obligations of States under IHRL as has been contended, do apply extraterritorially and the determination of whether such obligations apply to a particular area usually require questions of subject matter of the obligations and the State's connections in meeting the responsibility norms.[132] As Wilde stated, 'determining whether State obligations apply to a particular area of activity usually involve asking whether the activity in question falls within the scope *ratione materiae* (subject matter) of the obligations in question, and whether the connection between the State and activity meets the requirements of the relevant responsibility norms'.[133] When the activity in question takes place outside the State's territory, this requires a further question as to whether the obligations apply to the State at all given the extraterritorial nature of the location.[134] Given that a State has jurisdiction over its own territory, the underlying issue is to unravel the limits of the territorial scope of a State's jurisdiction for the purposes of IHRL. Therefore the nexus to the State in the form of jurisdiction must be established before the State's act or omission can give rise to responsibility.[135]

Furthermore, on the issue of jurisdiction, the case of *Soering v UK*[136] confirms that acts done by public authorities in the United Kingdom may have consequences if such acts are attributed to the United Kingdom even if they take place by the action of another State in a territory not under the jurisdiction of the UK. In a case concerning the alleged violations of human rights committed by the UK in Iraq during the invasion by Allied forces in 2003, the House of Lords (now Supreme Court) in *Al-Skeini and Others v Secretary of State for Defence*[137] held that the victim Mousa, killed in detention at a British military base in Southern Iraq came under the jurisdiction of the UK in the light of Art 1 ECHR. The ECtHR's Grand Chamber similarly found that the UK exercised jurisdiction under Art 1 ECHR regarding all the applicants including those killed

[132] See the introductory part of this chapter at section 2.1
[133] Ralph Wilde, 'Triggering State Obligation Extraterritorially: The Spatial Test in Certain Human Rights Treaties (2007) 40 (2) ISR L Rev 503
[134] ibid
[135] Ralph Wilde, 'Legal "Black Hole"? Extraterritorial State Action and International Treaty Law on Civil and Political Rights' (2005) 26 *Michigan Journal of International Law* 740, 798
[136] (1989) 11 EHRR 439 paras 83-87,111; see also Sarah Joseph, 'Scope of Application' in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds) *International Human Rights Law* (OUP 2010) 151
[137] [2007] UKHL 26 [14] [64-61] [90-91]

outside the prisons, which were attributed to the UK.[138] Therefore the ECtHR confirmed that jurisdiction could exist by virtue of Art 1 ECHR outside the territory of a member State.[139]

It therefore follows that where the detention and/or detention pending deportation of a non-national will trigger the breach of his/her rights even outside the UK, provided such consequences are attributed to the UK, it then follows that the UK will be in breach of its obligations under IHRL. In short, an examination of IHRL *ratione personae* (personal reach of the State's jurisdiction) and that of *ratione loci* (territorial reach-extraterritorial effect) will be made as tensions generated in the literature by the terms 'jurisdiction' and 'territory' demand examination.

The ICCPR requires States to respect and ensure the Covenant's rights 'to all individuals within its territory and subject to its jurisdiction'.[140] The HRC has interpreted this to mean that the Covenant's obligations apply to all individuals regardless of their nationality in the discussion of the extraterritorial scope of the meaning of jurisdiction under its Art 2. In its General Comment 31, the HRC remarked that 'the enjoyment of Covenant rights is not limited to citizens of States Parties but must be made available to all individuals regardless of nationality and statelessness, such as asylum seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State Party. This principle also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State Party assigned to an international peace-keeping or peace-enforcement operation'.[141]

---

[138] *Al-Skeini v UK* App no 55721/07 (ECtHR, 07 July 2011) para 186; see also the concurring opinion of Judge Rozakis on "state agent authority and control".

[139] ibid *Al-Skeini* para 142, similarly in *Al-Jedda v UK* App no 27021/08 (ECtHR, 07 July 2011) para 85; see also Samantha Miko, 'Al-Skeini v United Kingdom and Extraterritorial Jurisdiction under the European Convention for Human Rights' (2013) 35 *Boston College International and Comparative Law Review* 63, 74; Barbara Miltner, 'Revisiting Extraterritoriality After Al-Skeini: The ECHR and Its Lessons' (2012) 33 *Michigan Journal Of International Law* 693, 695 and Marko Milanovic, 'Al-Skeini and Al-Jedda in Strasbourg' (2012) 23 (1) *European Journal of International Law* 121, 125; T. Thienel, 'The ECHR in Iraq: The Judgment of the House of Lords in R (Al Skeini) v. Secretary of State for Defence', (2008) 6 *Journal of International Criminal Justice* 115, 116

[140] See ICCPR Art 2 (1)

[141] HRC ' CCPR General comment no. 31: The nature of the general legal obligation imposed on States Parties to the Covenant' (n73) para 10

In the *Lopez Burgos*[142] and *Celiberti*[143] communications, the HRC stated that 'the "jurisdiction" test for the applicability of ICCPR Art 2 does not imply that the State cannot be held accountable for violation of rights under the Covenant which its agent commit on the territory of another State whether with the acquiescence of the Government of that State or in opposition to it'. The HRC justified this position by relying on its Art 5 (1) ICCPR, which restrain States from the destruction of the Covenant's rights.[144] The HRC therefore concluded in line with the above that, it would be unconscionable to interpret the responsibility under its Art 2 permitting a State to perpetrate violations it could not perpetrate on its territory.[145]

As Wilde observed, the non-nationality basis of conceiving human rights is relevant in the consideration of whether IHRL should apply extraterritorially.[146] He argued that 'given that the majority of such individuals affected by extraterritorial State actions are aliens, to conceive "jurisdiction" only territorially when a State has taken extraterritorial action would in consequence produce a distinction in protection between nationals and aliens'.[147] For him, such will inadvertently produce unequal treatment between nationals and non-nationals which will be of arbitrary nature running contrary to the general concept of human rights based on humanity rather than nationality.[148] King argues that 'where a State has lawful competence to act in relation to a person under international law principles, that person is within its 'jurisdiction' for human rights purposes and the State has a commensurate obligation to respect and ensure his or her rights'.[149] This means that States also bring persons who are affected by their unlawful acts abroad within their jurisdiction for human rights purposes.[150] In the case of *Hirsi Jamma and*

---

[142] *Sergio Euben Burgos v Uruguay* Communication No 12/52 UN Doc CCPR/C/13/D/52/1979 (29 July 1981) para 12.3
[143] *Lilian Celiberti de Casariego v Uruguay* Communication No 13/56 CCPR/C/13/D/56/1979 (29 July 1981) para 10.3
[144] See ICCPR Art 5 (1)
[145] Sergio Euben Burgos v Uruguay (n142) 12.3
[146] Ralph Wilde, 'Legal "Black Hole"? Extraterritorial State Action and International Treaty Law on Civil and Political Rights' (n135) 791
[147] ibid
[148] ibid
[149] Hugh King, 'The Extraterritorial Human Rights Obligations of States' (2009) 9 (4) *Human Rights Law Review* 522, 522
[150] ibid; see also Theodor Meron, 'Extraterritoriality of Human Rights' (1995) 89 *American Journal of International Law* 78, 79; Martin Scheinin, 'Extraterritorial Effect of the International Covenant on Civil and Political Rights in Fon Coomans and Menno T. Kamminga (eds) *Extraterritorial Application of Human Rights Treaties* (Intersentia 2004) 73; and Silvia Borelli, 'Casting Light on the Legal Black Hole: International Law and Detentions Abroad in the "War on Terror" (2005) 87 INT'L REV. RED CROSS 39,40-41; Michael J. Dennis, 'Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation' (2005) 99 (1) *The American Journal of International Law* 119, 122

Others v Italy[151] the extraterritoriality was engaged. In that case, some two hundred and fifty Somali and Eritrean migrants were travelling from Libya to reach the Italian coast. They were intercepted at sea by the Italian authorities and sent back to Tripoli, Libya without the examination of their case, which as it was argued, exposed them to a risk of ill treatment, and amounted to a collective expulsion. Even though, the applicants objected to been handed over to Libyan authorities, they were forced to leave the Italian ship that took them from Italy to Libya. (Two of the applicants died in unknown circumstances while fourteen were granted refugee status by the Office of the UNHCR in Tripoli by October 2009). The ECtHR found that the applicants were within the jurisdiction of Italy for the purposes of Article 1 of the Convention. The court in addition found that there had been two violations of Article 3 of the Convention because the applicants had been exposed to the risk of ill treatment in Libya and of repatriation to Somalia or Eritrea as well as violation of violation of Article 4 of Protocol No. 4 (prohibition of collective expulsion of aliens). The Court further held that there had been a violation of Article 13 taken in conjunction with Article 3 and with Article 4 of Protocol No.4. In view of that, the Court awarded each applicant fifteen thousand euros in respect of non-pecuniary damage as well as one thousand, five hundred and seventy-five euros and seventy-four cents in total in respect of costs and expenses.

Therefore, a trigger for the application of extraterritorial concept of jurisdiction in IHRL is largely based on spatial concept of territorial control.[152] This is reflective of the principle of State responsibility in international law generally as expressed by the ICJ in the *Namibia opinion*[153] when South Africa was unlawfully occupying Namibia. The court emphasized that 'South Africa would be accountable for any violations of the rights of the people of Namibia'. In essence, the ICCPR was intended to have extraterritorial effect. Zilli recounted that 'the drafters of the ICCPR and their representatives who adopted it, understood from the beginning that the language of Art 2 (1) would have the effect of limiting the ICCPR to a State's party's territory and seriously considered editing the language to allow the Covenant to apply extraterritorially'.[154] As McGoldrick recalled, those who objected to the proposed Art 2

---

151 *Hirsi Jamaa and Others v Italy* App no 27765/09 (23 February 2012)

152 Wilde, 'Triggering State Obligations Extraterritorially' (n133) 504

153 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) (Notwithstanding Security Council Resolution* 276) (Advisory Opinion) 1971 ICJ Rep 16 (June 21) para 118

154 Aldo S Zilli, 'Approaching the Extraterritoriality Debate: The Human Rights Committee, the U.S. and the ICCPR' (2011) 9 (2) *Santa Clara Journal of Law* 399, 412

(1) regarding extraterritoriality queried whether limiting the ICCPR to the territorial boundaries of a State would be in conflict with other provisions of the Covenant such as freedom of an individual to return to his or her home country.[155] Even though the phrase "within its territory" was retained, the Covenant as has been argued was primarily meant to apply extraterritorially.[156]

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) in its Art 2 contains provisions regarding 'jurisdiction' and 'territory'.[157] Additionally, Art 3 (1) CAT regarding *refoulement* expresses the fact of extraterritoriality of consequences attributed to the State.[158]

2.4 The Right to Liberty and Security, Prohibition of Torture, Right to Private and Family Life in the Deportation and Removal Context

As discussed above, IHRL applies to all individuals regardless of their nationality and the extraterritorial effect of IHRL imposes obligations on States for breaches of the law that are attributable to them. The Human Rights Committee further stated that the general rule is 'that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens [non-nationals] […]'.[159] The ECHR on the other hand has been described 'as a comprehensive bill of rights on the Western liberal model born of the Council of Europe where contracting parties have undertaken to secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of the Convention'.[160]

---

[155] Dominic McGoldrick, 'Exraterritorial Application of the International Covenant on Civil and Political Rights' in Fon Coomans and Menno T. Kamminga (eds) *Extraterritorial Application of Human Rights Treaties* (Intersentia 2004) 66

[156] ibid; see Sarah Joseph, 'Scope and Application' in Daniel Moeckli, (n136) 165

[157] See CAT Art 2

[158] See CAT Art 3 (1); see also Art 33 of the 1951 Convention Relating to the Status of Refugees 2545 189 UNTS 150 (entered into force 22 April 1954) which provides that 'No Contracting State shall expel or return *('refouler')* a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened […].

[159] HRC, '*CCPR General Comment No 15: The Position of Aliens Under the Covenant'* (11 April 1986) para 2

[160] Brownlie, *Principles of Public International Law* (n120) 52; see also 2.3 of this chapter; Ian Brownlie and Guy S. Goodwin-Gill (eds) *Brownlie's Document on Human Rights* (6th edn, OUP 2010) 680-700, Pieter van Dijk and others (eds), *Theory and Practice of the European Convention on Human Rights* (4th edn, Intersentia 2006) 1, David Harris and others, *Law of the European Convention on Human Rights* (2nd edn, OUP 2009) 1

For the purposes of this thesis, the rights of non-nationals (migrants) will be examined. The aim is to present these rights as entrenched by the applicable international instruments and in subsequent discussions, to unravel whether the UK complies with its substantive and procedural obligations in the respect of these rights especially as it concerns detention pending deportation and/or removal. The discussions will be restricted to the migrant's right to liberty and security; the prohibition of torture and inhuman treatment; the right to private and family life that imposes a procedural duty upon signatory States to provide 'effective remedy' within their domestic procedures against violations of such rights and freedoms as entrenched in the applicable international instruments under evaluation.

2.4.1 The Right to Liberty and Security

From time immemorial, the right to liberty and security occupies an important niche in the history of human rights, which underlines efforts made by common law to establish basic and effective safeguards against detention. The pillars of these safeguards are entrenched in the Magna Carta 1215 which provides that 'No free man shall be taken or imprisoned or disseised or outlawed or exiled or in any way ruined, nor will we go or send against him, except by lawful judgment of his peers or by the law of the land'.[161] The Petition of Right 1628, seen as the second pillar of normative procedural device safeguard was designed to prevent the abuse of detention powers.[162] It has indeed been posited that freedom from arbitrary detention could be termed the oldest of human rights.[163]

The normative standard of the right to liberty and security as provided in UDHR Art 3 & 9 [164] has been codified in Art 9 & 10 of the International Covenant on Civil and Political Rights 1966 [165] and Art 5 ECHR. In the main, Art 5 ECHR will be considered

[161] Magna Carta 1215, 17 John, c.39 as reprinted in James Clarke Holt, Magna Carta 461 (2nd edn 1972)
[162] Petition of Right 1628 'The Great Charter of the Liberties of England' <http://www.constitution.org/eng/petright.htm> accessed 01 August 2014
[163] Tom Bingham 'Personal Freedom and the Dilemma of Democracies' (2003) 52 *International and Comparative Law Quarterly* 841, 842
[164] See UDHR Art 3 & Art 9 UDHR Art 9
[165] See ICCPR Art 9 (1) & Art 10 (1) ICCPR Art 9 (1) provides 'everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention'. Article 10 (1) provides 'All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person'.

in addition to international legal instruments mentioned above.[166] The Human Rights Committee's General Comment on the issue of right to liberty and security specifically includes immigration control.[167]

The protection of the right to liberty is important to the ECHR and Strasbourg jurisprudence has emphasized 'the protection of the individual against arbitrary interferences by the State with his right to liberty'.[168] The 'judicial control of interferences by the executive with the individual's right to liberty is an essential feature of the guarantee embodied in Art 5 ECHR which as the ECtHR stated is one of the fundamental principles of a democratic society that a State must observe the rule of law while interfering with the right to liberty'.[169] Art 5 ECHR lists six reasons allowed by the ECHR that allow for the deprivation of individual liberty.[170] Amongst these six, only one, Art 5 (1) (f), which is related to immigration, will be fully examined. The discussion will focus on the contours of detention, legality of detention in the light of the principles of necessity, due diligence, arbitrariness, proportionality, detention conditions and equality of arms within the remit of liberal democracy. These will be discussed in full at Chapter 4 of this thesis.

In any event, the supervening question is whether detention is in accordance with the law and permissible under Art 5 (1) (f) and what factors are engaged in deciding the legality of detention. Detention under Art 5 (1) (f) is permissible in two situations (two limbs): one is to prevent the migrant from 'effecting an unauthorized entry into the country' and the other is 'where action is being taken with a view to deportation or extradition' of a non-national (migrant) who has entered the country. That being said, Art 5 ECHR aims to ensure that no one is deprived of his liberty in an arbitrary manner, which emphasizes the security of the person.[171]

---

[166] U.N. Body of Principles for the Protection of All Persons […] (n34); Standard Minimum Rules […] (n35); Guidelines on the Applicable Criteria […] (n36)
[167] HRC 'General Comment No 8, Right to Liberty and Security of Persons, (Art 9)' CCPR (30 June 1982) para 1
[168] *Brogan and Others v UK* (1988) 11 EHRR 117, para 58
[169] ibid; see also *Bonzano v France* (1986) 9 EHRR 292, paras 54-60, *Engels v Netherlands* (1976) EHRR 647, para 58
[170] Art 5 (1) ECHR provides: 'everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: […] (f) the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition'.
[171] *Guzzard v Italy* (1980) 3 EHRR 333, para 92; *Bozano v France* (1986) 9 EHRR 292 para 54

Arbitrary Detention

It might be argued that what is in accordance with the law cannot be arbitrary.[172] According to Goodwin-Gill, an infringement of personal liberty such as detention may be arbitrary not only in accordance with procedures established by law but extends to the provisions of the law contrary to liberty and security of the person.[173] This evidently embraces not only what is illegal but also what is unjust. O'Nions contends that a broader test of substantive arbitrariness should include decisions which are unreasonable, unjust, delayed and unpredictable.[174] The concept of arbitrariness is also expressed in the UNHCR's guidelines on the detention of asylum seekers, which sees freedom from arbitrary detention 'as a fundamental human right'.[175] The UNHCR Guidelines 4 reaffirms that arbitrariness is interpreted broadly to include not only lawfulness but includes elements of inappropriateness, injustice and lack of predictability which demands for necessity in an individual case, reasonable in the circumstance and proportionate to a legitimate purpose. For Cole, 'Their very arbitrariness makes them indefensible, and defending them highlights the incoherence of attempting to justify views according to which citizens can enjoy better or worse life prospects by virtue of their relative location with respect to an arbitrarily erected border'.[176]

In the protection of a person against arbitrary detention, the ECHR had further determined that an avoidance of arbitrariness either in motivation or effect also encompasses cases of bad faith where detention is not consistent with the restrictions as enshrined in Art 5 ECHR.[177] The issue of bad faith was discussed in *Bozano v France* [178]; where an Italian national was convicted in his absence by an Italian court, forcibly taken by French police to the Swiss border and handed over to the Swiss custody in what later was adjudged an unlawful deportation order undertaken to circumvent a French court's ruling. The ECtHR held that the deprivation of liberty was arbitrary in

[172] Guy S Goodwin-Gill, 'International Law and the Detention of Refugees and Asylum Seekers' (1986) 20 *International Migration Review* 193, 195-196
[173] ibid
[174] Helen O'Nions, 'No Right to Liberty: The Detention of Asylum Seekers for Administrative Convenience' (2008) 10 *European Journal of Migration and Law* 149, 157; Manifred Nowak, UN Convention on Civil Political Rights: CCPR Commentary (NP Engel 1993) 173
[175] UNHCR Guidelines on the Applicable Criteria (n36) para 1 of the Introduction
[176] P Cole, 'Towards a symmetrical world: migration and international law' (2006) 4 *Ethics and Economics* 1, 1–7
[177] *Amur v France* (1996) 22 EHRR 533; *Winterwerp v Netherlands* (1979) 2 EHRR 387, para 37-9
[178] (1987) 9 EHRR 297

motivation and unlawful given that the detention was obviously for the purpose of deportation but in reality was a disguised illegal extradition. The ECtHR also determined that arbitrariness might occur where an applicant is denied adequate reasons for the detention. According to the court, this obligation continues as detention may therefore become unlawful if the reason given initially ceases to apply.[179]

The HRC had similarly considered the issue of arbitrary detention as a breach to right to liberty and security. In *A v Australia*[180] the HRC dealt with a communication concerning the detention of a Cambodian asylum seeker where it noted that the notion of arbitrariness must not be equated with 'against the law' but has to be given a broad interpretation to include inappropriateness and injustice. The Committee remarked that remand in custody could be considered arbitrary if it is not necessary in all circumstances. In Hugo *van Alphen v Netherlands*[181] the Committee emphasized that detention may be lawful but arbitrary which could constitute a gross breach of Art 9 ICCPR.

Given that lack of due diligence results in arbitrariness, consideration will be given to the importance of due diligence in detention. In *Chahal v UK* [182] the ECtHR limited the power of detention under the limb of Art 5 (1) (f) with the proviso that detention would only be lawful as long as the underlying deportation proceedings were being pursued with due diligence. The court further remarked that even where the said proceedings were diligently pursued, they would become arbitrary if they continue for an exceptional length of time without explanations being provided. In *Lynas v Switzerland* [183] it was held that while Art 5 (1) (f) sets no reasonable time limit on the length of detention, proceedings had to be pursued with due diligence. This can be contrasted with the decision in *Kolompar v Belgium*[184] where regardless of detention taking place for almost three years due to delayed proceedings by the applicant, no breach of Article 5 (1) (f) was found. Nonetheless, it has been emphasized that absolute maximum period

[179] *Chahal v UK* (1996) 23 EHRR 413
[180] *A v Australia* Communication No 456/1991 UN Doc CCPR/C/51/D/456/1991
[181] Communication No 305/1988 UN Doc CCPR/C/39/D/305/1988
[182] *Chahal v UK* (1997) 23 EHRR 413, para 117
[183] (1976) 6 DR 141 (Commission Decision, 6 October 1976)
[184] (1992) 16 EHRR 197

of detention should be specified in national law.[185] For a detailed discussion on arbitrary detention, see specifically chapter 4.4.1 of this thesis.

Necessity of Detention

It has further been argued that the legality of detention requires a determination of its necessity and proportionality. Necessity will be discussed first. This is against the backdrop of the debate that detention appears to produce a harmful effect on liberal ideologies by way of deterioration of liberal policies but may at the same time act as an indicator of deeper and more insidious change.[186] In fact, it has been posited that States have resorted more frequently to detention for longer periods as a response in part to large volume of migrants entering their territories.[187] Wilsher is of the view that the Guidelines allow for detention in order to determine the elements of the claim but stressed that such detention is justifiable if it is within a prescribed period.[188] In that connection, the UN Working Group suggested that necessity was important to avoid the issue of arbitrary detention because the detention of migrants in general or asylum seekers in particular is not prohibited.[189]

Following that reasoning is Hathaway who is of the opinion that short-term detention only aimed for administrative purpose can be said to be necessary even though it is not specifically governed by the Guidelines.[190] Grahl-Madsen, however opinionates that detention should be used to ascertain identity and for investigative purposes and limited by necessity but he specifically rules out the legitimacy of detention for administrative purposes.[191] In Field's view, the consideration of non-custodial alternatives is a 'pre-

[185] UNHCR 'Guidelines on Applicable Criteria and Standards' (n24); HRC 'Commission on Human Rights Working Group on Arbitrary Detention, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment regarding the situation of immigrants and asylum seekers' (1999) UN Doc E/CN.4/2000/4/Annex 2. It is noted that 'Principle 7 relates to Guarantees concerning detention' which provides that a maximum period should be set by law and the custody may in no case be unlimited or of excessive length.
[186] Marie-Claire Caloz-Tschopp, 'On the Detention of Aliens: The Impact on Democratic Rights' (1997) 10 *Journal of Refugee Studies* 165, 166-167
[187] Daniel Wilsher, 'The Administrative Detention of Non-Nationals Pursuant to Immigration Control: International and Constitutional Law Perspectives' (2004) 53 ICLQ 897.
[188] Daniel Wilsher, 'Detention of asylum seekers and refugees and international human rights law' in P Shah (ed) *The Challenge of Asylum to Legal Systems* (Cavendish 2005) 159
[189] UNHCR 'Report of the Working Group on Arbitrary Detention' (10 January 2008) UN Doc A/HRC/7/4
[190] James Hathaway, *The Rights of Refugees under International Law* (CUP 2005) 433
[191] AtleGrahl-Madsen, *The Status of Refugees in International Law* (Sijthoff Leiden 1972) 148

requisite for satisfying the principle of necessity in relation to lawful detention'.[192] That accords with my argument that even if properly motivated and otherwise lawful, a deprivation of liberty may become arbitrary in effect if it is found to be disproportionate to the pursued aim.

Further discussion on necessity requires the examination of detention rules. In the European Union, detention rules can be found in the common standards and procedures in Member States for returning illegally staying third-country nationals.[193] Art 15 of the Directive requires Member States to apply less coercive measures in detention for a third country national subject to removal even when there is a risk of absconding or the third-country national concerned avoids or hampers the preparation of return or the removal process'.[194] Even though the United Kingdom is not bound by its provision or application in its entirety but the important thing to note is that the Directive established standards which must be followed within the confines of "necessary in a democracy" test as adumbrated by the ECHR.[195] Put differently, limitations on human rights must be necessary in a democratic society with established standards incumbent on it. The Executive Committee's *Conclusion on detention of refugees and asylum seekers* on its part stressed the need for necessity to be related to legitimate aims.[196] The Committee stated that 'detention should be a measure of last resort with liberty being the default position'.[197]

Proportionality of Detention

Proportionality as the most crucial element of the necessity test involves a search for a fair balance between the demands of the general interest of community and the requirements of protection of the individual's human rights.[198] In *Daly* [199], the House of Lords adopted a three stage approach to establish proportionality: i) the legitimate

[192]Ophelia Field and Alice Edwards, 'Alternatives to Detention of Asylum Seekers and Refugees' (2006) UNHCR Legal and Protection Policy Research Series POLAS/2006, Appendix I <http://www.unhcr.org/refworld/pdfid/4472e8b84.pdf> accessed 29 August 2012
[193] Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals [2008] OJ L 348
[194] ibid, Art 15
[195] See the preamble of the Directive and para 26, which states that the United Kingdom is not taking part in the adoption of this Directive and is therefore not bound by it in its entirety or subject to its application.
[196] Ex Com Conclusion 44 (XXXVII) (1986) UN Doc A/AC.96/688
[197] ibid
[198]*Soering v UK* (1989) 11 EHRR 439, para 89
[199] *R (on the application of Daly) v SSHD* [2001] UKHL 26

objective should be of sufficient importance justifying the limitation of a fundamental human right; ii) the measures designed to meet the objective must be rationally connected to it; iii) the means used to impair that right must be no more than necessary to accomplish the objective. The principle of proportionality presupposes that where an action to achieve a lawful objective is taken in a situation where it appears to restrict a fundamental right, the effect on the right must not be disproportionate to the public purpose sought to be achieved.[200]

However, the Grand Chamber of the ECtHR appears to have applied a different parameter in discussing the issue of necessity and proportionality in the case of *Saadi v the UK*.[201] The ECtHR attempted to separate notions of necessity from arbitrariness and proportionality. It stated, 'to avoid being branded as arbitrary […] such detention should be carried out in good faith; it must be closely connected to the purpose of preventing unauthorized entry of the person to the country; the place and conditions of detention should be appropriate […] and the length of detention should not exceed that reasonably required for the purpose pursued'.[202] Cornelisse thinks that the court's approach was simply cautious and argued that the cautious approach adopted was simply deference to state sovereignty, which led the court to reason that the detention of migrants including asylum seekers should confer a broader discretion than detention under other exceptions in Art 5 (1).[203] She adds that the judgment exemplifies the 'limits and blinds-spots' of the European human rights system when it comes to those who are 'out of place' in the global territorial order.[204] O'Nions comments that the outcome of this case legitimizes reasonably brief periods of detention for administrative convenience provided it is not seen as arbitrary.[205] In *Chahal v UK*[206] the ECtHR held that proportionality does not

[200] Michael Fordham, *Judicial Review Handbook* (Hart Publishing 2008) 81; *R (Daly) v SSHD* [2001] UKHL 26 regarding the invasion of privacy of a prisoner's letters protected by privilege.
[201] *Saadi v UK* (2008) 47 EHRR 17
[202] ibid, *Saadi v UK*, para 74
[203] Galina Cornelisse, 'Human Rights for Immigration Detainees in Strasbourg: Limited Sovereignty or a Limited Discourse?' (2004) 6 *European Journal of Migration and Law* 93, 110; J.E.C Fawcett, *The Application of the European Convention on Human Rights* (2nd edn, OUP Oxford 1987) 248; see also Goodwin-Gill, *International law and the movement of persons between states* (Clarendon Press, 1978) 300
[204] Galina Cornelisee, ' A New Articulation of Human Rights, or Why the European Court of Human of Human Rights Should Think Beyond Westphalian Sovereignty' in M.B Dembour and T Kelly (eds), *Are Human Rights for Migrants?: Critical Reflections on the Status of Irregular Migrants in Europe and the United States* (Routledge 2011) 106
[205] Helen O'Nions, 'Exposing the flaws in the Detention of Asylum Seekers: A critique of Saadi' (2008) 17 *Nottingham Law Journal* 34, 37
[206] (1997) 23 EHRR 137

apply to immigration detention regardless of the length of detention (the applicant *Chahal* was detained for six years).

The issue of proportionality has also been viewed from the lens of the physical sites of detention centres. Flynn posits that the physical sites of the deprivation of liberty are critical factors in an effort to assess the proportionality of detention practices.[207] He remarked that, this accounts for the reason why the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) created standards relative to detention of aliens.[208] The CPT provides that 'care should be taken in the design and layout of [immigration detention facilities] to avoid as far as possible any impression of a carceral environment'.[209] Proportionality will inadvertently take into account the general characteristics of detention centres such as facility type even as Rule 94 of the UN Standard Minimum Rules for the Treatment of Prisoners prohibits restriction or severity of liberty greater than necessary.[210] Silverman and Massa however add that even though international law regulations stipulate that detention must be proportionate and legal; but given that the standards are poorly defined and the rarity of immigration detention watchdogs, the said regulations are difficult to enforce.[211] According to them, the difficulty creates a disadvantage for detainees in the state's attempt to balance the basic rights of non-citizens with the sovereign imperative of immigration control.[212] For further discussion on necessity and proportionality, see chapter 4.4.2 of this thesis.

The Conditions of Detention

As stated above, while detention under Art 5 (1) (f) may be lawful, an assessment of whether the conditions of detention comply with the appropriate standards is required.[213] The treatment of detainees may give rise to a breach of the right to liberty if certain conditions are not met. This is in view of Principle 2 UNHCR Guidelines that stated that asylum seekers should not be detained or as an exception under certain

[207] Michael Flynn, 'Who Must Be Detained? Proportionality as a Tool for Critiquing Immigration Detention Policy' (2012) 31 *Refugee Survey Quarterly* 40, 47
[208] ibid
[209] CPT, The CPT Standards, Council of Europe, (2009) 37-55; (CPT Standards, 38)
[210] Rule 94 of the UN Standard Minimum Rules for the Treatment of Prisoners (n35)
[211] Stephanie Silverman and Evelyne Massa, 'Why Immigration Detention is Unique' (2012) 18 *Population, Space and Place* 677, 678
[212] ibid
[213] See section 2.4.1 above

conditions,[214] a reflection of the U.N. Body of Principles for the Protection of All Persons under any Form of Detention 1988[215], and Article 10 of the ICCPR.[216] In addition, Guideline 10 of the Applicable Criteria and Standards relating to the Detention of Asylum- Seekers require that conditions of detention should be humane thus advocating for the avoidance of the use of prisons for detention etc.[217] In this wise, Strasbourg jurisprudence has firmly established that the conditions in which a person is detained may give rise to the engagement not only of Article 5 but also of Article 3 ECHR- torture and degrading treatment even if there is no intention on the part of the State to do so.[218] This will be discussed below in the context of Art 3 and not only of Article 5 ECHR at section 2.4.2 below with further details at chapter 4.4.4 of this thesis.

Length of Detention

Regarding length of detention, it has been argued that the length of detention could amount to a breach of the right to liberty and security. Johnston remarked that the importance of liberty both to the individual and society is too great to justify indefinite detention.[219] Bosworth argues strongly that a period of detention neither changes the detainee nor prepares them for eventual return; rather what detention does is to confirm their identity. [220]

Further commentaries have been made as to the undesirability of indefinite detention and its implication for the right to liberty. Gurd posits that indefinite detention is a failure given that it is increasingly seen as a symptom of a fundamentally dysfunctional detention system and an example of the UK's treatment of unwanted migrants.[221] For her, there is an impasse between the sanctity of liberty and the interplay of the statutory

[214] UNHCR 'Guidelines on Applicable Criteria (n36)
[215] U.N. Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment 1988 (n34)
[216] See ICCPR Art 10
[217] UNHCR 'Guidelines on Applicable Criteria' (n36)
[218] Helen Lambert, 'The European Convention on Human Rights and the Protection of Refugees: Limits and Opportunities' (2005) 24 *Refugee Survey Quarterly* 40, 49
[219] Johnston C, 'Indefinite Detention: Can it be justified' (2009) 23 *Journal of Immigration, Asylum and Nationality Law* 351, 355
[220] Mary Bosworth, 'Subjectivity and identity in detention: Punishment and society in a global age' 16 (2) *Theoretical Criminology* 123, 135
[221] Ruth Gurd, 'Redefining the Borders: The Call for Indefinite Detention Reform in the United Kingdom' (2011) 9 *Journal of Migration and Refugee Studies* 304, 309

purpose of effecting removal.[222] In essence, the legality of detention requires that the law, which authorizes detention, must accord with international human rights law standards.

In the words of Grant, 'immigration detention is an area in which there are particular tensions between international and regional human rights law and State practice. Although the State decides who enters and who should be removed from its territory, it must at the same time comply with fundamental human rights principles including the right to liberty'.[223] This will be discussed further at chapter 4.4.5 of this thesis.

2.4.2 Prohibition of Torture, Inhuman or Degrading Treatment-*Non-Refoulement*

The right not to be tortured or subjected to inhuman or degrading treatment is an unqualified right that can never be balanced against competing considerations. Art 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading punishment (CAT) expressly prohibit States from removing an individual in a manner where there are substantial grounds for believing that he/she will be in danger of being subjected to torture (*non-refoulement*).[224] Lauterpacht and Bethlehem argue that the principle of *non-refoulement* has acquired the status of customary international law and noted that the customary status of both the prohibition of torture and of cruel, inhuman or degrading treatment or punishment is clear.[225] Simply put, the prohibition against torture is a *jus cogens*-a binding obligation in international law.[226]

[222] ibid, see also chapter 4.5.4 of this thesis for a full discussion of the conditions of detention and length of detention.
[223] Stefanie Grant, 'Immigration Detention: Some Issues of Inequality' (2011) 7 *The Equal Rights Review* 69, 71
[224] Art 3 CAT (n30)
[225] Jane McAdam, *Complementary Protection in International Refugee Law* (OUP 2007) 9; see also Elihu Lauterpacht and Daniel Bethlehem, The scope and content of the principle of *non-refoulement*: Opinion in Erika Feller and Volker Türk and Frances Nicholson (eds) *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (CUP 2003) 148-153; See also HRC, *CCPR General Comment No 24* (2 Nov 1994) CCPR/C/21/ Rev.1/Add.6 para 8, cf Art 7 ICCPR with Art 3 CAT as stated above alongside Art 33 of the 1951 Convention Relating to the Status of Refugees 189 UNTS 150
[226] *R v Bow Street Metropolitan Stipendiary Magistrate ex p Pinochet Ugarte* (No 3) [1999] 2 WLR 827; [2000] 1 AC 147 [Lord Browne-Wilkinson]

Non-Refoulement as *Jus Cogens*

Non-refoulement, which simply means 'forbidding to send back', was noted to have appeared first as a requirement in history in the work of international societies of lawyers, at the 1892 Geneva Session of the *Institute de Droit International* (Institute of International Law).[227] Article 16 of the 1892 *Regles internationals sur l'admission et 'expulsion des etrangers* stipulated that a refugee, should not by way of expulsion, be sent back to another state that sought him except under certain observed stipulated conditions.[228] As time went by, especially with the tensions generated during the two world war periods, the principle of *non-refoulement* started appearing explicitly in predominant number of international conventions, reemphasizing that refugees must not be returned to their countries of origin, with the United Nations giving vent to the consolidation of this principle in international law.[229] This became universal by virtue of Article 45 of the 1949 Geneva Convention relative to the Protection of Civilians Persons in Time of War which provided that 'in no circumstances shall a protected person be transferred to a country where he or she may have a reason to fear persecution for his or her political opinions or religious beliefs'. This later metamorphosed into the grant of broader rights by the application of Article 33 of the 1951 Geneva Convention relating to the Status of Refugees that stipulates:

> 1. No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, member- ship of a particular social group or political opinion.
>
> 2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.[230]

---

[227] Tamas Molnar, 'The principle of non-refoulement under international law: Its inception and evolution in a nutshell' (2016) 1 (1) *Courvinus Journal of International Affairs* 51, 51
[228] Feraud-Giraud et Ludwig von Bar, (Rapporteurs) *Regles internationals sur l'admission et l'expulsion des strangers* (Institut de Droit international Session de Geneve, 1892)
[229] Tamas Molnar (n227) 52
[230] See the Convention Relating to the Status of Refugees 2545 189 UNTS 150 (entered into force 22 April 1954)

In addition, with the development of international protection of human rights, the application of *non refoulement* was further enlarged as it grew beyond the framework of refugee law exemplified by international legal instruments, as can be inferred from the 1966 International Covenant on Civil and Political Rights (ICCPR), Article 7 which prohibits a person from being transferred to where they would be subjected to torture, or subjected to cruel, inhuman or degrading treatment or punishment.[231] In essence, the principle of *non-refoulement* is considered to be international customary law, implying that all states regardless of being parties to the applicable human rights and/or refugee conventions, which prohibit *refoulement,* are required not to return a person to a country where the person's life will be in danger.[232] As Duffy recounted, *non-refoulement* having been accepted by 90 percent of world's sovereign state in some shape or form shows its normative worth and 'the incorporation of this principle into key international instruments is also testament to consistent practice and a strong *opinion juris* which contributes to the creation of a customary norm'.[233] In this connection, the Office of United Nations High Commissioner for Refugees opines that regardless of the exception in Article 33 (2) of the Refugee Convention 1951, the principle of *non-refoulement* has become a rule of customary international law based on state practice on the one hand and states' *opinion juris* on the other hand.[234]

Having briefly examined the customary basis of the norm of *non-refoulement*, I will now move to the question of whether this customary norm is recognised as *jus cogens*, if so, what are the implications? The notion of *jus cogens* came into the lexicon of international law through the 1969 Vienna Conventions of the Law of Treaties, Articles 53 and 64. These provide for the termination or invalidation of treaties even after ratification if their content does conflict with a peremptory norm of general international law, 'accepted and recognised by the international community of States as

[231] See also the 1984 United Nations Convention Against Torture (CAT), Article 3
[232] See Aoife Duffy, 'Expulsion to Face Torture? Non-refoulement in International Law' (2008) 20 International Journal of Refugee Law 374, 383 citing 'Extraditions, Expulsions, Deportations' in, *Anti-terrorism Measures, Security and Human Rights - Developments in Europe, Central Asia and North America in the Aftermath of September 11* (The International Helsinki Federation, 2003)
[233] Aoife Duffy (n232) 384
[234] UNHCR, UNHCR Note on the Principle of Non-Refoulement <http://www.refworld.org/docid/438c6d972.html >accessed 08 February 2017, see also UNHCR, Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol <http://www.refworld.org/pdfid/45f17a1a4.pdf >accessed 08/02/2017

a whole as a norm from which no derogation is permitted'.[235] As Allain pointed out, the international community had determined two types of laws that regulate their behavior namely *jus cogens* and *jus dispositivum*, where *jus dispositivum* are laws which States may derogate or deviate from while *jus cogens* do not allow for such deviations as they are higher norms which do not permit violation.[236] In essence, 'peremptory norms limit the actions and interactions of States on the international plane'.[237]

That said, the question worth examining is how to identify the norms of *jus cogens* and whether the prohibition against *refoulement* meets those standards. To this end, several scholars have argued that *non-refoulement* is indeed *jus cogens*. Allain expresses the view that *a jus cogens is* identifiable where there is sufficient state practice and if the rule is recognised by *opinion juris* not only as custom but also as *jus cogens*.[238] In reaching this conclusion, he relied on the 1982 Executive Committee Conclusions, which observed that non-refoulement was 'progressively acquiring the character of a peremptory rule of international law'.[239] Allain treats non-derogability and *jus cogens* as functional equivalent, this, has been challenged by Castello and Foster as incorrect as a matter of law.[240] They argued that 'while non-derogability is one of the formal indicia of a *jus cogens* norm (along with universality and peremptory character) that in itself is not sufficient'.[241] They pointed out that the statement that *non-refoulement* is non-derogable is an integral part of its acknowledgment as *jus cogens* but not total in conferring that character on a norm.[242] Orakhelashvili sees *non-refoulement* as *jus cogens* from the point of view of Art 33 of the 1951 Geneva Convention of the Status of Refugees stated above which according to him is a peremptory norm related to right of an individual, supported by its inseparable link with certain freedoms-right to life and freedom from torture, stating that the EXCOM Conclusion No.25 attests that the

[235] Vienna Convention on the Law of Treaties (adopted 23 May 1969) 1155 UNTS 331 (VCLT), Art 53 provides 'A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character', Art 64 stipulates 'If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates'.
[236] Jean Allain, 'The jus cogens Nature of non-refoulement' (2002) 13 *International Journal of Refugee Law* 533, 535
[237] ibid
[238] ibid 533
[239] ibid 539 citing UNHCR, EXCOM Conclusion No 82 (XL) (1989)
[240] Cathryn Costello and Michelle Foster, 'Non Refoulement as Custom and Jus Cogens? Putting the Prohibition to the Test' (2015) *Netherlands Yearbook of International Law* 46, 307
[241] ibid
[242] ibid, 308

principle of *non-refoulement* amounts to a norm of *jus cogens*.[243] Farmer on his part expresses that 'whereas *non-refoulement* has gained broad acceptance as a fundamental norm of refugee law, its exceptions have not garnered similar status'.[244] His thesis is that even though there is an exception in refugee treaties, no exceptions are found in Convention Against Torture (CAT), the ICCPR and the ECHR which protects individuals from *refoulement* in cases of torture or cruel, inhuman or degrading treatment.[245] For him, public order does not necessarily require the existence of a fixed, exhaustive catalogue of jus cogens, or peremptory norms, rather, certain criteria exist to identify these norms which the international community as a whole accept as norms which permit no derogation.[246]

In addition, some regional and domestic orders treat non-refoulement as *jus cogens*, such as the Cartagena Declarations on Refugees[247], the Organization for African Unity Convention[248] and quite recently the Brazil Declaration of December 2014 for Latin American and Caribbean governments[249], in addition to the dictum of Judge Pinto de Albuquerque in *Hirsi Jamaa and Others v Italy* where he stated that 'the prohibition of *refoulement* is a principle of customary international law, binding on all States, even those not party to the UN Refugee Convention or any other treaty for the protection of refugees […]' that permits no derogation due to is peremptory nature which disallows reservations.[250]

Regardless of the above position treating non-refoulement as *jus cogens*, some scholars doubted the conclusion without critical examination. Duffy treats non-refoulement as custom but argues that evidence about its *jus cogens* status is less convincing.[251] Wouters does not accept that *non-refoulement* in general is *jus cogens*, but accepts that

[243] A Orakhelashvili, *Peremptory norms in international law* (OUP 2006) 56; see the UNHCR, EXCOM Conclusion No 25 (XXXIII) 'General Conclusion on International Protection General Conclusion on International Protection' (1982)
[244] Alice Farmer, 'Non-Refoulement and Jus Cogens: Limiting Anti-Terror Measures That Threaten Refugee Protection' (2008) 23 (1) *Georgetown Immigration Law Journal* 1, 8
[245] ibid, 18-19
[246] ibid, 23
[247] Organization of American States, Cartagena Declaration on Refugees OAS Ser L/V/II.66 Doc 10 Rev 1 at III (5) (1984)
[248] Organization for African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa (adopted 10 September 1969, entered into force June 20 1974) 1001 UNTS 45
[249] Brazil Declaration and plan of action 'A Framework for Cooperation and Regional Solidarity to Strengthen the International Protection of Refugees, Displaced and Stateless Persons in Latin America and the Caribbean' (3 December 2014) <http://www.refworld.org/docid/5487065b4.html > accessed 09 February 2017
[250] *Hirsi Jamaa and Others v Italy* App No 27765/09 (ECtHR, 23 February 2012) para 67
[251] Duffy (n232) 389-390

the prohibition against torture does have the character of *jus cogens*.[252] Having reviewed the various positions, Castello and Foster, applying their 'customary international law plus' analysis take the view that *non-refoulement* is ripe for recognition as *jus cogens* on the basis that practice and *opinio juris* demonstrate its virtually universal scope and non derogability is evident in the language of relevant UN General Assembly resolutions.[253] As Lauterpacht and Bethlehem stated, 'non-refoulement is expressly protected in standard setting conventions that are concerned with extradition in addition to widespread and representative participation in the conventions said to embody the putative customary law'.[254]

In the light of the above analysis, there is overwhelming evidence pointing to the establishment of *non-refoulement* as a norm of customary international law with wide acceptance by the international community of the prohibition of torture and cruel, inhuman and degrading treatment, as *jus cogens*.

Non-Refoulement and Human Rights Law

Neuman thinks of *non-refoulement* as a rule concerning State responsibility where States must refrain from *refoulement* in order to avoid complicity in serious human rights violation committed by others. He asserted that 'a state that knowingly (or with awareness of sufficient risk) compels an individual to return to a country where their rights will be violated is not merely neglecting to protect them, but helps in causing the violation. This approach emphasizes the active character of *refoulement'*.[255] As Lehman observed in the case of *Saadi v Italy*[256] '*non-refoulement* obligations are applicable where the return of an individual to a territory where he would be at risk of subjection to treatment that falls within the ambit of the principle and where such treatment is

[252] K Wouters, *International legal standards for the protection from refoulement* (Intersentia 2009) 30
[253] Castello and Foster, (n240) 309 referring to UNGA Res 51/75 (12 February 1997)
[254] E Lauterpacht and D Bethlehem, 'The scope and content of the principle of non-refoulement' in Feller E, Volker T and Nicholson F (eds) *Refugee protection in international law: UNHCR's global consultations on international protection* (CUP 2003) 93, the authors considered relevant instruments 2003 and found that in terms of ratification, 170 out of 189 UN members (about 90%) are parties to one or more conventions which has non-refoulement in its provisions as an essential component.
[255] Gerald L. Neuman, 'Extraterritorial Violations of Human Rights by the United States' (1994) 9 (4) *American University International Law Review* 213, 25; see also Jean Allain, 'The Jus Cogens Nature of Non-Refoulement', (2001) 13 (4) *International Journal of Refugee Law* 533, 534
[256] (2009) 49 EHRR 30

attributable to the State'.[257] After the decision in *Saadi v Italy,* Strasbourg's jurisprudence in *A v Netherlands*[258] and *N v Sweden*[259] amongst others had consistently re-emphasized the absolute nature of *refoulement*.

In view of the above and consistent with the recommendations of the Committee Against Torture, the UK government had accepted that the government would not remove a person under immigration powers where this would lead to treatment contrary to Art 3 CAT or Art 3 ECHR, while assuring that all removals may be appealable to the UK courts.[260] This assurance by the UK to the CAT, evidence suggests, appears to be at variance with UK's State practice in deportation and removal as discussed at chapter 5 of this thesis.

The provision against torture, cruel, inhuman or degrading treatment is also contained in Art 7 ICCPR.[261] In Lehman's view, 'although the prohibition of expulsion in the ICCPR is confined to aliens lawfully on the territory, the HRC has not excluded that in theory any right of the Covenant may lead to a *non-refoulement* obligation for any individual within the state's jurisdiction'.[262] In *A.R.J v Australia*, the HRC stated that 'if a State party deports a person within its territory and subject to its jurisdiction in such circumstances that as a result, there is a real risk that his or her rights under the Covenant will be violated in another jurisdiction, that State party itself may be in violation of the Covenant'.[263]

As stated supra, Art 3 ECHR prohibits torture, and inhuman or degrading treatment or punishment. Torture is not specifically defined in the ECHR but implies a deliberate infliction of suffering of particular intensity and cruelty.[264] In essence, the ECHR as a

[257] Julian M Lehman, 'Rights at the Frontier: Border Control and Human Rights Protection of Irregular International Migrants' (2011) 3 (2) *Goettingen Journal of International Law* 733, 750
[258] App no 4900/06 (ECtHR, 20 July 2010) 142
[259] App no 23505/09 (ECtHR, 20 July 2010) paras 51-54
[260] CAT, *Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: Comments by the Government of the United Kingdom of Great Britain and Northern Ireland to the conclusions and recommendations of the Committee against Torture* (8 June 2006) UN Doc CAT/C/GBR/CO/4/Add.1 para 48
[261] See Art 7 ICCPR
[262] Lehman (n257) 751
[263] Communication No 692/1996 UN Doc CCPR/C/60/D/692/1996 (11 August 1997) Annex, para 6.9; see also HRC, CCPR Considerations on Reports Submitted by States Parties Under Article 40 of the Covenant: Concluding observations of the Human Rights Committee-United Kingdom and Northern Ireland (30 July 2008) UN Doc CCPR/C/GBR/CO/6 para12
[264] Ian MacDonald and Ronan Toal, *MacDonald's Immigration Law & Practice* (1st Supp, 7th edn, LexisNexis 2009) 95; see *Ireland v United Kingdom* (1978) 2 EHRR 25, para 96

living instrument applies the purposive approach in interpreting Art 3 rights to the extent that what was classified as inhuman treatment could now be classified as torture in the light of the rising protection of human rights and fundamental freedoms.[265] In *Tyrer v UK*[266] the ECtHR concluded that the judicial corporal punishment inflicted on the applicant amounted to degrading punishment within the meaning of Article 3 (art. 3) of the Convention'. As Rohl observed, 'because of its absolute protection against inhuman treatment "whatever the source" Article 3 ECHR considerably widens the international protection against *refoulement* compared to other refugee law and human rights instruments'.[267]

By and large, Art 3 ECHR is an absolute right that cannot be balanced with competing considerations neither does it permit derogations under any circumstance. As the ECtHR stated, Art 3 'enshrines one of the fundamental values of democratic societies, prohibits in absolute terms torture, or inhuman or degrading treatment or punishment irrespective of the victim's conduct'.[268] However, in *Soering v UK* [269] the ECtHR remarked that 'what amounts to "inhuman or degrading treatment or punishment" depends on all the circumstances of the case'. The *Soering* case attracted a lot of commentaries where majority are in agreement with the ratio while others think otherwise.[270] Mole observes that for Art 3 ECHR to be engaged, 'it must be shown that the applicant is at risk of treatment prohibited by that article and such a risk must be real and would involve a determination of what is risked and the necessary threshold of severity must be met'.[271]

---

[265] *Selmouni v France* (1999) 29 EHRR 403, para 101 the court stated 'the Convention is a "living instrument which must be interpreted in the light of present-day conditions"'.

[266] (1978) 2 EHRR 1, para 35, see also *Campbell and Cosans v UK* (1982) 4 EHRR 293, para 28-30; *Soering v UK* (1989) 11 EHRR 439, para 100

[267] Katharina Rohl, 'Fleeing violence and poverty: non-refoulement obligations under the European Convention of Human Rights' (2005) *UNHCR Working Paper* no 111, 31 <http://www.refworld.org/pdfid/4ff169d92.pdf >accessed 03 September 2014

[268] *Chahal v UK* (1996) 23 EHRR 413, para 79

[269] (1989) 11 EHRR 439

[270] Stephan Breitenmoser and Gunter E Wilms, 'Human Rights v. Extradition: The Soering Case' (1989/90) 11 Mich. J. Int'L L 843,885-886; Terje Enarsen, 'The European Convention on Human Rights and die Notion of an Implied Right to de facto Asylum', (1990) 2 *International Journal of Refugee Law* 361,366; William A Schabas, 'International Law and the Abolition of the Death Penalty' (1998) 55 WASH. & LEE L. REV. 797, 803; Christine Van Den Wyngaert,'Applying the European Convention on Human Rights to Extradition: Opening Pandora's Box?' (1990) 39 ICLQ 757,760-761; Richard B Lillich, The Soering Case' (1991) 85 AM. J. INT'L L 128,145-149; Collin Warbrick, 'Coherence and the European Court of Human Rights' (1989/90) 11 Mich. J. Int'L L 1073,1079

[271] Nuala Mole, *Asylum and the European Convention on Human Rights* (Council of Europe Publishing 2007) 30

In *Thampibillai and Venkadajalasarma v Netherlands*[272] the ECtHR noted that the applicant who left Sri Lanka in 1994, almost four years ago on the basis of the killing of his father by the army and after being arrested, detained and released by the army, cannot rely on facts of the case, to prove that he was at a real risk of return. In the determination of what is a risk, an evaluation of whether the risk reaches the necessary threshold of severity is required. In view of this, in *Cruz Varas v Sweden*[273] the ECtHR noted that the 'ill treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum is, in the nature of things, relative; it depends on the circumstances of the case […]'.

In essence, inherent in the whole of the Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights'.[274] The second part of this statement "a fair balance between the demands of the general interest of the community […]" may appear to suggest a kind of balance to be struck between competing interests, which would have removed the absolute nature of Art 3, but the ECtHR was quick to explain it in subsequent paragraphs and specifically in *Chahal* when it emphasized that there is no room for balancing the risk of ill treatment against reasons for expulsion in order to determine whether a State's responsibility under Art 3 is engaged.[275]

As MacDonald pointed out, the UK as a third party intervener in *Saadi v Italy* [276] attempted unsuccessfully to persuade the ECtHR to revisit the *Chahal* principle stated supra, arguing that the government should be able to balance the risk to the individual consequent on removal against the gravity of the threat posed by that individual to the community.[277] But the argument did not find favour with the Court as it reaffirmed that the principles afforded by Art 3 was absolute given that 'the concepts of "risk" and "dangerousness" in this context do not lend themselves to a balancing test because they are notions that can only be assessed independently of each other' meaning that the conduct of the individual however undesirable or dangerous could not be taken into

[272] App no 61350/00 (ECtHR 17 February 2004) para 61-64
[273] App no 15576/89 (ECtHR 20 March 1991) para 83
[274] ibid para 83; see also Hemme Battjes, 'The Soering reshold: Why Only Fundamental Values Prohibit *Refoulement* in ECHR Case Law' (2009) 11 (3) *European Journal of Migration and Law* 205
[275] See para 79 -81 of *Chahal* where the ECtHR made reference to para 88 of the *Soering* case
[276] App no 37201/06 (ECtHR, 28 February 2008) para 117
[277] MacDonald & Toal (n264) 99

account.[278] The examination of this right for the purposes of this thesis will be in the context of detention and/or deportation of migrants with respect to torture in the context of removal proceedings, torture in detention and torture in the country of destination.

The Concept of Safe Country in relation to Non-refoulement

Having examined *non-refoulement* as *jus cogens* in the previous part, 'safe country' notion will now be briefly discussed. The notion of safe country has been explained as 'a procedural mechanism for shuttling asylum seekers to other States said to have primary responsibility for them, thereby avoiding the necessity to make a decision on the merits because another country is deemed to be secure'.[279] Simply stated, the concept of 'safe country' was an invention aimed at returning asylum seekers back to where they came from on the ground that they have already found protection or there will be protection in that country which is deemed safe. The fundamental question which is being engaged is whether the application of the notion of 'safe country' violates the principle of *non-refoulement*, which means, whether there is effective or adequate protection in the so called 'safe' country both as matter of law or State practice.[280] Foster refers to 'safe country' as 'protection elsewhere policy'- 'a situation in which a State or agency acts on the basis that the protection needs of a refugee should be considered other than in the territory of the State where the refugee has sought or intends to seek protection'.[281] These have been described with different labels notably 'country of first asylum', 'third safe country' 'safe country of origin' (an integral part of eligibility procedure in Europe) but the core question is to ensure protection and whether the State deviates or deflects from its obligation by transferring a refugee to another State,[282] within the objective concept of protection against expulsion.[283]

Gil-Bazo expressed that 'the most sophisticated mechanism developed by States to embody the 'safe third country' notion is currently contained in the so-called Dublin III

[278] *Saadi v Italy* (n276) paras 124-127, 139-140
[279] G.S Goodwin-Gill and J McAdam, *The Refugee In International Law* (OUP 2010) 392
[280] ibid, 393
[281] Michelle Foster, 'Protection Elsewhere: The Legal Implications of Requiring Refugees to Seek Protection in Another State' (2007) 28 (2) *Michigan Journal of International Law* 223, 224
[282] Michelle Foster, 'Responsibility Sharing or Shifting? "Safe" Third Countries and International Law' (2008) 25 (2) *Refuge* 64,64
[283] Alberto Acherman and Mario Gattiker, 'Safe Third Countries: European Developments' (1995) 7 (1) *International Journal of Refugee Law* 19, see also K Hailbronner, 'The Concept of "Safe Country" and Expeditious Asylum Procedures: A Western European Perspective' (1993) 5 *International Journal of Refugee Law* 36

Regulation of the European Union (EU)- a third generation instrument aimed at determining the EU Member State responsible to examine an asylum application on behalf of all other EU Member States'.[284] Gil-Bazo opined that as much as many scholars have focused on the issue of effective protection explicit in the discussion of the notion of 'safe third country', many have not queried its lawfulness, given that asylum is not discretionary but a right under international law.[285] Gil-Bazo had argued that 'the status of refugees under international law is defined […] by the interaction of the different legal orders that may be applicable to any refugee in any given circumstances, both of universal and regional scope'.[286] She remarked that when a State transfers responsibility to another State, even by the acceptance or admission that the receiving State is a 'safe third country' this raises crucial issues of state responsibility regarding the fulfilment of all obligations under the regime of both international refugee law and human rights law with respect to the exercise of jurisdiction.[287] In this context, prior to the determination of asylum claim, a Member State must verify the existence of a safe country which the applicant may be returned, which follows that the principle of the responsible state has been turned upside down to the extent that expulsion to a third state is no longer the exception but the rule.[288]

In the United Kingdom, safe third country provisions are found in Schedule 3 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 that maintains an 'active' list of 28 countries of the European Economic Area (EEA) with the exception

---

[284] M T Gil-Bazo, 'The Safe Third Country Concept in International Agreements on Refugee Protection: Assessing State Practice' (2015) 33 (1) *Netherlands Quarterly of Human Rights* 42, <http://eprint.ncl.ac.uk/file_store/production/208565/36C34AD6-D85F-4359-8A2B-45C466C52A03.pdf> 3, accessed 11 February 2017, citing Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or stateless person [2013] OJ L 180/31 (Dublin III). Note that Dublin III Regulation replaced Dublin II Regulation-Council Regulation (EC) No 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national [2003] OJ L 50/1, this in turn replaced the 1990 Dublin Convention- Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities – Dublin Convention [1997] OJ C 254/1

[285] ibid, 4

[286] ibid, 4 Gil-Bazo, citing her work, M T Gil-Bazo, 'The Practice of Mediterranean States in the context of the European Union's Justice and Home Affairs External Dimension. The Safe Third Country Concept Revisited' (2006) 18 (3-4) *International Journal of Refugee Law* 571,597

[287] ibid, 4 Gil-Bazo citing M T Gil-Bazo, 'The Practice of Mediterranean States in the context of the European Union's Justice and Home Affairs External Dimension. The Safe Third Country Concept Revisited', 599

[288] Rosemary Byrne and Andrew Shacknove, 'The Safe Country Notion in European Asylum Law' (1996) 9 *Harvard Human Rights Journal* 185, 192, see also Alberto Acherman and Mario Gattiker, (n284)

of Liechenstein'.[289] By virtue of this provision, which refers to section 77 (4) of the Nationality, Immigration and Asylum Act 2002, countries are deemed safe on Refugee Convention grounds-Articles 1(A) 2 and 33 or on human rights grounds- Articles 3 and 8 ECHR emphasizing that anyone who falls to be returned to an European country, may not appeal against the decision unless the Secretary of State is persuaded that such a decision, would arguably be, a breach of human rights by the UK in doing so.

The 'safe third country' and 'country of first asylum' owe its background to the Executive Committee of the High Commissioner's Programme (EXCOM Conclusion) 58 (XL) that addresses the position of asylum seekers and refugees, moving away from the country in which they have already found protection in order to seek asylum or find permanent resettlement elsewhere.[290] This EXCOM Conclusion permits the return of individuals to which they have already found protection, which States aim to facilitate through bilateral and multilateral agreements, although it does not define the meaning of protection.[291] Prior to this time, the EXCOM Conclusion No 15 (XXX) has expressed support for a nascent 'safe country of asylum' notion, stating that if a person who requests asylum has a connection or close links with another State, he may, if it appears fair and reasonable, to be called upon first to request asylum from that State.[292] The assumption therefore is that so long as Art 33 of the Refugee Convention is not violated, the State is at liberty to transfer a refugee to a third State but not to avoid its obligations. The issue of avoidance of obligations was noted by the ECtHR when in *TI v UK*, the court observed that a sending State cannot avoid its obligations incurred under the human rights treaties vis-à-vis refugees within territory by engaging in their transfer under the Dublin Convention nor can it 'contract out' its legal obligations.[293] The ECtHR noted:

> The Court finds that the indirect removal in this case to an intermediary country, which is also a Contracting State, does not affect the responsibility of the United Kingdom to ensure that the applicant is not, as a result of its decision to expel, exposed to treatment contrary to Article 3 of the Convention. Nor can the United Kingdom rely automatically in that context on the arrangements made in the Dublin

[289] See First List of Safe Countries (Refugee Convention and Human Rights (1)) of the 2004 Act mentioned above, see also Gina Clayton, Immigration and Asylum Law, (5th ed OUP, 2012) 439
[290] UNHCR, EXCOM Conclusion No 58 (XL) 'Problem of Refugees and Asylum-Seekers Who Move in an Irregular Manner from a Country in Which They Had Already Found Protection' (1989)
[291] Gil-Bazo, (n284) 7
[292] UNHCR, EXCOM Conclusion No 15 (XXX) 'Refugees Without An Asylum Country' (1979) para h (iv)
[293] App No 43844/98 (ECtHR, 7 March 2000) para 456-457

> Convention concerning the attribution of responsibility between European countries for deciding asylum claims. Where States establish international organisations, or *mutatis mutandis* international agreements, to pursue co-operation in certain fields of activities, there may be implications for the protection of fundamental rights. It would be incompatible with the purpose and object of the Convention if Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution.[294]

This has been re-echoed by the European Parliamentary Resolution 1569 where States were reminded that the transfer of refugees offshore cannot absolve a State from its responsibilities.[295] Therefore, where there is evidence that the asylum seeker or refugee will be subjected to ill treatment on transfer under a third country arrangement and/or agreement, the sending State is prohibited from carrying our such transfers under international law. Foster argues that as much as Article 33 of the Refugee Convention is key in this regard against *refoulement* (direct), the violations of rights in the third State (indirect *refoulement*) can be of significance to the analysis of Article 33.[296] She posits that the conditions of treatment meted out to refugees in the third State (indirect *refoulement*) in fact amount to persecution in the context of race, religion and nationality viewed not only from a more traditional method of persecution such as violence but in the context of the violation of socio-economic rights.[297] It is her case that a violation of socio-economic rights in the third country may amount to constructive *refoulement*, if in particular; those conditions were to lead to the serious likelihood of risk in returning home rather than the toleration of harsh conditions.[298] Thirdly, she notes that the reception conditions afforded to refugees in the receiving State may be such as to engage fair and effective asylum procedure, which has a direct connection to *refoulement*.[299] Gil-Bazo, in analyzing the issue of burden sharing obligations reflected in the nature of third State agreements, noted that 'there is a difficulty of the effective articulation of concerted inter-State action in such a manner that guarantees the adequate fulfillment of States' obligations'.[300]

---

[294] ibid
[295] Council of Europe Parliamentary Assembly, Resolution 1569 (2007) on Assessment of Transit and Processing Centres as a Response to Mixed Flows of Migrants and Asylum Seekers (01 October 2007) para 13.6
[296] Michelle Foster, 'Responsibility Sharing or Shifting? "Safe" Third Countries and International Law' (n282) 69
[297] ibid
[298] ibid
[299] ibid
[300] Gil-Bazo (n284) 9

By and large, the determination of whether a country is safe requires 'anxious scrutiny'[301] and 'rigorous examination'[302] and part of that assessment relates to procedural safeguards which a sending State must take note of in addition to the issue of 'internal flight alternative' and 'internal relocation'. In *Januzi v SSHD*, the concept of internal relocation was engaged where the then House of Lords (now Supreme Court) denied granting refugee status to certain applicants on the 'grounds [that] there is another place, within the country of the appellant's nationality, where he would have no well-founded fear of persecution, where the protection of that country would be available to him, and where in all circumstances he could reasonably and without undue harshness expected to live'.[303] Furthermore, in *AH (Sudan) v SSHD*, the Court held that the assessment of 'internal relocation' required that the conditions in the country of relocation be compared against normal standards of life within the whole country of origin and in doing do so, found that it would be reasonable and not unduly harsh for three non-Arab men from Darfur to relocate to Khartoum.[304]

However, in *AMM (Somalia) v SSHD*, the UK Upper Tribunal in applying the ratio of Strasbourg jurisprudence in *Sufi and Elmi v UK*[305] found that it 'would be unreasonable to return anyone to an Internally Displaced Persons camp in Afgoye Corridor except the person concerned would be able to achieve the life styles of those better-off inhabitants of the Afgoye Corridor settlements'.[306] From the foregoing as distilled from these cases, a return to a safe part of a country of origin is lawful under international law, provided that admission and effective protection can be guaranteed.

Strasbourg jurisprudence has illuminated the horizon in the discussion of safe country notion with its fluctuating decisions hereunder analyzed. It did this by the application of the obligations incumbent on the High Contracting Parties by virtue of Art 1 ECHR charged with securing everyone within its jurisdiction, the rights and freedoms defined in Section 1 of the Convention and this gave vent to the extraterritorial principles as discussed fully in Chapter Two of this thesis. In *TI v UK*[307] (above), the ECtHR refused

[301] See *R (Yogathas) v SSHD* [2003] AC 920 [9]
[302] *Nasseri v SSHD* [2008] EWCA 464 [18]
[303] [2006] UKHL 5 [1]
[304] [2008] EWCA Civ 579 [17]
[305] App No 8319/07 and 11449/07 (ECtHR, 28 June 2011), see discussion on this case below.
[306] [2011] UKUT 00445 (IAC) [501]
[307] *TI v UK* (n293)

to admit an application made by a Sri-Lankan national and failed asylum seeker, on the question of his return from the UK to Germany under the springboard of the then Dublin Convention. The Court accepted that based on assurances from the German government, the applicant would be considered for protection in Germany even if discretionary. Similarly, in *K.R.S v UK* [308], the applicant Iranian national was facing transfer from the UK to Greece under the Dublin Convention. The applicant presented reports showing that Greece in the majority of cases did not meaningfully examine asylum claims by applying 'anxious scrutiny' and 'rigorous examination'. The ECtHR however held that when the matter is not about *refoulement* but about the conditions under which the asylum claimant is treated in Greece, the appropriate course would be that the applicant be returned to Greece and if unsuccessful, he is at liberty to bring a complaint against Greece, if he so wishes, thereby declining to address the applicant's claim that Greece did not, as a matter of fact, comply with its obligations with regards to procedures established by law.[309]

However, in *M.S.S v Belgium and Greece*[310] the ECtHR took a different approach to the transfer of a Dublin case, a departure from its position is *K.R.S* above. In the *M.S.S* case, the Court explained prior to the ordering of a Dublin transfer, that the sending State, in the instant case, Belgium, must ensure that Greece is in a position to consider the asylum claim and to apply fairness in all ramifications. The Court reasoned that Belgium knew or ought to have known that the applicant has no guarantee that his application was going to be fairly treated, if so, Belgium was in breach of Article 3 ECHR due to the fact that the applicant was exposed to conditions of detention and living that amounted to degrading treatment by the mere fact that the applicant was returned to Greece. In her analysis of the case, Lambert espoused that Belgium, by knowingly exposing the applicant, to deleterious conditions in Greece, exposed him to conditions tantamount to degrading treatment and it was incumbent on Belgium to have verified how Greece applied their legislation in practice and not simply to assume that *M.S.S.* would be treated in conformity to ECHR law and EU law.[311] The ECtHR equally

[308] App No 32733/08 (ECtHR, 02 December 2008)
[309] See for instance the Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) [2013] OJ L 180/96; Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) [2013] OJ L 180/60
[310] App No 30696/09 (ECtHR, 21 January 2011) paras 342, 358-359
[311] Helen Lambert, 'Safe Third Country' in the European Union: An Evolving Concept in International Law and Implications for the UK' (2012) 26 (4) *Journal of Immigration and Asylum Law* 318; Helen Lambert, 'Safe Third Country' in the European Union: An Evolving Concept in International Law and

found that the extreme urgent procedure adopted by Belgium, which seems to have drastically reduced or obliterated the right of the defence and the examination of the case to a minimum does not meet the requirements of Article 13 ECHR with respect to the right of effective within the meaning of rigorous examination by the competent authority.[312]

As mentioned earlier, there is responsibility of acts taking place extraterritorially engaging indirect *non -refoulement*. In Sufi and *Elmi v UK*[313], the ECtHR had the opportunity of considering the provisions of EU law in its interpretation of Article 3 ECHR within the remit of armed conflict. The Court found that returning anyone to Mogadishu at the time will be violation of Article 3 ECHR as the person or persons will be subjected to degrading treatment due to the general and extreme violence in Mogadishu. Having found Mogadishu unsafe, the Court had to consider whether another part of Somalia would be safe in terms of internal relocation but found the living conditions in main refugee camps in Somalia and even neighbouring Kenya to be extremely dire that it will be unsafe to return anyone there.[314]

Similarly in the case of *Hirsi Jamaa and others v Italy*[315] another case concerning extraterritoriality principles regarding removal that may lead to exposure of individuals to treatment contrary to Article 3 ECHR, which has been discussed in Chapter Two of this thesis, the Court applied the 'knew or should have known' test as discussed in *M.S.S v Belgium and Greece* and in *Sufi and Elmi v UK* above. The Court concluded that the bilateral agreement between Libya and Italy cannot be applied to have the potency of absolving Italy from its responsibility under the ECHR. The ECtHR found that Italy knew or should have known that the irregular migrants removed would not be protected in Libya, but it went ahead to remove them in breach of Article 3 ECHR. What appears to be the trend is the use by the ECtHR of its higher threshold of protection standards in applying EU asylum to enhance protection within the 'EU

Implications for the UK' (2012) University of Westminster School of Law Research Paper 13/05 <http://www.academia.edu/2447287/Safe_Third_Country_in_the_European_Union_An_Evolving_Concept_in_International_Law_and_Implications_for_the_UK > 11 accessed 10 February 2017

[312] ibid 17; *M.S.S v Belgium and Greece*, (n310) para 321

[313] App No 8319/07 and 11449/07 (ECtHR, 28 June 2011)

[314] ibid, para 282-284

[315] *Hirsi Jamaa and Others v Italy* App No 27765/09 (ECtHR, 23 February 2012)

space' that has been applied to situations beyond the EU, driven considerations of humanity.[316]

Within the EU legal framework proper, the implications of transfer under the Dublin II Regulation was illuminated. In this lead judgment, which will be briefly summarized, concerns the removal of asylum seekers from the United Kingdom and Ireland to Greece under the Dublin II Regulation. The Court of Justice of the European Union (CJEU) in the joined cases of *N.S and M.E*[317] held that there is now an obligation to examine an asylum application under Article 3 (2) Dublin II Regulation, if the transfer to the Member State which has primary responsibility under Article 3 (1) would expose the asylum seeker to serious risk of violation of fundamental rights as entrenched in the EU Charter of Fundamental Rights. The implication of this judgment is that Dublin II regulation no longer created a presumption that the asylum seekers fundamental rights will be observed by the Member State whose primary responsibility was to determine the application.[318] In her analysis, Gil-Bazo, notes that 'the judgment amounts to a reversal of the foundation of the Dublin system, namely the principle of mutual trust among Member States that they are all safe, and in doing so safeguards the dual nature of obligations that Member States have in guaranteeing the rights of individuals when the inter-State agreement fails to deliver on purpose'.[319]

The bottom line of what has been discussed in this part is that a State is not excused from its human rights obligations by transferring, returning or removing a migrant to another State on the basis of agreement without actually determining whether there will be violations of the individual's rights under international refugee law or international human rights law. So, the use of the so called safe country cannot exculpate the State from its obligations and whether the receiving state is actually 'safe' must as a minimum be investigated by the sending State applying 'anxious scrutiny' and 'rigorous examination' of the circumstances, avoiding as it should, direct or indirect *refoulement*.

[316] Helen Lambert (n311) 23
[317] Joined Cases C-411/10 and C-493/10 *N.S. v Secretary of State for the Home Department & M.E. and Others v Refugee Applications Commissioner* [2011] ECR I-13905
[318] Helen Lambert (n311) 24
[319] Gil-Bazo (n284) 34

Removal Proceedings and Torture

Removal proceedings could give rise to torture, inhuman or degrading treatment if the treatment meted to deportees are incongruent with international human rights law standards. Therefore the debate is simply whether the treatment conforms to the required standards.[320] In *Shchukin and Others v Cyprus*[321] the ECtHR found a violation of Art 3 ECHR on grounds that the Cypriot authorities failed to investigate allegations of ill-treatment of an Ukrainian ship crew member during the process of deportation. The Parliamentary Assembly of the Council of Europe recorded that thirteen people died between 1991 and 2001 during deportation.[322] They stated that 'the deaths are sad examples of the worst that can happen during expulsion procedures and should not mask the fact that foreigners awaiting expulsion are subjected in breach of the ECHR to discrimination, racist verbal abuse, dangerous methods of restraints and even violence and human and degrading treatment'.[323]

In corroboration, Fekete agreed that the conditions of deportation are usually inhumane and degrading which have led directly to a number of deaths in recent years.[324] The Institute of Race Relations has therefore identified nine cases where the general trend in deportation enforcement by the concerned States is the 'free use of handcuffs during deportation enforcements, the use of tapes on the mouth, feet, body and nostrils of the deportees, partial dragging on the floor, putting deportees on luggage trollies, beatings even on board the aircraft with officers sitting down on deportees, and cases of clear suffocation thus leading to heart failure, positional asphyxia, asphyxiation and ultimately death'.[325]

In the UK, the death of Jimmy Mubenga illustrates the use of extreme coercion employed in the deportation enforcement process. Jimmy Mubenga was a 46-year-old Angolan who died in October 2010 on a stationary aircraft at Heathrow during an attempt by the authorities to deport him from the United Kingdom, having restrained

[320] See Art 3 ECHR, Art 7 ICCPR, Art 3 CAT
[321] App no 14030/03 (ECtHR, 29 July 2010)
[322] Parliamentary Assembly, 'Expulsion procedures in conformity with human rights and enforced with respect for safety and dignity' (Report Committee on Migration, Refugees and Demography) Doc. 9196 <http://assembly.coe.int/ASP/Doc/XrefViewHTML.asp?FileID=9470&Language=EN> accessed 13 September 2014
[323] ibid
[324] Liz Fekete, 'Analysis: Deaths during Forced Deportation' (n61)
[325] ibid

him with excessive force during the deportation attempt.[326] Klein and Williams in general gives a description of the arrest and detention of migrants in the UK, finding 'bewildering experiences that contradict their senses of selfhood, their notions of natural justice, and their expectations of how a just society should treat its members'.[327] During arrest and prior to detention, some detainees recounted the way they were arrested thus feelings of indignation prevailed, 'indignation about the way they were arrested being asked to come to the police station under false pretenses and arrested and detained, spending over 24 hours in a police cell'.[328]

In short, torture, inhuman or degrading treatment in detention is deemed unlawful either through the conditions of detention and where certain treatments that are being meted out to detainees fall below acceptable standards. This brings the detainee within the purview of absolute nature of Art 3 ECHR and not only Art 5 of the ECHR.[329]

Torture and Detention Conditions

In the general pattern and trend that exists concerning the conditions of detention, the ECtHR had cause to determine the detention and subsequent deportation of a five-year-old child. In *Mubilanzila Mayeka and Kaniki Mitunga v Belgium*[330] the ECtHR held that the detention and subsequent deportation of a five-year-old child in 'an adult world' where liberty was restricted thereby exposing her vulnerability was a violation of Art 3 ECHR.[331] In *Hurtado v Switzerland* [332] (a case that predated *Mayeka*) the ECtHR had held that not providing an applicant with the opportunity to change his clothes is degrading treatment and that failure to provide adequate medical treatment following a violent arrest was inhuman treatment. Furthermore the ECtHR in *Ribitsch v Austria*[333]

[326] Samira Shackle, 'Jimmy Mubenga's death: no prosecution, no surprise' *The Guardian* (London, 17 July2012)<http://www.theguardian.com/commentisfree/2012/jul/17/jimmy-mubenga-death-no-prosecution> accessed 19 October 2013 For further details on this case see chapter 5.3 of this thesis.
[327] A Klein & L Williams 'Immigration detention in the community: research on the experiences of migrants released from detention centres in the UK' (2012) 18 (6) *Population, Space and Place* 741, 743
[328] M Griffiths, 'Anonymous aliens? Questions of identification in the detention and deportation of failed asylum seekers' (2012) 18 (6) *Population, Space and Place* 715, 727
[329] Phil Miller, 'Dalrymple verdict: NEGLECT contributed to death of American tourist in UK immigration jail' *Our Kingdom* (London 27 June 2014) <https://www.opendemocracy.net/ourkingdom/phil-miller/dalrymple-verdict-neglect-contributed-to-death-of-american-tourist-in-uk-immi> accessed 02 September 2014
[330] App no 13178/03 (ECtHR, 12 October 2006) para 8-10
[331] ibid para 50-53
[332] App No. 1754/90 (ECtHR, 28 January 1994)
[333] (18896/91) [1995] ECHR 55; in the following cases, the ECtHR had similarly found certain detention conditions as giving rise to a violation of Art 3, see *Dougoz v Greece* App no 40907/98 (ECtHR 06

held that severe bruises while in detention in police custody suggests ill treatment as much as shaving off of detainees' hair also constitutes degrading treatment contrary to Article 3.[334] The above cases illustrate to a great extent that the conditions of detention could give rise to a violation of Art 3 ECHR if the required standards are not adhered to.

Torture in the Destination Country

The prohibition against torture in the destination country raises the question as to whether there is a real risk of exposure to ill treatment to the proposed destination. Where the applicant has been removed, the existence of the risk must be assessed with reference to fact that the deporting State ought to know. As the ECtHR stated in *Cruz Varas*[335] 'the Court is not precluded from having regard to information which comes to light subsequent to the expulsion'. In *Soering v United Kingdom*[336] the court had to consider torture in the country of destination. The applicant German national was accused of killing his girlfriend's parents in Virginia the United States (US) and was arrested in the United Kingdom. The US sought his extradition to the US where the death penalty could be imposed after conviction. In addition, he could be subject to the death row phenomenon where prisoners spend up to six and eight years on the death row prior to execution. *Soering* claimed he could face death penalty and the death row phenomenon if extradited, and the court agreed that the death row could amount to inhuman treatment, which will violate Art 3 ECHR.[337] The issue being that the applicant having fled the US for the UK was in the jurisdiction of the UK, but the treatment if carried out will be done in the US by the US authorities.

March 2001); *Riad and Idiab v Belgium* App nos 2978/03 and 29810/03 (ECtHR 24 January 2008); *S.D v Greece* App no 53541/07 (ECtHR 11 June 2009); *A .A v Greece* App no 12186/08 (ECtHR 22 July 2010); *M.S.S v Belgium and Greece* App no 30696/09 (ECtHR 21 January 2011), concerning migrants with specific needs, see *Mubilanzila Mayeka and Kaniki Mitunga v Belgium* App no 13178/03 (ECtHR 12 October 2006) discussed above, see also *Muskhadzhiyeva and Others v Belgium* App no 41442/07 (ECtHR 19 January 2010), see also Marie-Benedicte Dembour, 'What It Takes To Have a Case: the Backstage Story of Muskhadzhiyeva v Belgium (illegality of children's immigration detention)' in E.L Abdelgawad (ed), *Preventing and Sanctioning Hindrances to the Right of Individual Petition before the European Court of Human Rights* (Intersentia 2011) 75-90; see equally *Rahimi v Greece* App no 8687/08 (ECtHR 05 April 2011); *Popov v France* App no 39472/07 (ECtHR 19 January 2012)

[334] *Yankov v Bulgaria App No. 39084/97 (ECtHR 11 December 2003); see also* HM Inspector of Prisons 'Report of a short unannounced inspection of HM Prisons Rochester' (31 August -03 September 1999) <http://www.justice.gov.uk/downloads/publications/inspectorate-reports/hmipris/prison-and-yoi-inspections/rochester/roch1-rps.pdf> accessed 02 September 2012,
regarding filthy dirty accommodation, poor treatment and conditions of asylum seekers considered a breach of detainees' right to liberty and security

[335] *Cruz Varas v Sweden* App no 15576/89 (ECtHR 20 March 1991) para 76

[336] (1989) 11 EHRR 439

[337] See Art 3 ECHR

The UK argued that the Convention should not be interpreted as to impose responsibility on a Contracting State for acts, which occur outside its jurisdiction.[338] The court disagreed and emphasized that a Contracting State incur liability for actions taken by it that has consequences of exposing an individual to the proscribed ill treatment, therefore the nexus or crucial link has been established. Furthermore, 'extradition in such circumstances would, according to the Court, 'plainly be contrary to the spirit and intendment of the Article' and would 'hardly be protection against expulsion under Art 3 ECHR compatible with the underlying values of the Convention'.[339]

Similarly in *Mubilanzila Mayeka and Kaniki Mitunga v Belgium*[340] the ECtHR found that the applicant's subsequent deportation to a destination country after her detention at the host country (as above) was unlawful. The court specifically held that the Belgian authorities' decision to deport the applicant without the provision of adequate preparation, supervision and safeguards at the destination country was unlawful. However, in *Vilvarajah and Others v UK*[341] the applicants' asylum seekers were deported from the UK but there were undisputed evidence that they will be ill-treated in Sri-Lanka but the ECtHR nevertheless did not find a violation of Art 3 ECHR reasoning that the UK could not have foreseen without convincing evidence that they would be ill-treated as they claimed.

In medical cases, torture or degrading treatment can occur in destination countries. This is because Art 3 ECHR has equally been held to apply to medical cases where deportation would result to harsh suffering for an individual due principally to inadequate medical treatment in the destination country. *In D v UK*[342] the ECtHR had to consider the proposed removal of alien drug courier dying of AIDS to his country of origin, where he was said not to have accommodation, family, moral or financial support and no access to medical treatment. If he were deported to St Kitts, the treatment, which he depended upon, would not be available coupled with the fact that he had no family or relations to support him. The ECtHR held that given the fact that

[338] *Soering v UK* (n336) para 111
[339] ibid *Soering v UK*, paras 88, 91
[340] App no 13178/03 (ECtHR, 12 October 2006) paras 8-10
[341] App no 13163/87 (ECtHR, 30 October 1991)
[342] (1997) 24 EHRR 423

the applicant has entered into the fatal stages of the illness, removal at this stage would hasten his death thereby exposing him to the risk of dying under most distressing circumstances; thus inhuman treatment.[343] The focus therefore was ensuring a dignified death rather than prolonging life.

In *N v UK*[344] the ECtHR nuanced its earlier position in *D v UK* above where a different decision was reached. *N* was an AIDS sufferer from Uganda, resident in the United Kingdom for over five years, having been stabilized with medication, which would not be available in Uganda upon removal. The ECtHR held that Art 3 only usually applied to intentional acts or omission of a state or non state-body insisting that in medical cases, Art 3 applies only in very exceptional circumstances; therefore Art 3 is not meant to be used to address the disparity in medical care between the Contracting States and the applicant's state of origin.[345] The implication is that *N* has established a high threshold that applicants will cross in determining whether Art 3 is engaged in medical cases where removal had been proposed.[346] For further details of this discussion, see chapter 5 of this thesis.

2.4.3 The Right to Private and Family Life

Article 8 ECHR guarantees the right to respect for private and family life, home and correspondence. The right requires a balance given that it is a qualified right and any interference, which is according to the law, is permissible and such interference must be for a legitimate purpose. It has been held that 'human beings are social animals. They depend on others. Their family, or extended family, is the group on which most people heavily depend, socially, emotionally and often financially'.[347] The above statement expresses the importance of the right to private and family life, which in immigration control in general and deportation in particular may come in conflict with the State's exercise of sovereignty.

The ICCPR makes provision for family rights and specified that 'no one should be subjected to arbitrary or unlawful interference with his privacy, family, home or

[343] ibid, paras 45, 53-54 cf *N v UK* (2008) 47 EHRR 885 para 24
[344] (2008) 47 EHRR 885
[345] ibid, paras 42-45
[346] cf *Bensaid v UK* (2001) 33 EHRR 10, paras 36-40, see also *CA v SSHD* [2004] EWCA Civ 1165
[347] *Huang and Kashmiri v SSHD* [2007] UKHL 11 [18]

correspondence, nor to unlawful attacks on his honour and reputation'.[348] The ECHR in its Article 8 guarantees the right to respect for private and family life, home and correspondence.[349] It is a qualified right that permits interferences in specified circumstances; such interferences must be in accordance with the law, for legitimate purpose and necessary within the context of the ECHR.[350] The right to private and family life is more elaborately defined in the ECHR than all other international treaties under evaluation, in view of this; our discussion on this right will primarily be restricted to the scope of the ECHR in the context of immigration albeit deportation and/or removal.

The key significance of Art 8 ECHR for the purpose of this thesis is the protection it affords to non-nationals against deportation and/or removal-arbitrary interference by public authorities. In *K v UK*[351] the European Commission had stated that the existence of family life is contingent on 'the real existence in practice of close personal ties'. The ECtHR further held that 'whatever the word 'family' may mean, it must at any rate include the relationship that arises from a lawful and genuine marriage'.[352] It has been stated in *Marckx v Belgium* that 'by guaranteeing the respect for family life, Article 8 presupposes the existence of a family… it makes no distinction between the "legitimate" and "illegitimate family". Such distinction would not be consonant with the word 'everyone' [as captured by Art 1 ECHR]'.[353] It has also been determined that 'from the moment of the child's birth and by the very fact of it, there exists between him and his parents a bond amounting to family life'.[354] Other relationships outside of parents and siblings do exist but will depend on the strength of ties involved.[355]

The ECHR equally protects the private life limb of Art 8 ECHR in the immigration context as a bar against deportation and removal. The broad scope of the private life limb has been highlighted in *Niemietz v Germany*[356] where the court stated that it is not capable of exhaustive definition and must comprise a right to establish and develop

[348] See ICCPR Art 17; see also ICESR Art 10
[349] See ECHR Art 8 (1)
[350] See ECHR Article 8 (2)
[351] (1986) 50 DR 199, para 207
[352] *Abdulaziz, Cabales and Balkandali v UK* (1985) 7 EHRR 471, para 62
[353] (1979) 2 EHRR 330
[354] *Gul v Switzerland* (1996) 22 EHRR 93, para 32, see also *Berrehab v Netherlands* (1988) 11 EHRR 322
[355] *Marckx v Belgium* (n353) para 45; *Moustaquim v Belgium* (1991) 13 EHRR 802
[356] (1992) 16 EHRR 97, para 29

relationships with other human beings. Where an individual facing deportation had integrated in the host state, his level of integration may give rise to an unjustified and disproportionate interference.[357] As the court remarked in *Razgar v SSHD*[358] 'elusive though the concept is, I think one must understand "private life" in article 8 as extending to those features that are integral to a person's identity or ability to function socially as a person'. Warbrick sees the right to private life as a freedom to make fundamental decisions over one's life.[359]

In its determination and assessment of Art 8, Strasbourg jurisprudence had been inconsistent as to the date when it can be said that family life has been formed so as to have the potency of inhibiting the deportation of a non-national. In *Nasri v France*[360] the ECtHR took into account events post-dating the decision as in this case, factors about his family and private life were taken into account in 1995 whereas an exclusion order was made in 1991. In *Boughanemi v France*,[361] the ECtHR appears to have considered the establishment of family life, which may have been established after a removal order had been issued. In *Konstatinov v Netherlands*,[362] it was held that a person's precarious immigration status (not having leave to remain) might weigh against a breach of Article 8 at the time when family life was formed even when a spouse and children are involved. Furthermore in *Bouchelkia v France*,[363] the ECtHR held that family life established in a period of unlawful stay could not be used as a bar to the deportation of the applicant. Nonetheless, where the removal of a parent will lead to a serious disruption of family life with his/her child or children; regardless of the applicant's precarious immigrant status, the interference will be disproportionate.[364] The point being made is that the ECtHR appears not have developed a consistent pattern of assessing the establishment of private and family life potential enough to bar deportation of non-nationals even for long term residents, rather, prefers to rely on the

[357] *Beljoudi v France* (1992) 14 EHRR 801; *Nasri v France* (1995) 21 EHRR 458; *Bouchelkia v France* (1998) 25 EHRR 686, para 41; *Mehemi v France* (2000) 30 EHRR 739, para 27 and *Boujlifa v France* (2000) 30 EHRR 419
[358] [2004] UKHL 27 [9] citing with approval from an article by Professor Feldman 'The Developing Scope of Article 8 of the European Convention on Human Rights' (1997) EHRLR 265, 270
[359] C Warbrick**,** 'The structure of Article 8' (1998) *European Human Rights Law Review* 32,33
[360] *Nasri v France* (n357) paras 13, 28-30
[361] (1996) 22 EHRR 228, para 35
[362] [2007] 2 FCR 194, paras 48-49
[363] (1997) 25 EHRR 686, para 41
[364] *Da Silva and Hoogkamer v Netherlands* [2007] 44 EHRR 34, [2006] FCR 229, para 44

circumstances of the individual. This approach has produced differing outcomes and has attracted a lot of commentaries.[365]

Regardless of these inconsistencies as highlighted above, some clear principles may have nevertheless emerged from the jurisprudence of the ECHR that might be applied to Art 8 rights in expulsion cases regardless of whether the affected individuals are long-term residents or not.[366] In *Boultif v Switzerland*[367] the ECtHR appears to have laid down guiding principles in the assessment of interference with family life and the question of proportionality to its legitimate aim. The *Boultif* criteria include amongst others, the nature and seriousness of the offence committed, the duration of stay in the host State, the time which elapsed since the commission of the offence, the applicant's family situation, whether children are involved and significant obstacles to be faced by the applicant's spouse in the country of destination.[368] In a subsequent case that came before the ECtHR, the Court added two additional criteria to the *Boultif* ones in its assessment that may inhibit deportation, these are 'the best interests and well-being of the children, in particular the seriousness of the difficulties which any children of the applicant are likely to encounter in the country to which the applicant is to be expelled; and the solidity of social, cultural and family ties with the host country and with the country of destination'.[369]

In the domestic context, the courts in the UK following the principles developed by Strasbourg jurisprudence have on their own developed principles for the assessment of Art 8. The key questions are whether family life exists and if so, does it require respect from immigration authorities, if so, is the interference justified, if so, is it necessary in a democratic society?[370] This is otherwise referred to as the *Razgar* test. The first two questions of the test proceeds to find whether family life exists while the second appears

[365] Charlotte Steinforth, 'Uner v The Netherlands: Expulsion of Long-term Immigrants and the Right to Respect for Private and Family Life (2008) 8 *Human Rights Law Review* 185, 186; Marie-Benedicte Dembour, 'Human Rights law and the national sovereignty in collusion: the plight of quasi-nationals at Strasbourg' (2003) 21 *Netherlands Quarterly of Human Rights* 63, 67-80; Sally Frontman-Cain, ' Boultif v Switzerland: The ECHR Fails to Provide Precise Criteria for Resolving Article 8 Deportation Cases' (2003) 25 *Loyola of Los Angeles International and Comparative Law Review* 323, 328-331; Ann Sherlock, 'Deportation of Aliens and Article 8 ECHR' (1998) 23 EUR.L.REV.H.R 62,70

[366] MacDonald and Toal (n235) 109; see chapter 5 of this thesis generally regarding the discussion on the expulsion of long-term migrants.

[367] (2001) 33 EHRR 50

[368] ibid *Boultif* para 48

[369] *Uner v Netherlands* [2006] ECHR 873, para 58, cf *Sezen v Netherlands* (2006) 43 EHRR 621, paras 48-50

[370] *Razgar* (n358) [17]

to have set a threshold for the engagement of Article 8. *In AG (Eritrea) v SSHD*[371] the court of appeal explained that the threshold test is not exceptionally high one.

In expanding the concept of proportionality in a removal decision, the House of Lords (now Supreme Court) addressed the question of whether the policy of insisting on departure from the UK in order to satisfy entry clearance was legitimate and proportionate.[372] The answer was that only 'comparatively rarely, certainly in family cases involving children, should an article 8 appeal be dismissed on the basis that it would be proportionate and more appropriate for the appellant to apply for leave from abroad'.[373] In further addressing the issue of proportionality, in *EB Kosovo (FC) v SSHD*[374] the court considered three points regarding delay by the authorities in failing to remove an irregular non-national during which period he would have established private and family life making his removal a disproportionate interference. A full discussion of the right to private and family as a bar to the expulsion of nationals has been examined at Chapter 5 of this thesis.

2.5 Liberalism and the Defining Elements of a Liberal Democracy as a Prelude to the Categorization of the United Kingdom as a Liberal democracy

This thesis is concerned with the UK's practice on deportation and removal of migrants in the context of liberal democracy. In this connection, 'liberal democracy' consists of two strands-liberalism and democracy.[375] The word 'liberal' in the phrase liberal democracy refers not to the question of who rules but how the rule is exercised given that democracy itself is 'the rule of the people' as distinguished from monarchy (rule by one person), aristocracy (rule of the best) and oligarchy (rule of the few).[376] A liberal democratic government is therefore limited in its powers and mode of acting first, by the rule of law and most especially by a fundamental law or constitution and ultimately by the rights of the individual.[377] Therefore, in order to situate the UK as a liberal democracy, the thesis undertakes to explain liberalism in a bid to identifying the

[371] [2007] EWCA Civ 801 [33-37]
[372] *R (on the application of Chikwamba) v SSHD* [2008] UKHL 40 [39]
[373] ibid [44]
[374] [2008] UKHL 41
[375] Marc F. Plattner, 'Liberalism and Democracy' (1998) 77 (2) *Foreign Affairs* 171, 172 cf Fareed Zakaria, 'The Rise of Illiberal Democracy' (1997) 76 (6) *Foreign Affairs* 22, 22-23
[376] ibid; See also Amartya Kuma Sen, 'Democracy as a universal Value' (1999) 10 *Journal of Democracy* 3, 17
[377] Platner (n375) 172-175

defining elements of a liberal democracy. The idea is that liberal democracies have salient features and values, which regulate their character and behavior, therefore an exploration of these elements, will assist in the assessment of the UK as a liberal democracy. By so doing the UK's State practice regarding deportation and removal of migrants will be examined within the confines of a liberal democracy.

Liberalism is a line of modern political theory that begins in some sense with Machiavelli and continues through Thomas Hobbes, John Locke, Jean-Jacques Rousseau who saw the issue of political freedom as one that pits the State against individuals rather than groups.[378]John Locke as one of the classic commentators of liberal principles in his *Second Treaties* posited that legitimate government must reproduce the conditions necessary for 'perfect freedom […] and equality' reminiscent of the state of nature.[379] He argued that liberty and equality could still be upheld under a monarchy or mixed government without compromising the rule of law.[380] In essence, 'the constitutional protection of individual liberty and equality under the rule of law has remained fundamental to liberal theory ever since'.[381] In his contribution, Skinner was concerned that there still remains the danger of individuals being forcibly deprived of their liberty by their government, it is therefore crucial that the government of a free State should provide enabling environment for the enshrinement of liberty and equality.[382] Therefore 'liberals retain the fundamental idea that individuals have equal ethical standing and are society's fundamental ethical unit'.[383]

In essence, early liberal thinking was enmeshed with the protection of personal liberty where the rule of law was required to prevent the interference of the State with the rights of individuals in the civil society. Skinner and Paine reconstructed that the classical statements credited to Hobbes and Locke made reference to the absence of such interference as liberty, in addition, they opined that the subsequent Declarations of the Rights of Man embodied the same objective of protecting individuals from arbitrary

[378] Francis Fukuyama, ' Identity, Immigration and Liberal Democracy' (2006) 17 *Journal of Democracy* 5, 7-9
[379] John Locke, *Of Civil Government: Two Treaties* (Introduction by William S Carpenter, J M Brent 1924) 118-124
[380] John Locke, ibid; See also John Locke, Two Treaties of Government (1680-1690) Book II Chapter 9 <http://www.lonang.com/exlibris/locke/loc-209.htm> accessed 27 August 2014
[381] Joe Foweraker and Roman Krznaric, 'Measuring Liberal Democratic Performance: an Empirical and Conceptual Critique' (2000) 48 *Political Studies* 759, 770
[382] Skinner Quentin, *Liberty before Liberalism* (CUP 1998) 30, 70
[383] Gus Dizerega, ' Spontaneous Order and Liberalism's Complex Relation to Democracy' (2011) 16 (2) *The Independent Review* 173,174

power.[384] Mill supports their theses and argued vehemently that the only justification for interfering with liberty of the individual is for the prevention of harm to others.[385]

Furthermore, liberals at the time considered that political rights are necessary but not sufficient to protect individual liberties and equality before the law given that the rule of law must itself be protected by the accountability of government to its citizens therefore free and fair elections were *sine qua non* to the enjoyment of political rights.[386] The liberals are in agreement that liberty and equality require the provision of civil rights, property rights, individual rights (political rights) and by extension, minority rights.[387]Raz had stated that even though liberalism and individualism grew up together, they were nonetheless distinct doctrines.[388] A cursory look at liberals will reveal that their thoughts were based on liberty and equality, accountability of the State to the individual as governed by the rule of law. It is important to clarify that equality does not connote equal treatment between citizens and non-citizens, being that objective differences may justify such distinctions but the State's action must be legitimate. Hansen and King reveal a scenario. In their view 'an Immigration policy may legitimately hold that due to pressures on housing, utilities and employment, immigration levels must be reduced but it should not decide on one category of migrants such as black migrants or migrants from country X or migrants from a particular sexual orientation'.[389] State practice in the UK as evidenced in our discussion shows that certain immigration policies exist that illegitimately draws such distinctions and this may be necessary in the assessment of whether the United Kingdom meets the standards requisite of a liberal democracy.[390]

For clarity, a distinction is drawn between liberalism and new liberalism. Liberalism is distinct from new liberalism (neo-liberalism). For Neo-liberals, individuals were no longer regarded as solely responsible for their fortunes given that the society seen

---

[384] Skinner Quentin (n382) 10; Paine T, *The rights of Man* (Watts & Co 1937) 80; see also Christopher Hobson, 'Liberal Democracy and Beyond: extending the sequencing debate' (2012) 33 (4) *International Political Science Review* 441,449

[385] J S Mill, *On Liberty and Other Essays* (OUP 1991) 16-17

[386] C B Macpherson, *The Life and Times of Liberal Democracy* (OUP 1977) 34; See also J Roland Pennock, 'The Life and times of Liberal Democracy by C.B. Macpherson' (1978) 6 (4) *Political Theory* 555, 555-556

[387] W. Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Clarendon Press 1995) 45

[388] J Raz, *The Morality of Freedom* (Clarendon Press 1986) 17-18

[389] Randall Hansen and Desmond King, 'Illiberalism and the New Politics of Asylum: Liberalism's Dark side' (2000) *The Political Quarterly* 396, 397

[390] See chapter 3 of this thesis on immigration laws, rules, policies and State practice generally.

through the prism of the State also had a central role to play, arguing that the 'night-watchman state of classical liberalism was insufficient'.[391] Rather what is required is for the State to be more active in creating a socio-economic environment within which real freedom can be more fully realized and where it becomes necessary, 'intervention would be needed to level the playing field and to protect the vulnerable'.[392] Green agreed and stated that 'it is the business of the State, not indeed directly to promote moral goodness […] but to maintain the conditions without which a free exercise of the human faculties is impossible'.[393] Laying a conceptual background, Harvey posits that 'the founding figures of neoliberal thought took political ideals of human dignity and individual freedom as fundamental-central values of civilization-and in so doing they chose wisely, for these are indeed compelling and seductive, powerful and appealing in their own right'.[394]

In the opinion of Clarke, neoliberalism 'represents a reassertion of the fundamental beliefs of the liberal political economy that was the dominant political ideology of the nineteenth century above all in Britain and the United States emerging as an ideological response to the Keynesian welfare state'.[395] Taking an expansive and teleological posture, Steger and Roy see neoliberalism as a 'broad and general concept referring to an economic model or 'paradigm' that rose to prominence in the 1980s and built upon the classical liberal ideal of self-regulating market which comes in several strands and variations'.[396] They conceptualize neoliberalism as 'three intertwined manifestations: (1) an ideology; (2) a mode of governance; (3) a policy package'.[397]Neo-liberalism therefore 'emphasizes individual liberty, competition and the self-correcting nature of the market, and prioritizes the economic realm over the political sphere and not only does it differ from other versions of the tradition, it may actually operate to undermine other liberal values'.[398] It may weaken the foundations that enable the state to uphold the rule of law and protect basic rights.[399] As Linz and Stepan have argued, a

[391] Christopher Hobson, 'Liberal democracy and beyond: extending the sequencing debate' (2012) 33 *International Political Science Review* 441, 445
[392] J A Hobson, *The Social Problem* (Nisbet 1902) 204
[393] T H Green, *Lectures on the Principles of Political Obligations and Other Writings* (CUP 1986) 201-202
[394] David Harvey, *A Brief History of Neoliberalism* (OUP 2005) 5
[395] Simon Clarke, 'The Neoliberal Theory of Society' in Alfredo Saad-Filho and Deborah Johnston (eds) *Neoliberalism: A Critical Reader* (Pluto Press 2005) 57-58
[396] Manfred B Steger & Ravi K Roy, *Neoliberalism: A Very Short Introduction* (OUP 2010) 11
[397] ibid
[398] Christopher Hobson, (n391) 447
[399] ibid

functioning and effective state is a prerequisite for the consolidation of democracy that it might not simply be the case that some States (transitional States) lack liberalism, but may suffer from a wrong kind of liberalism with such capacity to distort and limit their democratic potential.[400]

Having now drawn a distinction between liberalism and neo-liberalism while de-emphasizing the latter for the purposes of this thesis, I move on to democracy and the concept of liberal democracy with a view to discerning its defining elements. Democracy seen from a general perspective means 'rule by the people' which appears to be the common usage across borders with a long heritage dating back to the classical times.[401] Democracy 'implies a recognition of the duties of government and the rights of the people that postulates a measure of personal freedom and equal consideration for all classes'.[402] It has been postulated that 'the challenge of democracy lies in making difficult choices, such choices inevitably bring important values into conflict'.[403] Some Scholars view democracy through a prism of contours separated and tagged 'procedural' 'substantive' and 'process oriented' which appears to make democracy different from its classical variants.[404] Others have constructed what they consider 'a newer and more assessable and transparent database of democratic indices and indicators in measuring democracy dating back to the 1900'.[405] Consideration will only be had to liberal democracy for the purposes of this thesis. For Rhoden, regardless of the qualifying adjectives, 'if liberalism and democracy are matters of kind or degree, the answer is that democracy is more a matter of degree, whilst liberalism is more a matter of kind'.[406]

Therefore when we speak of modern democracy in a shorthand way, it includes its liberal components given that contemporary nation States have both a democratic

---

[400] J Linz and A Stepan, *Problems of Democratic Transition and Consolidation* (Johns Hopkins University Press 1996) 17

[401] Michael Coppedge and others, 'Conceptualizing and Measuring Democracy: A New Approach' (2011) 9 (2) *Perspectives on Politics* 247, 260-267

[402] A. Appadorai, *The Substance of Politics* (OUP 1968) 142

[403] Kenneth Janda, Jeffrey M. Berry and Jerry Goldman, *The Challenge of Democracy* (Houghton Mifflin Company 1999) 26

[404] Larry Diamond, *Developing Democracy: Toward Consolidation* (Johns Hopkins University Press 1999) 1; Phillipe C Smitter and Terry Lynn Karl, 'What Democracy Is' (1991) 25 *Journal of Democracy* 114, 114-116; Robert A Dahl, *Dilemmas of Pluralist Democracy: Autonomy Versus Control* (Yale University Press 1982) 16-20 See also a review by David Greenstone, 'Dilemmas of Pluralist Democracy: Autonomy Versus Control by Robert A Dahl (1983) 11 (1) *Political Theory* 146, 146-147

[405] Coppedge and others (n331) 262; T H Rhoden, 'The liberal in liberal democracy' (2013) *Democratization* 1, 6

[406] Rhoden, ibid 10

component and a liberal component as there may not be in existence purely liberal or purely democratic regime in a strict sense.[407] Zakaria in his thesis postulated that in the West and for almost a century ago, democracy has been synonymous with liberal democracy, a political system characterized 'not only by free and fair elections, but also by the rule of law […]'.[408] For him, liberal democracy consists of two strands, constitutional liberalism and liberalism itself where the two strands woven in the western political fabric are falling apart given that democracy is flourishing while liberalism is not.[409] Dahl's seminal work on *Polyarchy* emphasized that democracy was primarily concerned with 'the continuing responsiveness of the government to the preferences of its citizens.[410] The idea is that by making government accountable to the people, it presupposes that the government would guarantee to uphold the law thereby supplying the essential link to liberal democracy.[411]

For a regime to be considered a liberal democracy, it must be democratic in the sense that it must protect the rights of individuals and minorities thus guaranteeing freedom or liberty of its citizens, with the guarantees expressly stated in its constitutional framework with the government further limited by the rule of law.[412] This is in contrast to the notion 'illiberal democracy' characterized by regimes that choose their leaders through reasonably accepted free and fair elections but are known to be deficient in the rule of law and the protection of individual and minority rights.[413] The practice of Liberal democracy in the opinion of Hansen and King enlivens a tension between liberal and illiberal impulses, basic liberal values being a right to fair treatment, procedural equality and the rule of law, equality among all individuals, competing with illiberal pressures and impulses such as xenophobia and racism.[414]

Furthermore, Foweraker and Krznaric coming from a minimal and procedural standpoint posit that one of the ways of measuring a liberal democracy is 'the delivery of democratic values or how far liberal governments achieve in practice the values to

[407] ibid, 7 & 9
[408] Fareed Zakaria, 'The Rise of Illiberal Democracy' (1997) 76 (6) *Foreign Affairs* 22, 22-23
[409] ibid 23
[410] R Dahl, *Polyarchy: Participation and Opposition* (University of Chicago Press 1971) 1-2
[411] Joe Foweraker and Roman Krznaric (n381) 771
[412] Marc F. Plattner, ' Populism, Pluralism and Liberal Democracy' (2010) 21 *Journal of Democracy* 82, 84
[413] Zakaria, 'The Rise of Illiberal Democracy' (n408) 23-28
[414] Randall Hansen and Desmond King, 'Illiberalism and the New Politics of Asylum: Liberalism's Dark side' (2000) *The Political Quarterly* 396, 396

which they subscribe in principle- accountability, participation, the respect of individual rights and the rule of law'.[415] It could therefore be reasoned that democratization, the rule of law and respect for human rights and good governance are inextricably intertwined as structural aspects of liberal democracies.[416] In essence, liberal democratic ideologies and or constitutions define the democratic character of States where the constitution serves as a limit on the authority of the government that delineates separation of powers, judicial independence and checks and balances between governmental organs thus emphasizing the importance of the rule of law.[417] A liberal democracy sees itself as inseparable from international human rights with the aim of applying the rights effectively and properly matched with individual and collective responsibilities.[418] Therefore a typical liberal democracy believes in certain values such as fundamental freedoms and the rule of law and actively promotes them.[419]

2.5.1 Liberal Democracy and the Rule of Law in the Context of Migration in the United Kingdom

The rule of law is the life-blood of any liberal democratic State. The rule of law has an efficacious character, which requires utmost respect given that a blatant disregard for the law and or enforcement of unjust laws may destroy its potency. Dicey opines that rule of law implies that every citizen is subject to the law with specific procedural attributes and substantive rights required of a legal framework in order to comply with the doctrine.[420] Raz sees the rule of law as a shorthand description of the positive aspects of any given political system.[421] Finnis in his contribution describes it as 'the state of affairs in which a legal system is legally in good shape'.[422] The ECtHR in *Engel v The Netherlands* refers to the rule of law as a tonic from which the whole Convention draws its inspiration.[423]

---

[415] Foweraker and Krznaric (n381) 760
[416] Commission ' Commission Communication to the Council and Parliament' (Communication) COM (98) 146, para 4
[417] Rogers Smith 'Constitutional Democracy, Coercions and Obligations to Include' in Jeffrey Tulis and Stephen Macedo (eds), *The Limits of Constitutional Democracy* (Princeton University Press 2010) 280
[418] Bertrand Ramcharan, *The Fundamentals of International Human Rights Treaty Law* (Martinus Nijhoff 2011) 63
[419] David Cameroun 'PM's Speech at the Munich Security Conference' (Munich Security Conference, 5 February 2011) < http://www.number10.gov.uk/news/pms-speech-at-munich-security-conference/> accessed 13 October 2011
[420] A V Dicey, *An Introduction to the study of the Law of the Constitution* (6th edn, Macmillan 1902) 179
[421] Joseph Raz, *The Authority of Law: Essays on Law and Morality* (2nd edn, OUP 2009) 210
[422] John Finnis, *Natural Law and Natural Rights* (OUP 1980) 270
[423] (1976) 1 EHRR 647, para 69

Heydon observed that the rule of law 'prevents citizens from being exposed to the uncontrolled decisions of others in conflict with them where powerful citizens are not permitted to use self-help against other citizens so far as their arbitrary might permits operating as a bar to untrammeled discretionary power'.[424] It does so by 'introducing a third factor to temper the exposure of particular citizens to the unrestrained sense of self-interest or partisan duty of other citizens or institutions- an independent arbiter- the judges who will be allowed free hand to decide the matter'.[425] He stressed that the rule of law preserves for citizens an area of liberty in which they can live their lives free from the raw and direct application of power by so doing creates a framework within which the creative aspects of human life can thrive, removing both the reality of injustice and the sense of injustice while providing actual remedies.[426]
In short, the core principle of the rule of law suggests that 'all persons and authorities within the State, whether public or private, should be bound by and entitled to the benefit of the laws publicly and prospectively promulgated and administered in the courts'.[427] Lord Bingham stated:

> 1.The law must be accessible and so far as possible intelligible, clear and predictable. 2. Questions of legal right and liability should ordinarily be resolved by application of the law and not the exercise of discretion. 3. Laws of the land should apply equally to all, save to the extent that objective differences justify differentiation. 4. The law must afford adequate protection of fundamental human rights. 5. Means must be provided for resolving, without prohibitive cost or inordinate delay, bona fide civil disputes which the parties themselves are unable to resolve. 6. Ministers and public officers at all levels must exercise the powers conferred on them reasonably, in good faith, for the purpose for which the powers were conferred and without exceeding the limits of such powers. 7. Adjudicative procedures provided by the state should be fair. 8. The existing principle of the rule of law requires compliance by the state with its obligations in international law. [428]

These sub rules in my view can be applied to illustrate the extent at which the United Kingdom and other liberal States apply the rule of law especially with respect to non-nationals (migrants). As Bingham clearly stated in his first sub rule above, the rule of

[424] Dyson Heydon, 'Judicial Activism and the Death of the Rule of Law' (2003) 47 1 (2) *Quadrant Magazine* 2-3
[425] ibid
[426] ibid
[427] Lord Bingham, 'The Rule of Law' (Centre for Public Law Lecture Series, 16 November 2006) < http://www.cpl.law.cam.ac.uk/past_activities/the_rt_hon_lord_bingham_the_rule_of_law.php> accessed 05 April 2012
[428] ibid; T. Bingham, *The Rule of Law* (Penguin 2010) 3

law demands that the law must be accessible, intelligible, clear and predictable.[429] This means that everyone bound by the law should without undue difficulty see the clarity of the law in any course of action.

The ECtHR had confirmed explicitly that the law must be adequately accessible in that the citizens [non-citizens] should have indications that are adequate so as to help them regulate their conduct.[430] It further stated that the law should allow a person the latitude to predict or foresee within reasonable circumstances the consequences of any action before being taken, [431] and in *Fothergill v Monarch Airlines* Ltd, the UK's House of Lords (now Supreme Court) stated that the law should be sufficiently clear.[432] The ECHR further incorporates the requirements that any restrictions on the freedoms, which it enunciates, must be "in accordance with" or "prescribed by law".[433] This means that, they must be subject to the accessibility, intelligibility, clarity and predictability test.[434]

In his contribution to the importance of the rule of law, the former UN Secretary-General, Kofi Annan also emphasized amongst others, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness, and procedural and legal transparency consistent with international human rights norms and standards.[435] Therefore, there is a need for a rule of law in every state and agreement at the international level by all states that the rule of law should operate in national systems, as there are consequences for the state if the rule of law is not complied with.[436] Therefore the rights of migrants with respect to detention pending deportation cannot be secured if the rule of law is not respected given the vulnerable nature of such migrants in detention pending deportation and/or removal.

---

[429] ibid
[430] *Sunday Times v United Kingdom* (1979) 2 EHRR 245, paras 42-48
[431] ibid, para 49
[432] [1981] AC 251
[433] See ECHR Art 17
[434] Lord Mance, 'Should the law be certain?' (The Oxford Shrieval lecture University Church of St Mary The Virgin, Oxford 11October 2011) <http://supremecourt.uk/docs/speech_111011.pdf >accessed 12 August 2014
[435] Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post Conflict Societies, UN Doc S/2004/616 (2004); See also UNGA Res 61/39 (18 December 2006) UN Doc A/RES/61/39 concerning the rule of law; UNSC Presidential Statement 'Justice and the Rule of Law: the United Nations Role' (24 September 2003) UN Doc S/PRST/2003/15
[436] Robert McCorquodale, 'The Rule of Law and Migration: Some General Themes' (Asilah, Morocco, 21 July 2010)

It has been suggested that State practices in migration show that the operation of the rule of law has not been accorded adequate respect; yet it is essential that the rule of law operate in all aspects of migration.[437] The Court of Justice of the European Union (CJEU) in *Deutsche Milchkontor GmbH and others v Federal Republic of Germany*[438] espouses certainty in its jurisprudence, and held that 'the principles of legitimate expectation and assurance of legal certainty are part of the legal order of the Community'.[439] As Lord Mance observed, 'If the law is certain, individuals know what to expect as a precondition for legitimate expectation, the authority, which ought to know the law, is bound by its own specially created law'.[440]

In the UK, the constant changes to immigration law may violate the rule of law as evident in the way the right to appeal an immigration decision is granted and removed at times even by the exercise of discretion contrary to the rule of law which demands that legal right and liability should ordinarily be resolved by application of the law and not by the exercise of discretion.[441] But the history of immigration law in the UK and other liberal democratic states as will be seen is a history of exercise of discretion. The issue therefore is that the broader and more loosely textured a decision is, the greater the risk of abuse, the greater the risk of subjectivity and arbitrariness which is the antithesis of the rule of law. The point being made is that the law is conceived in such a way that a significant number of cases are subject to the exercise of discretion implying that discretion would be borderline with arbitrariness.[442]

Further to the above, the rule of law requires that the laws of the land should apply equally to all save to the extent that certain objective differences justify such differentiation.[443] It is clear that the right of citizens and non-citizens with no right of abode differ from each other. Citizens of a State enjoy certain privileges that non-citizens cannot enjoy by virtue of their nationality. Nevertheless, the rule of law does not warrant irrelevant distinctions with respect to protection because nationals and non-nationals within the State's territorial jurisdiction alike require the same degree of

[437] ibid
[438] Joined Cases 205-215/82, paras 27-30
[439] For a full discussion on the principle legal certainty and legitimate expectation, see chapter 5.7.1 of this thesis.
[440] Lord Mance (n434) 3
[441] Lord Bingham (n427) 7
[442] See Chapter 3 of this thesis for a full discussion on discretion and its ancillaries.
[443] T. Bingham, 'There is a World Elsewhere: The Changing Perspectives of English Law' (1992) 41 ICLQ 513

protection. Lord Scarman opines that he who is subject to English law is entitled to its protection, as there is no distinction between British nationals and others in terms of protection provided they are all in the UK's territorial jurisdiction.[444] However, part 4 of the Anti-Terrorism, Crime and Security Act 2001 provides for indefinite detention without charge of non-nationals suspected of international terrorism while at the same time exempting that liability from nationals who were qualitatively or objectively judged to present the same threat. Even though the resulting Anti-Terrorism Act 2005 has now been repealed, the fact remains that the law did not apply equally between nationals and non-nationals with respect to protection.[445]

Similarly Justice Jackson of the US Supreme court had observed that 'states and the Federal Government must exercise their powers so as not to discriminate between their inhabitants except upon some reasonable differentiation fairly related to the object of regulation, adding that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law, which officials would impose upon a minority, must be imposed generally the issue of no distinction in protection'. He added, 'nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation […] Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation'.[446]

In sum, it will be observed that a liberal democracy has features and values and such categorizations turn on the qualification as a liberal democracy. The threads that run through a liberal democracy as has been identified in this thesis includes the respect of international human rights law, the equality of treatment-save for objective differences, the respect for the rule of law as has been explained which includes legitimate expectation and legal certainty, accountability, transparency and the avoidance of arbitrariness. Therefore in the treatment of migrants, it is expected that a liberal democracy State such as the United Kingdom will be alive to the protection of the rights of migrants and for the purpose of this thesis, right to liberty and security, prohibition

[444] *R v SSHD ex p Khawaja* [1984] AC 74 [111]
[445] The 2005 Act has been repealed by s 1 of the Terrorism Prevention and Investigation Measures Act 2011, see *A and Others v SSHD* [2004] UKHL 56; cf *A v SSHD* [2005] UKHL 71 relating to the use of evidence obtained by torture; see Liberty, 'Summary of the Prevention of Terrorism Act 2005' <https://www.liberty-human-rights.org.uk/sites/default/files/prevention-of-terrorism-act-2005-summary.pdf> accessed 30 August 2014
[446] *Railway Express Agency Inc. v New York* 336 US 106 (1949)

against torture, the protection of the right to private and family life and the right to an effective remedy. The above will be employed to measure State practice in the UK and whether such State practices are 'necessary in a democratic society'.[447] The assessment will assist in answering the question whether the UK complies with its substantive and procedural obligations in the expulsion of migrants. I shall now look at the challenges faced by a liberal democracy in meeting with its obligations as reflected in the liberal democratic paradox, which will be discussed hereunder.

2.5.2 The Liberal Democratic Paradox

A liberal democracy has been construed, as more than the sum of its composite parts given that some aspects of liberal democracy conform to its stated standards while others nearly seem to be in conflict with each other.[448] While one aspect tends to favour majoritarian principles the other appears to tilt towards individual rights. Therefore 'constructing a regime that is both more liberal and more democratic will pose a challenge; for these aspects will always have point of conflict',[449] which in the view of Plattner occurs as a democratic disorder known as populism- 'where democracy excessively weakens the protection offered for individual and minority rights as against the aggrandizement of its liberal or anti-majoritarian side'.[450] For Plattner, populism is often accompanied by what he referred to as 'nativism' or hostility to immigrants and immigration as the populists tend to view the people (majority) as homogenous while outsiders (the minority) are viewed as enemies of the people rather than allies.[451] This tension between two competing sides is referred to as the liberal democratic paradox that requires the maintenance of a reasonable balance.

In the immigration context, the liberal democratic paradox has been explained by Gibney and Hansen as the capacity to exercise border control, which is fundamental to liberal democracy in terms of sovereignty and the reflection of aggregate preferences of its citizens as against the deportation of individuals which completely and permanently severs the relationship between the State and that of the individual.[452] For them, liberal

[447] See Janneke Gerards, 'How to improve the necessity test of the European Court of Human Rights' (2013) 11 (2) *International Journal of Constitutional Law* 466
[448] James W Ceaser, *Liberal Democracy & Political Science* (John Hopkins University Press, 1990) 26
[449] Rhoden (n405) 11
[450] Marc F Plattner, 'Populism, Pluralism and Liberal Democracy' (n412) 87
[451] ibid 88
[452] Gibney and Hansen (n1) 1-2

democratic paradox explains the 'conflict between the liberal state support for the demos (the populace of a democracy) and its support for rights which could be addressed through expanded inclusion-by dismantling external measures such as visas or on the other hand expanded exclusion- a more frequent recourse to deportation thereby matching external restrictions with internal ones'.[453]

The liberal paradox thus refers to the existence of increasingly restrictive and deterrent immigration policy of the State in the extending of the legal protection being granted to migrants within its territory.[454] This is divided into 'politics of restriction' on the one hand and the 'law of inclusion' on the other hand. By the exercise of sovereignty, the State decides who is a citizen and who is not thus the State advances the interest of its citizen above the interest of outsiders.[455] In contrast, the law of inclusion makes reference to the expanding levels of protection enjoyed by migrants within the jurisdiction of liberal democracies as required by standards imposed by law.[456] Therefore when the restriction and inclusion elements are juxtaposed, there appears to be a conflict where citizen rights influence restrictive entry policies as against human rights obligations thus restricting State discretion regarding the deportation or removal of migrants.

The challenge faced by liberal democratic states is therefore how to reconcile these liberal principles with competing principles of authority, which equally transcends it. The tension as it has been argued, exists. Hollified in his 'gap hypothesis' believes that the tension is amplified by a growing gap between restriction policy intent and expansionist immigration reality.[457] Tuitt argues that such disparity exposes the friction between the aims and objectives of international law and municipal law, which springs from the liberal paradox.[458] The ECHR amongst other leading instruments ostensibly developed the protection of the rights of migrants thus undermining national

[453] ibid 15
[454] George Gigauri, 'Resolving the Liberal Paradox: Citizen Rights and the Alien Rights in the United Kingdom' (2006) *RSC Working Paper* 31, 6
[455] Sovereignty may be legal or political as expressed in the following cases *Musgrove v Chun Teeong Toy*, Privy Council (Australia) 18 March 1891; *The Chinese Exclusion Case* 130 US 581 (1889); *Schmidt v SSHD [1969] 1 All ER*
[456] Powers of States are limited by virtue of Article 1(2) of the 1951 Convention Relating to the Status of Refugees that allows a refugee to seek protection and be allowed protection in another State; Article 18 of the EU Charter of Fundamental Rights reinforces and guarantees the right to seek asylum and there is an obligation under Article 33 of the 1951 Refugee Convention on the part of States not to return (*refouler)* an asylum seeker to a territory where they may face persecution.
[457] J Hollifield, 'Migration and International Relations' (1992) *International Migration Review* 26 (2) 570
[458] P Tuitt, *False Images: The Laws Construction of the Refugee* (Pluto Press 1996) *10*

sovereignty and domestic order of rights distribution.[459] Soysal adds that the paradox manifests itself as a de-territorialised expansion of rights even despite the closure of polities.[460]

In a similar vein, Jacobson reasons that what gave rise to the liberal paradox are the separation of identity and rights, which are the two components of citizenship. He explains that while identity has remained territorially bounded and specific, rights have become increasingly abstract, but only defined and legitimated at transnational levels.[461] In affirming the existence of a liberal paradox, Joppke points to the weakness of international human rights law which according to him has led to erroneous dualism between States and an external human rights regime.[462] He arrived at this conclusion with the belief that the protection of human rights is constitutive of and not external imposition on liberal democracies. Gibney on his part strongly believes that the tension between the law of inclusion and politics of restriction is best understood as a reflection of a deeper conflict between liberal and democratic values in a liberal democracy.[463] This in my view can be exemplified when the British public vote for increasing closure of the frontiers, which potentially engages the violation of human rights, which may be interpreted, as the use of democratic means to achieve supposedly undemocratic ends.

As Storey argues, States avoid obligations that expressly safeguard human rights in such a disproportionate manner that is reflective in their pattern of legal commitments.[464] With reference to the ICCPR, the UK placed a reservation on Art 12 which holds that: 'the UK reserves the right to continue to apply such immigration legislation governing entry into, stay in and departure from the United Kingdom as they may deem necessary […]'. The UK did not ratify the Optional Protocol to the ICCPR[465] that enshrines the right of individual petition. Furthermore, the UK is a signatory to the

[459] Y Soysal, 'Changing Citizenship in Europe: Remarks on Post-National Membership and the National State' in Cesarani, D and Fulbrook, M (eds) *Citizenship, Nationality and Migration in Europe* (Routledge Press 1996) 20
[460] ibid Soysal 24
[461] D Jacobson, *Rights Across Borders: Immigration and the Decline of Citizenship* (John Hopkins University Press 1996) 18
[462] C Jopke, 'Asylum and State Sovereignty: A comparison of the US, Germany and Britain' in Joppke C (ed) Challenge to the Nation State: Immigration in Western Europe and the US (OUP 1998) 110
[463] Matthew Gibney, 'The State of Asylum: Democratization, Judicialization and Evolution of Refugee Policy in Europe' (2001) *UNHCR Working Paper* 50, 17
[464] H Storey, 'International Law and Human Rights Obligations' in S Spencer (ed) *Strangers and Citizens: A Positive Approach to Migrants and Refugees* (Oram Press1994) 117
[465] UNGA Res 2200A (XXI) (23 March 1976) UN Doc A/6316

ECHR but to date has not ratified Protocols No.4[466] (liberty of movement and prohibition of collective expulsion of aliens) and Protocol No.7 (a supposedly tight procedural safeguards relating to expulsion of aliens).[467] Therefore, the tension generated by the fact of being a liberal democracy and its attendant obligations are reflected in the paradox.[468] For Akakpo and Lennard, 'whereas liberal political philosophy is founded on a commitment to the moral equality of persons, immigration challenges this commitment by highlighting that the right of states to choose their members treats others unequally in some key respects. Attempts to reconcile the 'liberal universal concern for all persons with the reality of state boundaries and their exclusionary policies continue to prove difficult within the limits of liberal political theory'.[469]

2.6 Conclusion

The notion that every State by reason of its territorial supremacy is competent to exclude non-nationals partly or wholly from its territory is supported by international law but such prerogative authority is subject to a cluster of international law and treaty obligations prominent of which was the UDHR, viewed as not imposing legal obligations on States at the time of its adoption but remains a primary source of global human rights standards based on humanity rather than nationality.

The obligations of States under IHRL also apply extraterritorially so that whenever a State exercises its authority abroad, it leads to accountability of its officials and acts done by public authorities in the State may have consequences if such acts are attributed to them even if they take place by the action of another State in a territory not under its jurisdiction. It would equally be unconscionable to permit a State to perpetrate violations it could not perpetrate on its territory for this will be contrary to the general concept of human rights based on humanity as against nationality.

---

[466] COE, Treaty Office ETS No 46 <http://conventions.coe.int/treaty/en/Treaties/Html/046.htm> accessed 24 January 2013

[467] COE, ETS No 117 http://conventions.coe.int/treaty/en/Treaties/Html/117.htm accessed 24 January 2013

[468] See Nicholas De Genova, 'Migrant "Illegality" and Deportability in Everyday life' (2002) 31 *Annual Review of Anthropology* 419, 420

[469] C.E.G. Akakpo and P.T. Lenard, 'New challenges in immigration theory: an overview' (2014) 17 (5) *Critical Review of International Social and Political Philosophy* 493,494

The express right of non-nationals to enter, settle or to be free from expulsion in the host states is unknown to the ECHR but any breach of the right of migrants might be challenged when it involves their right to life, right to liberty and security, freedom from torture or degrading treatment and the right to private and family life. It follows that a Contracting State's decision to deport, or to deny entry to a non-national may be successfully challenged where the circumstances attending the detention pending deportation and/or removal, or the State's domestic procedures governing such proceedings give rise to a violation of the migrant's rights as may be applicable.

Liberal democracies as have been argued have salient features and values, which regulate their character and behavior. Having explored these elements, the UK was adjudged a liberal democracy implying that the UK's State practice regarding deportation and removal of migrants will be examined within the confines of a liberal democracy. Prominently, the constitutional protection of individual liberty and equality under the rule of law has remained fundamental to liberalism which demands the protection of the rights of individuals and minorities thus guaranteeing freedom or liberty of its citizens and non-citizens alike in its territorial jurisdiction as expressed in its constitutional framework within the ambit of the rule of law.

Therefore, the consideration of the legality of detention pending deportation and/or removal of migrants in the UK in the context of liberal democracy requires a discussion on liberal democratic ideologies which enlivens a tension in establishing boundaries between individual and collective rights, otherwise referred to as liberal democratic paradox. This may further be exemplified by the existence of increasingly restrictive and deterrent immigration policy of the State in extending the legal protection being granted to migrants within its territory.

Chapter 3. Immigration Control in the UK

3.1 Introduction

Immigration control, it has been argued, 'has a strong reliance on spectacle where the migration regime must be perceived as competent and for the State to act powerfully in the defense of its borders'.[470] This is anchored on the assertion that immigration control unarguably remains 'one of the central prerogatives of national sovereignty but international human rights obligations require States to comply with their treaty obligations regarding the treatment of aliens in their territory'.[471] The concern for this thesis therefore, is to assess whether the UK's State practice and legislation in the treatment of migrants conform to acceptable international standards that invites the examination of State practice governing the detention and subsequent deportation of migrants.

Having laid the foundation and provided the framework for the position of international human rights law in the detention and expulsion of migrants in the United Kingdom in Chapter Two, this chapter will discuss the various sources of immigration law in form of Immigration Acts and its supplement, Immigration Rules that have effect on State practice. The discussion will be carried out thematically in order to unravel the revolving issues and trends in immigration control. The effect of some of these legislations is that they create special immigration status (precarious immigration status) for migrants that in turn create the enabling environment for their detention and subsequent deportation and/or removal, which as will be argued, are incompatible with liberal democratic ideals.

In this chapter, references will be made to three other selected liberal democratic states- the United States of America, Australia and France whose immigration reality offers significant similarities with the UK. This is in order to put the analysis of immigration issues in the UK within the broader context of other liberal democracies by way of convergence, divergence, diffusion and dilemmas of practices in immigration control.

[470] Bridget Anderson, "Illegal Immigrant": Victim or Villain? (2008) ESRC Centre on Migration, Policy and Society Working Paper 64/2008, 3 <http://www.compas.ox.ac.uk/fileadmin/files/Publications/working_papers/WP_2008/WP0864%20Bridget%20Anderson.pdf > accessed 20 October 2013

[471] Steve Peers, 'Free Movement, Immigration Control and Constitutional Conflict' (2009) 5 *European Constitutional Law Review* 173

As has been observed, the UK, USA, Australia and France are major receiving countries in terms of immigration.[472] They are liberal democratic countries given their constitution and democratic practices.[473] USA and Australia are outside the European Union while UK and France are within the European Union. In the views of Groenendijk, Guild and Dogan, 'Europe over time has become the western target of immigrant flows and migration policies seem to have increased rapidly with the reaction that they have adopted deportation and detention as standard practices'.[474] This is connected with the finding by a British Social Attitudes Survey, which found that immigration is one of the only areas in which public opinion has not become more liberal in the last two decades.[475]

3.2 Immigration Control, Citizenship and the Interplay of Sovereignty

As a 'matter of well-established international law and subject to its treaty obligations, a State has the right to control the entry of non-nationals into its territory'.[476] Therefore a fundamental principle of State sovereignty is that States enjoy the discretion over the admission, residence and expulsion of non-nationals in their territorial jurisdiction.[477] The exercise of sovereignty has over time affected the plight of non-nationals as the pre-twentieth-century developments illuminated the idea that 'the alien was literally a non-person'.[478] This changed substantially in the middle ages due principally to Christianity, which was the prevalent religion in the West that emphasized the inherent dignity and equality before God of all human beings, changing the fact that the alien was no more a non-person.[479] This was to be followed by the rise of diplomatic protection in the development of international legal doctrine where cognizance was made of the right of the State to protect its citizens abroad- a doctrine with the

[472] Gibney and Hansen, 'Deportation and the liberal state' (n1)
[473] Michael Coppedge and others, 'Conceptualizing and Measuring Democracy: A New Approach' (2011) 9 (2) *Perspectives on Politics* 247, 260-267; C B Macpherson, *The Life and Times of Liberal Democracy* (OUP 1977) 34; See also J Roland Pennock, 'The Life and times of Liberal Democracy by C.B. Macpherson' (1978) 6 (4) *Political Theory* 555, 555-556
[474] Kees Groenendijk, Espeth Guild and Halil Dogan, 'Security of Residence of Long-term Migrants: A comparative study of law and practice in European Countries (Council of Europe 1998) 20-58
[475] Alison Park and others, (eds) British Social Attitudes (2012 edn, 29th Report, NatCen Social Research) 26-41 <http://www.bsa-29.natcen.ac.uk/media/13421/bsa29_full_report.pdf > accessed 30 March 2015
[476] *Abdulaziz, Cabales and Balkandani v UK* (1985) 7 EHRR 471, para 67
[477] Seyla Benhabib, 'Borders, Boundaries and Citizenship' (2005) 38 (4) *Political Science and Politics* 673, 675
[478] Richard B Lillich, *The human rights of aliens in contemporary international law* (Manchester University Press 1984) 6
[479] ibid

theoretical underpinning set by Emmerich de Vattel in his 1758 classic treatise *The Law of Nations* where he opined that 'Whoever uses a citizen ill indirectly offends the State which is bound to protect its citizen'[480], even though it has 'no duty to do so if it so chose'.[481]

As Dunn pointed out 'it was not until the nineteenth century that the development of a body of law governing the treatment of aliens really got underway'.[482] Therefore it was up to the State to seek redress for the wrong done to its citizens as the citizen in an alien country has no direct right to seek redress which exposes three possibilities namely 'the attribution of injury to the home State of the injured alien; the attribution of the wrongful act to the State in which the alien resided; and the doctrine of the exhaustion of local remedies known as State responsibility'.[483]

In the first aspect of diplomatic protection above-the attribution of injury to the home State of the injured alien-rather than the aggrieved individual himself, the Permanent Court of International Justice (PCIJ) in the *Mavrommatis Palestine Concessions* case held:

> It is an elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through the ordinary channels. By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights-its right to ensure, in the person of its subjects, respects for the rules of international law.[484]

The difficulty then is that the traditional doctrine of diplomatic protection was not very much about the rights of the alien, strictly speaking, but about the rights and duties of States more especially when the individual and the State has differences as to whether or not to bring a claim and given that the claim belongs to the State, its opinion holds

---

[480] Emmerich de Vattel, *Law of Nations* (Bela Kapossy and Richard Whatmore eds, first published in 1758, Liberty Fund Inc 2008) 161

[481] Edwin Borchard, *The Diplomatic Protection of Citizens Abroad* (New York 1914) 35

[482] See generally F Dunn, The Protection of National (1932) 53 cited in Richard B Lillich, *The Current Status of the Law of State Responsibility for Injuries to Aliens* (University Press of Virginia 1983) 1, see also discussions by Myres S McDougal, Lung-chu Chen and Harold D Lasswell, 'Protection of Aliens from Discrimination and World Public Order: Responsibility of States Conjoined with Human Rights' (1976) 70 *American Journal of International Law* 432, 432-437

[483] Lillich, *The human rights of aliens in contemporary international law* (n478) 11

[484] Mavrommatis Palestine Concessions Case [1924] PCIJ Series A No 2, 12 <http://www.icj-cij.org/pcij/serie_A/A_02/06_Mavrommatis_en_Palestine_Arret.pdf >accessed 25 April 2015 cf *Case Concerning Certain German Interests in Polish Upper Silesia (Merits)* [1926] PCIJ Series A No 7

sway.[485] As Lillich remarked 'traditional international law sought to induce States to maintain certain minimal conditions as reflected in the international minimum standard by penalizing them when they fail to do so'.[486] In the opinion of Sohn and Baxter, 'the law has not only protected aliens but has also suggested a desideratum for States in their relationships with their own nationals'.[487]

Borchard expressed that 'while equality is the ultimate that the alien may ask of municipal law, which is by no means bound to grant equality, the body of international law developed by diplomatic practice and arbitral decision, indefinite as it may be, represents the minimum which each state must accord the alien whom it admits'.[488] This is regardless of whether it is the fundamental, natural, or inherent rights of humanity in general or the alien in particular; this minimum standard has acquired a permanent place within the ambit of protection in international forums.[489] What the standard did was to set a certain number of basic rights established under international law which States are under obligation to grant to aliens regardless of the treatments accorded to their own citizens, such that violations of this norm triggers international responsibility of the host State that may open the way for international State responsibility by the injured state.[490]

By and large, the Minimum Standard of Treatment in international law can be said to have originated from the doctrine of denial of justice from ancient Greece that endured into the early 20th century and forming part of the natural law legacy of the law of nations.[491] The Organization for Economic Co-operation and Development (OECD) thus defines international minimum standard, as 'a norm of customary international law

---

[485] See Dunn (n482) 54
[486] Richard B Lillich, *The Current Status of the Law of State Responsibility for Injuries to Aliens* (n482) 13
[487] Sohn and Baxter, Convention on the International Responsibility of States for Injuries to Aliens, Explanatory Notes, Art 1, 44 (Draft No 12 1961); see further commentaries by Sompong Sucharitkul, 'State Responsibility and International Liability under International Law' (1996) 18 *Loyola of Los Angeles International and Comparative Law Review* 821, 822-829
[488] Edwin Borchard, 'Minimum Standard of the Treatment of Aliens' (1940) 38 (4) *Michigan Law Review* 445, 448
[489] ibid
[490] Adriana Sánchez Mussi, 'International Minimum Standard of Treatment' <https://asadip.files.wordpress.com/2008/09/mst.pdf >accessed 10 January 2017, cf the Calvo Clause, dealing with settlement of disputes between aliens and States requiring aliens to commit themselves, by their very contract with the State, not to seek diplomatic protection from the State of which they are nationals as against the Contracting State which allegedly caused them some damage, Oxford Public International Law <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e689 > accessed 10 January 2017
[491] Alwyn V. Freeman, *The International Responsibility of States for Denial of Justice* (Longmans, Green and Co 1938) 498

which governs the treatment of aliens, by providing for a minimum set of principles which States, regardless of their domestic legislation and practices, must respect when dealing with foreign nationals and their property'.[492] This can be understood in analyzing the ratio of the 1926 decision on the *Neer* claims[493] alongside the *Roberts* claims[494]; these became the landmark case for the international minimum standard.

In the *Neer* claims[495] the victim Paul Neer was a U.S. national who was murdered on his way back from a mine where he worked. Following this event, his wife filed a claim arguing that the Mexican Government had shown lack of diligence in investigating and prosecuting the murder. The Mexico/ U.S.A General Claims Commission[496] found that even though the murder did not violate the international minimum standard on the treatment of aliens but noted that the authorities should have acted in a more effective way to protect the alien. In the *Roberts* claims,[497] Roberts was a U.S. national who had been confined for nineteen months in a small cell along with some other men. The place of confinement had no sanitary facilities, no furniture and no opportunities for exercise. The Mexico/ U.S.A General Claims Commission then declared that although equality is relevant in determining the merits of a complaint of mistreatment of an alien, it is nonetheless, not the ultimate test of the propriety of the acts of authorities in the light of international law. Rather, the test is whether aliens are treated in accordance with ordinary standards of civilization. On facts of the case, the Claims Commission concluded that the treatment of Roberts was such as to warrant an indemnity on the ground of cruel and inhumane imprisonment.

It is therefore the case that attempts have been made in emphasizing the rights of aliens, synthesizing as it did the concept of human rights and the principles governing the treatment of aliens. This arguably raised the standard, extending to 1945 developments concerning human rights, which have now come to provide a new content for

[492] OECD Directorate for Financial and Enterprise Affairs (2004) 'Fair and Equitable Treatment Standard in International Investment Law' *Working Papers on International Investment* 2004/3; The Organization for Economic Co-operation and Development <http://www.oecd.org/about/ > accessed 10 January 2017
[493] *L. F. H. Neer and Pauline Neer (U.S.A.) v. United Mexican States* (Reports of International Arbitral Awards 15 October 1926) (RIAA iv p.60 at 60-61)
[494] *Harry Roberts (U.S.A.) v. United Mexican States* (Reports of International Arbitral Awards 2 November 1926) (RIAA iv 77 at 80)
[495] ibid
[496] Convention Between the United States of America and the United Mexican States of 1923 (The Claims Commission)
[497] *Roberts* claims (n494)

international standard that are solely based on human rights principles, becoming part of customary international law.[498]

With further developments which space may not permit here, human rights norms factored in the UN Charter and subsequently engrained in the Universal Declaration of Human Rights in concert with the International Bill of Rights as discussed in Chapter Two of this thesis preempted the treatment of aliens-minimum standards of treatment as a rule of customary international law.[499] In essence, the notion that every State by reason of its territorial sovereignty is competent to exclude non-nationals partly or wholly from its territory constitute a general principle of international law which has been confirmed in myriads of cases in the Strasbourg jurisprudence.[500] However, as Bryan and Langford noted 'although States' prerogative authority in this regard exists, it is rather subject to a cluster of international law and treaty obligations'.[501] This is simply because the international legal regime and its attendant institutions presume that while individual States can maintain sovereignty over its internal affairs, 'they are nonetheless accountable to upholding certain principles and standards in the exercise of sovereignty which calls for a reconciliation of sovereignty with universality of human rights law'.[502] Herein lies the debate, which will be examined by the pages that follow.

Clearly stated, international law allows States in the exercise of sovereignty to lay down rules governing the grant of its own nationality (citizenship).[503] As Harris puts it:

> Nationality is a legal bond having at its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with reciprocal rights and duties, constituting as it may, juridical expression of the

[498] Ian Brownlie, *Principles of Public International Law* (7th edn, OUP 2008) 528
[499] See chapter 2.2 of this thesis for a full discussion on this subject
[500] Ian Bryan and Peter Langford, 'The Lawful Detention of Unauthorised Aliens under the European System for the Protection of Human Rights' (2011) 80 *Nordic Journal of International Law* 193, 194; The following cases support the principle of State sovereignty *Abdulaziz, Cabales and Balkandani v UK* (1985) 7 EHRR 471, para 67; *Soering v UK* (1989) 11 EHRR 449, 86-87; *Vilvarajah v UK* (1991) 14 EHRR 248, para 102; *Amur v France* (1996) 22 EHRR 533, para 41; *Chahal v UK* (1996) 23 EHRR 413, para 73; *Saadi v UK* (2008) 47 EHRR 17, para 64, 73
[501] Bryan and Langford, ibid 194
[502] Ryszard Cholewinski and Patrick Taran, 'Migration, Governance and Human Rights, Contemporary Dilemmas in the era of Globalization' (2010) 22 *Refugee Survey Quarterly* 1, 3
[503] This thesis does not differentiate nationality from citizenship in the context of deportation as both terms emphasize the same idea of State membership, see also Hans Kelsen, *Principles of International Law* (The LawBook Exchange Ltd 2003) 248; Francois Rigaux, 'Hans Kelsen on international Law' (1998) 9 *European Journal of International Law* 325 cf Thomas Alexander Aleinikoff, David Marin and Hiroshi Motomura, *Immigration Process and Policy* (3rd edn, West Group 1995); Carmen Tiburcio, *The Human Rights of Aliens under International and Comparative Law* (Martinus Nijhoff Publishers 2001) 2-5

> fact that the individual upon whom it is conferred, either directly by law, or as a result of an act of the authorities, is in fact more closely connected to the population of the State conferring nationality than with any other state'.[504]

More so, nationality according to Sir Robert Jennings and Sir Arthur Watts 'is the principal link between individuals and international law, the right of protection over its nationals abroad […] and the duty of receiving on its territory its nationals as are not allowed on remaining on the territories of other states'.[505] Put objectively, 'nationals have a special and more permanent tie with the State of their nationality and while they have some obligations towards the State of their nationality, they also have a right of abode'[506] and are entitled to the protection of the State at various levels.[507] Nationality is of 'foremost importance in the life of an individual which will determine his or her right to enter a country and under what circumstances'.[508] The UDHR has expressed that everyone has a right to nationality and no one shall be arbitrarily deprived of his nationality or even denied the right to change his nationality.[509]

In Oppenheim's view 'nationality of an individual is his quality of being a subject of a certain state, and therefore its citizen, it is not for international law but for municipal law to determine who is, and who is not to be considered a subject'.[510] Writing on a submission to the UK Parliament on the government's proposal to introduce a system of temporal exclusion orders intended to be applied against British citizens, Goodwin-Gill emphasized that the intended action 'raises a number international legal issues including responsibility of the States to its citizens and the international community of states at large, stating that there is no justification in international law for the exclusion, even temporarily, of British citizens from the United Kingdom'.[511]

---

[504] D J Harris, *Cases and Materials on International Law* (5th edn, Sweet and Maxwell 1998) 592
[505] R Y Jennings & A Watts (eds) Oppenheim's International Law (9th edn, Longman 1951) 857-9
[506] Carmen Tiburcio*, The Human Rights of Aliens under International and Comparative Law* (n422) 2
[507] William W Bishop Jr, International Law: Cases and Materials (3rd edn, Little Brown & Co Law & Business Publishing 1971) 488
[508] Carmen Tiburcio, (506) 6
[509] See UDHR Art 15
[510] L Oppenheim, *International Law* (8th edn, Longmans, Green & Co 1955) 642
[511] Guy S Goodwin-Gill, ''Temporary Exclusion Orders' and their Implications for the United Kingdom's International Legal Obligations' <http://www.parliament.uk/documents/joint-committees/human-rights/GSGG-Counter_Terrorism_JCHRFinal.pdf >accessed 25 March 2015; <http://www.ejiltalk.org/temporary-exclusion-orders-and-their-implications-for-the-united-kingdoms-international-legal-obligations-part-ii/ >accessed 25 March 2015

Put simply, citizenship is commonly seen as membership in a state.[512] Therefore citizenship in the language of the British Nationality Act 1948 (BNA 1948) and subsequently extended by the BNA 1981 suggests that citizenship rights held by an individual determine his/her status and the ancillary implication in deportation and removal matters.[513] As Gibney captures it 'the possession of citizenship therefore offers a unique level of residence in a state'.[514] This means that it is almost difficult if not impossible to deport or expel a citizen except through denationalization.[515]

In the *Nottebohm case (Liechtensen v Guatemala)* [516] the International Court of Justice (ICJ) *inter alia* was called upon to 'adjudge and declare that the Government of Guatemala in arresting, detaining, expelling and refusing to re-admit Mr. Nottenbohm […] acted in breach of their obligations under international law'.[517] Mr. Nottebohm was a German national, born in Hamburg who later in 1939 applied for naturalization in Liechtenstein. In 1905, he went to Guatemala and took up residence, settling for 34 years there making it the headquarters of his business activities, while maintaining business connections in Germany. He had some of his friends and relatives in Germany and Guatemala, whom he paid visits but he later succeeded in naturalizing and obtained Liechensten's passport. In answering that question relevant to the admissibility of the case, the ICJ considered that different factors are taken into account and their importance will vary from one case to the other while giving prominence to the 'habitual residence of the individual concerned but also the centre of his interests, his family ties, his participation in public life, attachment shown by him for a given country and inculcated in his children'.[518]

---

[512] See the British Nationality Act 1948, s 1

[513] For a discussion of nationality and its redefinition and other connected matters see generally Fiorella Dell' Olio, 'The Redefinition of the Concept of Nationality in the UK: Between Historical Responsibility and Normative Challenges' (2002) 22 *Politics* 9, 10; Ann Dummet and Andrew Nicol, Subjects, Citizens, Aliens and Others: Nationality and Immigration Law (Weidenfield and Nicolson 1990) 216-217; see also Ian Spencer, *British Immigration Policy since 1945: The Making of Multi-Racial Britain* (Routledge 1997) 1, 21,53

[514]Matthew Gibney, 'Precarious Residents: Migration Control, Membersip and the Rights of Non-citizens' (2009) *UNDP Human Development Reports Research Paper* 1,6

[515] See s 40 of the British Nationality Act 1981 (as amended); see also s 66 of the Immigration Act 2014, which came into effect on 28 July 2014, see Melanie Gower, 'Deprivation of British Citizenship and the withdrawal of passport facilities' (House of Commons Library 2014) 1-2 <www.parliament.**uk**/briefing-papers/sn06820.pdf> accessed 25 November 2015

[516] [1955] ICJ Rep

[517] ibid, para 6

[518] ibid, para 6

Despite the core attachment of nationality (citizenship) Harvey opines that 'international legal order tends to emphasize '"all human beings", "every human being", "everyone", "anyone", "all persons", "no one"'[519] which suggests that what is important is the fact of being human which in any event does not vitiate or displace the existence of nationality or citizenship. A further implication of the International legal order as emphasized by Harvey is that '"International bill of Rights" is generally insistent on the inclusive applicability and the erosion of distinctions based on citizenship simply for the purpose of right protection'.[520]

In her essay, Gil-Bazo expressed the fact that in the light of the 'more comprehensive nature of other international human rights treaties, notably the ICCPR and the ECHR, these IHRMBs [International Human Rights Monitoring Bodies] have had the chance to pronounce themselves on issues regarding the specific attachment-other than nationality-between individuals and States which may, under certain circumstances require the State not merely to refrain from expelling the individual but rather to take positive measures to ensure their stay and integration in the host country'.[521] She asserted that the UN Human Rights Committee had had cause to 'consider extensively the relationship that exists between individuals and States other than nationality, particularly the legal relevance of such significant attachments other than nationality'.[522]

In short, the jurisprudence of the HRC and the ECHR have emphasized the importance of factors other than nationality establishing close and strong ties, enduring and durable connections between a person and a country, sufficient to engaging connections that may be stronger than that of nationality thus making the deportation of the individual disproportionate.[523]

The UK's Immigration Rules on its part reflect the importance of ties given that paragraph 276ADE (in force from 09 July 2012) allows a grant of settlement for those

[519] Collin Harvey, 'Time for Reform? Refugees, Asylum-Seekers, and Protection Under International Human Rights Law' (2015) 34 *Refugee Survey Quarterly* 43, 44; see particularly Chapter 2 of this thesis
[520] ibid 47
[521] Maria-Teresa Gil-Bazo, 'Refugee Protection under International Human Rights Law: From Non-Refoulement to Residence and Citizenship' (2015) 34 *Refugee Survey Quarterly* 11, 33-34
[522] ibid 34
[523] See HRC, *Stewart v Canada* (1996) Communication No. 538/1993; *Nystrom v Australia* (2011) Communication No 1557/2007; *Beldjoudi v France* App No 12083/86 (ECtHR, 26 March 1992); *Boujlifa v France* App No 122/1996/741/940 (ECtHR 21 October 1997); see further discussions at Chapter 5 of this thesis.

who have remained in the UK for over 20 years, whether lawfully or otherwise.[524] In addition, paragraph 276ADE (iv) allows a grant of leave for those who have remained in the UK for less than 20 years discounting any period of imprisonment, but having no ties (including social, cultural or family) in their country of origin.[525] It then follows that ties established in the State by the migrant places the individual in an advantage for the grant of leave with certain other benefits enjoyed by citizens such that any expulsion from the State ought to take the strong and enduring connections into account. Similarly, Immigration Act 2014, s 19 tagged 'Article 8 of the ECHR: public interest considerations' which replaces Part 5 of the Nationality, Immigration and Asylum Act 2002 (s117A-117B) makes it mandatory for a court or tribunal to have regard to "integration into society" when considering whether a decision made under the Immigration Acts breaches a person's right to respect for private and family life.[526]

It could then be surmised that the movement of persons (migration) across international boundaries especially non-nationals (aliens, migrants) raise issues of admission, residence and expulsion. The UN General Assembly has reaffirmed the rights of States to enact and implement migratory policies and border security measures but in doing so cautioned against adopting legislation or measures that restrict the human rights and fundamental freedoms of migrant in complying with their obligations under international human rights law.[527] Consistent with the above is the International Covenant on Civil and Political Rights (ICCPR), Art 12 which states that everyone is free to leave any country, including his own, international human rights law does not recognize a corollary right to enter or reside in another State's territory,[528] the Convention on the other hand accepts that International Human Rights Law (IHRL) 'imposes obligations in respect of other treatments towards migrants with respect to measures of border control'.[529]

[524] Home Office, Immigration Rules Part 7 (Consolidated version of the current Immigration Rules) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/393497/20150108_Immigration_Rules_-_Part_7_-_final.pdf > accessed 25 March 2015
[525] ibid; see also *Bosadi (paragraph 276ADE;suitability; ties)* [2015] UKUT 00042 (IAC)
[526] *Dube (ss.117A-117D)* [2015] UKUT 00090 (IAC), see the Headnote
[527] UNGA Res 61/165 (19 December 2006) UN Doc A/Res/61/165, para 7; see also *Amuur v France* (1996) 22 EHRR 533, para 41
[528] See ICCPR Art 12
[529] Julian Lehman, Rights at the Frontier: Border Control and Human Rights Protection of Irregular International Migrants' (2011) 3 *Goettingen Journal of International Law* 733, 742

3.2.1 Socio-Political Dimension of Citizenship and the Interplay of Sovereignty

Viewed from a socio-political dimension, the decision to admit or expel the citizen who had made claim on the sovereign is the test for the performance of the sovereign.[530] As Nyers argues, 'the recognition of citizen/sovereign occurs not exclusively at the border but does include the entry and exclusion decision'.[531] Citizenship is therefore a political identity between state, citizen and territory to the exclusion of all others; it goes beyond a legal status accorded to an individual by a State to active construction by State action.[532]

In his contribution to the socio-political dimension, Gibney asserted that 'migration is usually driven by inequalities between states and regions with the cumulative effect of creating non-citizens'.[533] Regardless of this distinction, States under international human rights law (IHRL) are guided by certain standards of treatment meted to persons in their territorial jurisdiction, whether citizens or not. Such standards are codified under various international legal instruments to which states are bound and or by customary international law practiced by the international community.[534] In words of Joppke, 'an emergent international human rights regime protects migrants independent of their nationality, limiting the discretion of states toward aliens and devaluing national citizenship'.[535]

In essence, immigration control is a central and arguably a 'necessary feature in the maintenance of liberal democracies that implies two capacities: one is to block the entry of individuals to a State and the other is to secure the return of those who have entered

---

[530] Mark Salter, 'When the exception becomes the rule: Borders, Sovereignty, and Citizenship' (2008) 12 *Citizenship Studies* 365, 375

[531] P Nyers, 'Abject Cosmopolitanism: the politics of protection in the anti-deportation movement' (2003) 24 *Third World Quarterly* 1069, 1093; for further discussion on this issue, see Mark Salter, 'Governmentalities of an Airport: heterotopia and confession' (2007) 1 *International Political Sociology* 49, 50-67; S Taylor, 'Sovereign power at the border' (2005) *Public Law Review* 16, 55-77

[532] Bridget Anderson, "Illegal Immigrant": victim or villain (2008) 64 *ESRC Centre on Migration and Policy Working Paper* 7

[533] Gibney, 'Precarious Residents' (n514) 1; for further discussions on this, see generally Etienne Balibar, *We, the People of Europe? Reflections on transnational citizenship* (Princeton University Press 2004) 180; Anne McNevin, 'Contesting Citizenship: Irregular Migrants and Strategic Possibilities for Political Belonging' (2008) 31 *New Political Science* 163, 166; Alexander Aleinikoff and Vincent Chetail (eds) *Migration and International Legal Norms* (Asser Press 2003) 21; Paulina Tambakaki, *Human Rights or Citizenship?* (Birbeck Law Press 2010) 13

[534] This has been fully been discussed at Chapter Two of this Thesis, see particularly section 2.3 of Chapter Two.

[535] Christian Joppke, 'Why Liberal States Accept Unwanted Immigration' (1998) 50 (2) *World Politics* 266, 268

thereby raising fundamental concerns to liberal democratic ideologies as control may require the forcible expulsion of persons from the national territory; this requires bringing the powers of the state to bear against an individual'.[536] The effect might be 'the complete and permanent severing of relationship between the individual and the State'.[537] Moreover, 'physically removing individuals against their will, from communities in which they wish to remain, effectively cuts the social, personal and professional bonds created over the course of residence with connected degrees of hardship which cannot easily be denied'.[538] The point being made is that the coercive power of States in expulsion destroys the ties, degree of integration, strong connections with the host State usually exemplified by consequent loss of social and cultural ties with the country of origin of the migrant due principally to the length of time in the host State and other relationships developed by migrants during the course of their residence which is not capable of exhaustive definition.

In short, immigration control requires a decision on entry and exit. Gibney and Hansen identify three categories. 'The first category involves those evading port or entrance officials or by using fraudulent documentation, the second involves those that breached their specific terms of entry and residence-overstaying their work permit, tourism or visit visas or those who have committed a crime which may then necessitate enforcement actions against them while the third category involves those who gained entrance or continued residence in the state on the basis of an asylum claim whose application has been rejected'. [539] The phenomenon of irregular immigration in the view of Joppke, reflects the 'gap between restrictionist policy goals and expansionist outcomes which is not actively solicited by States compared to the legal quota of the classic settler nations'[540] with such restrictionist policies playing out in the form of admission and expulsion. As Arendt observed, 'sovereignty is nowhere more absolute than in matters of emigration, naturalization, nationality and expulsion'.[541]

---

[536] Gibney and Hansen, 'Deportation and the liberal state' (n1) 1

[537] ibid; the 'complete and permanent severing of relationship between the individual and the State' according to Gibney might not be exactly so as a deportee may return to the country as in the case of the UK, after a period of time and after the occurrence of some events such as application for revocation of a deportation order, see paragraph 390, 391, 391A of the Immigration Rules.

[538] ibid

[539] Gibney and Hansen (n1) 7

[540] Christian Joppke, 'Why Liberal States Accept Unwanted Immigration' (1998) 50 (2) *World Politics* 266, 266

[541] Hannah Arendt, *The Origins of Totalitarianism* (Harcourt Brace Jovanovich 1973) 278

By and large, migration albeit irregular migration, 'is a feature of most liberal democratic states and it is said to be high on policy agendas particularly in relation to border controls where migrants use irregular and undocumented means of entry to accomplish their various motives and aspiration for the migration project'[542] with consequences for international human rights law and lays the foundation for a thematic discussion in this chapter. Such discussions will revolve *inter alia* on hostility, patterns of control, appeal rights and right to an effective remedy, parliamentary scrutiny, temporary admission and precarious immigration status, convergent and divergent immigration practices amongst liberal democracies and the exercise of discretion.

3.3 Immigration Control and Hostility

In the UK, the history of immigration control through the instrumentality of the law 'consists of a complex body of statutes, rules and case law governing entry which did not exist prior to the twentieth century, rather there were numerous provisions controlling the movement of aliens'.[543] In summary, the power to remove or exclude aliens during the previous 200 years required parliamentary approval whether temporary in effect or permanent.[544] The implication here is that exclusion was a key issue that requires parliamentary scrutiny where executive deference in the form of discretion or policies was not permitted. This seems at variance today where there appears to be less parliamentary scrutiny with respect to the enactment of immigration rules.[545] According to Clayton, the issue of hostility even with modern day immigration control in the UK can be gleaned from 'the persecution of the Jews in Eastern Europe towards the end of the nineteenth century'.[546] Commenting on the issue of hostility in the Aliens Act, albeit the 1905 Act, in its 100th anniversary in 2005, Sedon remarked that 'it is depressing that there still exists so much xenophobia and so many negative attitudes about immigration'.[547] In addition, the British Social Attitudes survey on public attitudes towards immigration in 2003 'reflected the negativity surrounding the

[542] Alice Bloch, Nando Sigona and Roger Zetter, 'Migration Routes and Strategies of young undocumented Migrants in England: a qualitative perspective' (2011) 34 *Ethnic and Racial Studies* 1287, 1287
[543] Gina Clayton, 'Transparent and Trusted: The Immigration Rules in 2009?' (2008) 14 *Immigration Law Digest* 2, 7
[544] State Papers, ibid; see also Christopher Vincenzi, 'Aliens and the judicial review of Immigration Law' (1985) *Public Law* 93, 114
[545] See Immigration Act 1971, s 3 (2)
[546] Gina Clayton, *Textbook on Immigration and Asylum Law* (4edn, OUP 2010) 7
[547] Duran Seddon, *Immigration, nationality and Refugee Law* (JCW1 2006) 1

issue, with public opposition increasing sharply from the already recorded high levels'.[548]

The implication for this study is that measures were put in place to secure the State from perceived enemies (alien enemies) and such perception led to hostility. Better still, it was typical that the State was hostile to aliens due *inter alia* to fear of migrants, perceived as a threat or were demonised by the general public and in a bid to control them, the State put in place certain measures that led to the creation of multiple rules in the pattern of immigration control as it will be shown.[549]

3.4 Patterns of Immigration Control

In 1793, 'a statute was passed to control the entry of aliens, which at this time was directed towards travellers from France, as a result of the French Revolution that was said to have stirred up fervour in England.[550] While some may have remained in certain forms in modern law, by and large the immigration law of the last 100 years as has been reported 'is a very different creature from the Royal Proclamations.[551] The Aliens Act 1905 was the first major piece of modern immigration legislation that marked the inception of the Immigration Act and the appeal system.[552] Hayter notes the significance of the Aliens Act 1905, given that it was the first time since the reign of Elizabeth 1 that proper immigration control under an established legal framework commenced. [553] As Block and Schuster saw it, 'during the early part of the twentieth century, the Home

[548] Alison Park and others, British Social Attitudes 29 (eds) (2012 edn, 29th Report, NatCen Social Research) 27 <http://www.bsa-29.natcen.ac.uk/media/13421/bsa29_full_report.pdf > accessed 30 March 2015

[549] John L Hammond, 'Immigration Control as a (False) Security Measure' (2011) 37 *Critical Sociology* 739, 740

[550] Proclamations of Accession of English and British Sovereigns (1547-1952) < http://www.heraldica.org/topics/britain/brit-proclamations.htm> accessed 04 April 2012; see also Clayton *Textbook on Immigration and Asylum Law* (n474) 7

[551] The Proclamations referred to in this instance are those of the Proclamations of Edward and Elizabeth Proclamations of Accession of English and British Sovereigns (1547-1952)< http://www.heraldica.org/topics/britain/brit-proclamations.htm> accessed 04 April 2012

[552] Helena Wray, 'The Aliens Act 1905 and the Immigration Dilemma' (2006) 33 *Journal of Law and Society* 302, 303; for further information about this Act see the following Ann Dummet and Andrew Nicol, *Subjects, Citizens, Aliens and Others: Nationality and Immigration Law* (Weidenfield and Nicolson 1990) 27; T.W.E Roche, *The Key in the Lock: A History of Immigration Control in England from 1066 to the Present Day* (1st edn, John Murray Publishers Ltd 1969) introductory pages; Robert Winder, *Bloody Foreigners: The Story of Immigration to Britain* (Little Brown 2004) 1-15, 192

[553] Theresa Hayter, *Open Borders: The Case Against Immigration Controls* (Pluto Press 2000) 39; see also Jill Pellew, 'The Home Office and the Aliens Act of 1905' (1989) 32 *Historical Journal* 369, 371

Office was also involved in the occasional enforced repatriation and expulsion of indigent sailors from Africa and Asia'.[554]

According to Wray, the Act's 'commitment to exclusion was partial at the level of policy, law and implementation and while equivocation was more evident than in later periods, due to the novelty of a system of control, a constant factor is the tension between restriction and liberalization and the inconsistent structures and unofficial purposes to which this gives rise'.[555] This was the beginning of tighter restrictions evidencing the power of the State in immigration control given that the Act has been framed as the major antecedent to Britain's more substantial and enduring legislative moves […]'.[556] Grahl-Madsen has expressed the view that the 'Aliens Act 1905 and its successors of 1914 and 1919 were particularly important stepping-stones in the history of modern aliens legislation'[557] whose effect has left a footprint on State practice in immigration control followed by other Acts that sustained the impetus for deportation.[558]

Furthermore, an integral pattern of immigration control is the introduction and interplay of discretion rather than law itself. An immigration officer had a wide discretion (a plethora of unpublished instructions in the form of guidelines and concessions) under the Commonwealth Immigration Act 1962 Act.[559] The use of guidelines and concessions, as will be seen in the course of this research appears to be a peculiar feature of British immigration law, which relies heavily on unpublished instructions, guidelines and concessions. This reliance has consequences for the legality of deportation and removal of migrants in the UK because the State can set targets for detention and removal of immigration offenders without recourse to due process.

In the light of the existence of wide discretionary powers during the early days, Chimienti thinks that, 'liberal British migration policy has been in decline since 1962

[554] Alice Bloch & Liza Schuster, 'At the extremes of exclusion: Deportation, Detention and Dispersal' (2005) 28 *Ethnic and Racial Studies* 491, 493-494
[555] Wray (n552) 303
[556] Alison Bashford and Jane McAdam, 'The Right to Asylum: Britain's 1905 Aliens Act and the Evolution of Refugee Law' (2014) 32 (2) *Law and History Review* 218, 311; see generally John Garrard, *The English and Immigration 1880-1910* (OUP 1971), Bernard Gainer, The Alien Invasion: *The Origins of the Aliens Act of 1905* (Heinemann Education 1972), Helena Wray, 'The Aliens Act 1905 and the Immigration Act Dilemma' (2006) 33 *Journal of Law and Society* 302, 303
[557] Atle Grahl-Madsen, *The Status of Refugees in International Law*, vol 1 (A W Sijthoff 1966) 11
[558] See for instance the Aliens Order Act 1920
[559] Gina Clayton, *Textbook on Immigration and Asylum Law* (n546) 9

because of series of Immigration Acts promulgated in order to limit the settlement of certain migrants'.[560] But Dell 'Olio disagrees arguing that 'from 1948-1962, Britain operated one of the most liberal immigration regimes in the world, granting citizenship to millions of colonial subjects as part of a policy aimed to support the ties between Britain and the Old Dominions'.[561] That argument might not hold water given that current UK's State practice in immigration as will be shown in due course evidence tighter controls by the application of discretion as further exemplified by the Immigration Act 1971, s 3 (2) which states:

> The Secretary of State shall from time to time (and as soon as may be) lay before Parliament statements of the rules, or of any changes in the rules, laid down by him as to the practice to be followed in the administration of this Act for regulating the entry into and stay in the United Kingdom of persons required by this Act to have leave to enter, including any rules as to the period for which leave is to be given and the conditions to be attached in different circumstances […][562]

However, the courts have had to review the exercise of discretion as was aptly demonstrated in *Padfield v Minister of Agriculture* [563] where it was held that no discretion is unfettered and that every discretion is reviewable. Furthermore, *in R v Environmental Secretary ex parte Spath Holme Limited* [564] the issue of discretion came alive again and Lord Nichols considered its import and ramifications and held that the discretion given by Parliament is never absolute or unfettered stating specifically that 'powers are conferred by Parliament for a purpose and they may be lawfully exercised only in furtherance of that purpose'. The general trend therefore is that immigration control became more restrictive with the general exercise of discretion, which the 1971 Act gave statutory footing.

---

[560] Milena Chimenti, 'Mobilization of Irregular Migrants in Europe: a comparative analysis' (2011) 34 *Ethnic and Racial Studies* 1338, 1342, cf R Hansen, *Citizenship and Immigration in Post-war Britain* (OUP 2000) 207

[561] Fiorella Dell' Olio, 'The Redefinition of the Concept of Nationality in the UK: Between Historical Responsibility and Normative Challenges' (2002) 22 *Politics* 9,10

[562] The 1971 Act is complemented by the Immigration Rules HC 395 as amended by subsequent legislations although it can also operate independent of the rules

[563] [1968] AC 997 [8]

[564] [2001] 2 AC (Lord Nichols); see also *Ukus (discretion: when reviewable)* [2012] UKUT 307, Headnote; Maurice A Roberts, 'The Exercise of Administrative Discretion Under the Immigration Laws' (1975-76) 13 *San Diego Law Review* 144, 145

3.4.1 Appeal Rights and Right to an Effective Remedy

The limitation of appeal rights directly was another salvo fired to sustain the pattern of immigration control. The Asylum and Appeals Act 1993 (The 1993 Act) came into being as a result of concerns to enforce the appeal rights of asylum seekers, in addition the concept of certification which means claims without foundations.[565] The Immigration and Nationality Act 2006 further tinkered with the right of appeal of migrants. The UK Borders 2007 Act went further in interfering with right of appeal for 'in-country' leave to remain applications under the points based system.[566] Quite recently, the Immigration Act 2014, s 15 (5) makes reference to section 85 (5) of the 2002 Act and akin to the UK Borders Act 2007 and states that the 'Tribunal must not consider a "new matter" unless the Secretary of State has given the Tribunal consent to do so'[567], which has a bearing on the right to an effective remedy.

The purpose of the right to an effective remedy is to safeguard the right of individuals in the event of breach by the State and to increase judicial protection offered to individuals' complaints regarding alleged violation of their rights. The ICCPR's regime on expulsion of non-nationals requires procedural safeguards against arbitrary State action as against the substantive grounds in ECHR Art 13.[568] As Kuijer observes, the primary aim of Art 13 ECHR is to increase judicial protection offered to individuals' complaints regarding alleged violation of their rights, which follows that the right to an effective remedy is an essential pre-condition and a guard to an effective human rights law which serves as a safety net.[569]

---

[565] The Asylum and Appeals Act 1993, Sch 2 para 5

[566] See UK Borders Act 2007, s 19

[567] A matter is a "new matter" if— (a) it constitutes a ground of appeal of a kind listed in section 84, and (b) the Secretary of State has not previously considered the matter"

[568] See ICCPR Art 13; see also HRC '*CCPR General Comment No 15: The Position of Aliens Under the Covenant'* (11 April 1986) para 10, on the issue of procedural safeguards in ICCPR Article 13, cf ECHR Art 13 concerning the substantive grounds of expulsion as against the ICCPR's provisions.

[569] Martin Kuijer, 'Effective Remedies as a Fundamental Right' (Seminar on human rights and access to justice in the EU, Barcelona, 28-29 April 2014) 1 <http://www.ejtn.eu/Documents/About%20EJTN/Independent%20Seminars/Human%20Rights%20BCN%2028-29%20April%202014/Outline_Lecture_Effective_Remedies_KUIJER_Martin.pdf > accessed 19 August 2014

In my view, the relevance of the right to an effective remedy in agreement with Kuijer cannot be over-emphasized. Despite the fact that it serves as a 'safety net' it seems to me that the right highlights the relevance of human rights in essentially fact-finding nature as it provides succor and palliatives against violations of rights. The purpose of the right therefore is to ensure that the substance of the ECHR rights are enforced at the national level in any form the remedy takes in the domestic context.[570] In *Klass and Others v Germany*[571], the ECtHR held that Art 13 should be interpreted as requiring an effective remedy before a national authority for those who claim that their rights and freedoms under the Convention have been violated.[572] The ECtHR in *Boyle and Rice* further stated that grievances under Art 13 must be arguable.[573] A claim is arguable if it is supported with demonstrable facts and not manifestly lacking grounds in law.[574]

In *Silver v UK*[575], the ECtHR emphasized that ordinary discretional remedies will be inadequate as there must be an element of compulsion.[576] The UNHRC had observed that the notion of an effective remedy under Art 13 requires independent and rigorous scrutiny of a claim that there exist substantial grounds for fearing a real risk of treatment contrary to Art 3 ECHR emphasizing that the remedy must be 'effective' and must take a form of guarantee.[577] It follows from the above that a 'Contracting State's decision to deport, or to deny entry to a non-national may be successfully challenged only where the circumstances attending the deportation, or the State's domestic procedures governing such deportations, give rise to a violation of one or more of the ECHR's Articles or Protocols',[578] and it remains to be seen whether this right to effective remedy is indeed effective.

---

[570] *Boyle and Rice v UK*, App no 9659/82 (ECtHR, 27 April 1988) para 52
[571] App no 5029/71 (ECtHR, 6 September 1978) para 64
[572] See also Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, Art 47 states: 'Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article'.
[573] Boyle and Rice (n570) para 52
[574] ibid
[575] App no 5947/72 (ECtHR 25 March 1983)
[576] ibid, para 115-117
[577] UNHCR, 'UNHCR Statement on the right to an effective remedy in relation to accelerated asylum procedures': Issued in the context of the preliminary ruling reference to the Court of justice of the European Union from the Luxembourg Administrative Tribunal regarding the interpretation of Art 39, Asylum Procedures Directive (APD); and Article 6 and 13 ECHR', para 45 <http://www.refworld.org/pdfid/4bf67fa12.pdf >accessed 13 August 2014
[578] Ian Bryan and Peter Langford, 'Impediments to the Expulsion of Non-Nationals: Substance and Coherence in Procedural Protection under the European Convention on Human Rights' (2010) 79 *Nordic Journal of International Law* 457,460

3.4.2 Retroactive Legislation, Parliamentary Scrutiny and Immigration Rules

The Nationality Immigration and Asylum Act 2002 (2002 Act) engrained the principle of retroactive legislation given the provisions of s 76 (5) which states that 'A power under Sub section (1) or (2) to revoke may be exercised- (a) in respect of leave granted before this section comes into force; (b) in reliance of anything done before this section comes into force'. This means that even if the Act came into force on 10 February 2003 reliance can be placed on anything done before it came into force thus giving the Act retrospective effect.

Furthermore, it has been identified that some immigration laws are passed without adequate and crucial parliamentary scrutiny. The 2002 Act and the Treatment of Claimants Act 2004 Act as report and debate in Parliament confirmed were passed without crucial parliamentary scrutiny for compatibility with human rights. In his comment during the debate, Lord Lester stated that 'the unfortunate effect of lack of parliamentary scrutiny would be that the matter would open up legal challenges'.[579] Previously under the Status of Alien Act 1914 s 27, parliamentary scrutiny was a key issue where executive deference in the form of discretion or policies was not permitted.[580]

On Immigration Rules, it has been noted that the Secretary of State makes the Immigration Rules consistent with the 1971 Act, s 1 (4).[581] The procedure is that the rules must be laid before Parliament and immediately takes effect when either the House of Commons or the House of Lords votes, approve it.[582] The full statement of immigration rules is the 'HC 395' pursuant to s 3 (2) of the 1971 Act.[583] It may be made several times a year and when this is done, it adds, amends or completely replaces the previous statement.[584] Since the advent of the Immigration Rules, arguments have arisen

[579] HL Deb 6 July 2004, vol 663 col 722
[580] See the discussion on this at section 3.3 of this thesis; State Papers, vol 42 (1852-1853) cited by Ian Macdonald and Ronan Toal, *Macdonald's Immigration Law and Practice* (n235); Jessica Levy, *Strengthening Parliament's Powers of Scrutiny: An assessment of the introduction of Public Bills Committee* (UCL 2009) 49; see also R Hazell, 'The Continuing Dynamism of Constitutional Reform' (2007) 60 *Parliamentary Affairs* 3, 25; A King, 'Modes of Executive-Legislative Relations: Great Britain, France, and the West Germany' (1976) 1 (1) *Legislative Studies Quarterly* 11, 13
[581] See Immigration Act 1971, s 1 (4)
[582] Immigration Act 1971, s 3 (2)
[583] Home Office <http://www.official-documents.gov.uk/document/hc1012/hc17/1733/1733.pdf > accessed 06 December 2014
[584] ibid

as to the true nature and legal status of the rules; whether they are rules of law or not. However in 1968, the Court of Appeal seized an opportunity in *Pearson v IAT* [585] where it stated that although the immigration rules are not delegated legislation or rules of law, but rules of practice laid down for guidance of those entrusted with the administration of the Act, having the force of law for those hearing immigration appeals. According to Buxton LJ in *Odelola v SSHD* [586] the immigration rules are not 'rules of law' but they are a source of legitimate expectation that they will be applied and they now have legal force and the force increases as the rules become precise. In addition, they are no longer the rules of guidance for entry clearance or for immigration officers as ordinarily seen.[587]

The conclusion is that retroactive legislation; inadequate parliamentary scrutiny and the elasticity of immigration rules engender the deportation and/or removal of migrants by systematic denial of leave where the creation of irregularity is unarguably the outcome.

3.5 Precarious Immigration Status and Deportation: Conceptualization and Factual Matrix

The UK Borders Act 2007 Act, s 32-39 introduced automatic deportation for those foreigners who have committed certain criminal offences. Whereas the 2006 Act increased the immigration officers' powers of arrest the 2007 Act gave them increased powers of detention.[588] The Criminal justice and Immigration Act 2008 followed this and makes provision for the implementation of the 2007 Act for the deportation of criminals under the 2007 Act.[589] The Explanatory Notes to the 2008 Act uses the phrase 'Special Immigration Status' to equate a 'precarious status' a phrase employed by Gibney and others in their several works in the examination of subgroup of migrants who possess few social, political or economic rights and are highly vulnerable to deportation with little or no option for securing their immigration status.[590] The 2008 Act from its enactment was inundated with the aim of creating a 'special immigration

[585] [1978] Imm AR 212
[586] [2008] EWCA Civ 308 [12-20] (Buxton LJ)
[587] ibid
[588] See section 53 of the Immigration, Asylum and Nationality Act 2006 and the UK Borders Act 2007 s 2 & 36.
[589] See the preamble of the Criminal Justice and Immigration Act 2008
[590] Gibney, 'Precarious Residents' (n514) 1; Anderson, Gibney and Paoletti, *'Citizenship, Deportation and the Boundaries of Belonging'* (n3) 547

status', limbo or precarious status for migrants.[591] In creating such precarious status, the 2008 Act removed all legal rights to remain (such as revocation of their leave to remain of those affected) from persons who have been convicted of a criminal offence but who cannot be deported for legal reasons.[592]

Section 132 (4) of the Act specifies that 'a designated person shall not be deemed to have been given leave in accordance with paragraph 6 of Schedule 2 to the Immigration Act 1971 and may not be granted temporary admission to the United Kingdom under paragraph 21 of that Schedule'. From the foregoing, it can be seen that the law favours the creation of these precarious migrants convicted of criminal offences but who cannot possibly be deported for administrative and human rights implications. As will be seen later, State practice in this regard appears contrary to the tenets of liberal democracy since the State favours the creation of a special category of non 'deportables' who have been ostracized from society, socially and legally but who cannot be deported or removed.[593]

In essence, the thin line that runs through these recent Acts are 'that they shortened removal proceedings, reduced avenue for appeal of decisions and enabled fast tracking of asylum decisions'.[594]Therefore, in conceptualizing the precarious migrant status and its factual matrix as has been highlighted above, the preamble of the Criminal Justice and Immigration Act (2008 Act) and its explanatory notes did not mince words in creating this special immigration status category which follows that the Act was aimed at creating a status limbo or precarious status for migrants to unarguably enable their deportation and/or removal.[595] In essence, precarious migration is exemplified by lack of resident rights, having no capacity to regularize their immigration position with the consequence of social segregation and alienation from the society as epitomized by the possession of no or few political, social or economic rights and are made highly vulnerable to deportation or removal.[596] These are referred to as precarious migrants represented by the undocumented migrants- those who reside in the State's territory

[591] See the Criminal Justice and Immigration Act 2008, Explanatory Notes 'Commentary on Sections Part 10: Special Immigration Status' <http://www.legislation.gov.uk/ukpga/2008/4/notes/division/5/1/13 > accessed 05 April 2015
[592] Criminal Justice and Immigration Act 2008, s 130 (Designation), s 131 (Foreign Criminal), s 132 (Effect of Designation) s 133 (Conditions).
[593] See chapter five of this thesis on the discussion of the contrivance of deportability and removability
[594] Anderson, Gibney and Paoletti, *'Citizenship, Deportation and the Boundaries of Belonging'* (n3) 551
[595] Joseph Carens, 'The Rights of Irregular Migrants' (2008) 22 *Ethics and International Affairs* 163, 163
[596] Gibney, 'Precarious Residents' (n514) 2

unlawfully.[597] Therefore in constructing the factual matrix of a precarious migrant in the UK, it is expressed that the burden of being an irregular migrant is made more severe by this categorization of special immigration status or precariousness with no entitlement to benefit or support leading to vulnerabilities engendering deportation even with a grant of temporary admission. Temporary admission will now be examined.

3.5.1 Temporary Admission and Precarious Immigration Status

Temporary admission has been described by the Court of Appeal as a term of statutory art created by the combined effect of paragraphs 16 and 21 of Schedule 2 to the Immigration Act 1971, which allows for examination pending a decision to allow entry or detention pending deportation, or to be given temporary admission.[598] Temporary admission may further be granted consistent with s 62 (3) of the Nationality, Immigration and Asylum Act 2002 (2002 Act) and in tandem with s 67 of the 2002 Act as constructed with reference to a person liable to detention.[599] In *R v SSHD ex p Khadir*,[600] their Lordships held that a person granted temporary admission might remain in that position for years even if there is no possibility of being removed.[601] The UK had argued that those on temporary admission are not 'lawfully present' in the State for the purpose of social security and housing rules,[602] given that those on temporary admission are not lawfully present in the UK.[603]

In the view of Sawyer and Turpin, 'temporary admission (also called temporary release where someone has previously been detained) is thus an alternative to detention, and remains the status of a person who is physically within the UK but either awaiting a decision on whether they may legally and properly enter or, having had that permission refused, awaiting departure'.[604] Temporary admission is granted by the issuance of

---

[597] ibid
[598] See *R (MS, AR, FW) v SSHD* [2009] ECWA Civ 1310 [2] where it was stated 'Such people do not have to be detained, but they have to exist in a half-world called limbo in which they have £5 a day to live on, cannot take work, must live where they are required to, have access only to primary healthcare, can obtain no social security benefits or social services assistance and can study only in institutions that require no payment.
[599] See the Nationality, Immigration and Asylum Act 2002, s 62 (3)
[600] [2005] UKHL 39 [27-30]
[601] ibid
[602] cf *Szoma v SSHD* [2005] UKHL 64 [7]
[603] See *Saadi v UK* [2008] 47 EHRR 17, para 65
[604] Caroline Sawyer and Philip Turpin, 'Neither Here nor There: Temporary Admission to the UK' (2005) 17 *International Journal of Refugee Law* 688, 694

'Form IS 96 Notification of Temporary Admission to a person who is liable to be detained'[605] to any or all of the following persons:

a. An overstayer (someone who has remained in the UK more than the leave permits)[606]
b. An individual who has breached the condition of his leave and is liable for removal[607]
c. A individual whose asylum application has been refused and is considered for deportation[608]
d. An individual who has been refused admission.[609]
e. An individual whom the state would have removed but conditions back in his country has made it impossible[610]
f. An individual who does not have travel documents or have not been procured through his Embassy or High Commission.

From the foregoing, when temporary admission is granted, the standard practice is that the person would not be allowed to work and would also not be entitled to any benefits to support his/herself. The person would, in addition, be expected to live and sleep at a place where the immigration officers can visit for routine checks. This temporary admission leaves the person in a precarious position where he is not able to work, cannot receive benefits and may not be removed. The continuation of this status makes the affected individual to remain in an immigration status limbo until a further decision is made about the migrant's status. In the view of Gibney, the precarious migrant 'is a modern variant of stateless men and women'[611] such statelessness *Arendt* saw 'as the most symptomatic group in contemporary politics in that their plight reveals the emptiness of human rights because they lack the effective or formal membership in an actual nation state'.[612] As Gibney further explained, 'these migrants lack security, basic economic and political rights in the countries where they have migrated and their day to day activity is exemplified by lack of effective state protection that is linked to their being outside the country of their origin'.[613] It is therefore argued that the precarious status of a migrant makes him vulnerable and puts the migrant in the position of being exploited by the State or by others in the State or agents of the State given the migrant's immigration status, leading to deportation and/or removal as aftermath.

---

[605] This form IS96 does not have a period of validity lasting up to 3 years or more.
[606] See Para 320 (7B) of the Immigration Rules
[607] See Immigration and Asylum Act 1999, s 10 1 (a) (b) (ba)
[608] See the Nationality, Immigration and Asylum Act 2002, s 18.
[609] See Immigration Act 1971, s 3
[610] cf. category (a) on issues of Art 3 ECHR 1950 and proportionality with respect to Art 8 ECHR
[611] Gibney, 'Precarious Residents' (n514) 3
[612] Hannah Arendt, *The Origin of Totalitarianism* (Harcourt Inc 1951 reprinted 1986) 277
[613] Gibney, 'Precarious Residents' (n514) 3

3.5.2 Stranded Migrants

Grant defines stranded migrants as those 'who become legally stranded where they are caught between removal from the State in which they are physically present, inability to return to their State of nationality or former residence, and the refusal by any other State to grant entry'.[614] Therefore legally stranded migrants are 'typically irregular migrants, without a lawful immigration status'.[615] I add that the state of being legally stranded in the host state is one of such ways giving rise to a precarious status and ultimately detention pending deportation. As Grant noted 'many are held in detention for long period constitutive of arbitrary detention in breach of their rights under international human rights law or at best some would receive temporary admission with restricted movement, restriction on employment and zero access to social and economic benefits'.[616] An examination of the status of the stranded migrant, presents a foray of helplessness or hopelessness, a position made worse by additional burden of his/her condition.

Their stranded nature may further be exacerbated by practical or humanitarian reasons that hinder their return to their home country. They may also include migrant workers or other economic migrants who were smuggled into the country or even trafficked, some are even legally stateless.[617] A case in point is the USA case of *Shaughnessy v US ex relMezei* [618] that concerns a migrant who left the USA after a period of legal residence. Upon his return to the USA he was refused entry and held in detention, without being admitted by any other country, after all failed attempts, he remained in indefinite detention. Furthermore, in the Australian case of *Al-Kateb v Godwin*[619] a Palestinian national arrived the country without a visa, was refused admission and detained pending removal. Without any country of nationality, removal could not take place nor was it likely in the near future because he was stateless and was kept in detention under national legislation that requires an unlawful non-citizen be held in detention

[614] Stefanie Grant, 'The Legal Protection of Stranded Migrants' in Ryszard Cholewinski, Richard Perruchold and Euan MacDonald (eds) International Migration Law: *Developing Paradigms and Key Challenges* (Asser Press 2007) 30-31
[615] ibid 31
[616] ibid 31
[617] Ibid 32; see also Ryszard Piotrowicz, 'Victims of Trafficking and de Facto Statelessness' (2002) 21 *Refugee Survey Quarterly* 50, 59
[618] *Shaughnessy v US ex relMezei* 345 US 206 (1953)
[619] [2004] HCA 37

indefinitely until either removal or grant of visa. In his case, both were impossible. He was therefore legally stranded without any hope of leaving the country or liberty.[620]

The exposition on the peculiar situation of a stranded migrant finds credence in Mole's work. She argues that failed asylum seekers 'who are not granted international protection may not be returned to their country for various reasons that range from uncertain citizenship, lack of documentation as the host state may not have diplomatic presence in the country of origin, the logistics of returning them, including cost of transportation which the returning state may consider expensive, or the inability of the host state to locate and remove them'.[621] For Mole, such circumstances will place them in a legal limbo with a high degree of uncertainty with consequences for their livelihood and that of their families.[622] In tandem with this viewpoint is the Amnesty's contribution to the dilemma faced by the precarious migrant, in which it argued that lack of entitlement to seek employment and to receive support and benefits from the state including education and health care is destructive of humanity. In its view, 'the direct consequence is abject poverty and an infra-dignifying blockage of all avenues to a normal life forced into destitution with the intention of compelling them to return home'.[623] It is not contended that States cannot remove such migrants but what is contended is the approach and mechanism adopted by the state prior and during the removal process, what standards are applied and by extension to what extent does the State contribute to the precarious status of migrants.

3.5.3 Irregular Migrants

Migrants as we have seen above, for reasons of legal expediency and jurisdictional control could become precarious. This precarious state flows from the issue of irregular migration or entry. Irregular entry in the opinion of Guild essentially refers 'to the lack of the required permit enabling an individual to enter and stay within a state's territorial

[620] Indefinite detention in the context of precarious nature of stranded migrants have been fully examined in Alfred de Zayas, 'Human Rights and Indefinite Detention' (2005) 87 *International Review of the Red Cross* 15, 17; Shyla Vohra, ' The Detention of Irregular Migrants and Asylum Seekers' in RyszardCholewinski, Richard Perruchold and Euan MacDonald (eds) International Migration Law: *Developing Paradigms and Key Challenges* (Asser Press 2007) 49; see also this thesis' discussion on detention at chapter four

[621] Nuala Mole, *Asylum and the European Convention* on Human Rights (Council of Europe Publishing 2007) 106

[622] ibid

[623] Amnesty UK, 'UK: The road to destitution for rejected asylum seekers' <http://www.amnesty.org.uk/actions_details.asp?actionid=226 >accessed 29/02/2012

jurisdiction noting that most jurisdictions define irregularity by default in contrast to regularity'.[624] It is necessary to clarify that the aspect of irregular migration defined under International law is irregular entry, defined by the Smuggling Protocol as 'crossing borders without complying with necessary requirements for legal entry into the receiving state'.[625]

Lehman adds that 'obligations on irregularity are imposed by the United Nations 1951 Convention and the Protocol Relating to the Status of Refugees that according to the UN 1951 Convention allows the host state to incorporate a distinction between presence, lawful presence, lawful stay and durable residence'.[626] The practicality of this differentiation pertains principally to refugees in that those individuals admitted to asylum procedures are said to be lawfully present while those who have formally being recognized are said to have lawful stay.[627] In essence, those individuals whose applications were rejected or who did not make any claims are said to have an irregular status.

It is therefore argued that it is this irregular status that may in turn lead them to precariousness. Irregular migrants as remarked by Finch and Cherti 'are generally not criminals other than the breaking of immigration laws and the reasons for their irregular status may be attributed to desperation to cling to a country that they consider safe and secure'.[628] In their analysis, Finch and Cherti introduced the concept of 'marginal irregularity' and 'manifest irregularity' where marginal irregularity is explained as those having minor importance and little effect therefore close to the margin of regularity while manifest irregularity they define as the transgression of immigration laws in a clear and obvious ways.[629] Therefore all international migrants whether refugees or non-refugees who enter a country without the required and appropriate documentation would

[624] E. Guild, 'Who is An Irregular Migrant?' in Barbara Bogusz and Others (eds), *Irregular Migration and Human Rights: Theoritical, European and International Perspectives* (Martinus Nijhoff Publishers, 2004) 3
[625] Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime (the Smuggling Protocol) Art 3 (1)
[626] Julian Lehman, 'Rights at the Frontier: Border Control and Human Rights Protection of Irregular International Migrants' (2011) 3 (2) *Goettingen Journal of International Law* 733, 739
[627] See the UNHCR, '*Saadi v United Kingdom*: Written Submissions on Behalf of the United Nations High Commissioner for Refugees' (30 March 2007) <http://www.refworld.org/docid/47c520722.html >accessed 12 December 2014; In *Celepli v Sweden*, the HRC considered as lawfully within a territory of State those who lodged an application for asylum see HRC, *Celepli v Sweden*, Communication No 456/1991 UN Doc CCPR/C/51/D/456/1991, Annex para 9.2
[628] Tim Finch and Myriam Cherti, ' No Easy Options: Irregular Immigration in the UK' (2011) *Institute for Public Policy Research* 18
[629] Ibid

be regarded as irregular migrants. This legal position is in the light of the principle laid down in *Saadi v UK* [630] that held that until a state has authorized entry to the country, any entry is unauthorized and that even temporary admission is no such admission.

Nonetheless, the underlying issue is that the state has a duty to respect and protect migrants while they remain within their territorial jurisdiction and to facilitate their return safely to their country or as the case may be country of former residence in dignity. This is in view of the jurisprudence of the ECtHR in *Assanidze v Georgia*[631] which explains that Art 1 of the ECHR 1950[632] creates a general duty on States 'to secure to everyone within their jurisdiction the rights and freedom defined' which implies that State parties are answerable for any violation of the protected rights and freedoms of anyone within their territorial jurisdiction. Moreover, human rights are guaranteed irrespective of an individual's immigration status because they are a function of a person's status as a human being but not as a citizen of a particular State.[633] In essence the basic principle underlying the protection of international human rights of migrants is that 'entering a country in violation of immigration law does not deprive an irregular or undocumented migrant of their fundamental human rights,[634] nor does it in any way vitiate the duty of the state to protect the rights of these migrants.

3.5.4 Migrants and the Firewall [Bifurcation] Argument

The firewall argument [bifurcation] as originally canvassed by Carens holds that States should 'build a firewall between immigration law enforcement on the one hand and the protection of basic human rights on the other hand emphasizing that States should guarantee that individuals should be able to pursue their human rights without being exposed to apprehension and deportation'.[635] In agreement with the above, I argue that irregular migrants may be compared to as uninvited guests or trespassers in the Law of Tort. The Occupiers' Liability Act 1984, s2 provides that the occupier extends a

[630] [2008] 47 EHRR 17 193, para 65
[631] *Assanidze v Georgia* Application No 71503/01 (ECtHR 08 April 2004) para 137; See also Jean-Francois Akandji-Kombe, *Positive Obligations under the European Convention on Human Rights: A guide to the implementation of the European Convention on Human Rights* (Council of Europe 2007) 8
[632] See ECHR, Art 1
[633] CCPR 'General Comment 15' in 'The Position of Aliens Under the Covenant' (11 April 1986) *UN Doc CCPR/C/86/45139*
[634] Stefanie Grant, 'The Legal Protection of Stranded Migrants' (n614) 36
[635] Joseph Carens, 'The Rights of Irregular Migrants' (2008) *Ethnic and International Affairs* 163, 167; this refers to Caren's 'firewall' as bifurcation

"common duty of care" to all legal visitors, although it keeps the low duty of care towards illegal visitors such as trespassers. This means that even though these guests are uninvited they are however treated with some modicum of protection as long as they are on the land whether invited or not. In a similar vein, migrants possess a wide range of legal rights even while in the territorial jurisdiction of a state, regardless of whether they have lawful stay in the host State.[636] These rights are basic fundamental rights not only possessed by citizens and lawful residents but tourists, temporary visitors, overstayers etc. A case in point is the right to security of person and property as it is the duty of the police to protect both irregular and lawful residents.[637]

In the firewall argument, Carens argues 'that most liberal democratic states treat violations of immigration laws different from violations of criminal laws as can be seen by the different procedural protections migrants receive when they commit a criminal offence compared to that granted them in immigration matters'.[638] He reasons that this can be seen from the fact that 'most liberal democratic states treat their own immigration rules as administrative matters which provide weaker procedural safeguards for immigration offenders than they do for defendants in criminal matters'.[639] This is because in criminal matters irregular migrants receive same level of protection with citizens or legal residents such as publicly funded legal aid etc. Aside of these legal rights, there are other basic human rights which states are legally and by extension morally obliged to provide those within her territorial jurisdiction notwithstanding their immigration status as in a case of an emergency medical care.[640] As Gibney sees it, 'irregular migrants may not be owed the benefits of citizenship, or even permanent residence, but they are simply owed a modicum of protection against violence, intimidation and exploitation'.[641]

Analytically, the issue is that irregular migrants may be entitled to certain rights but do not actually make use of those rights. The resulting question is; of what use would

[636] See our discussion of extraterritoriality at section 2.3 of chapter two of this thesis
[637] Joseph H Carens, 'Aliens and Citizens: The Case for Open Borders' (1987) 49 (2) *Review of Politics* 251, 257; Carens has extenstively discussed the rights of irregular migrants in Joseph H Carens, 'Citizenship and Civil Society' in Randall Hansen and Patrick Weil (eds) *Dual Citizenship, Social Rights and the Federal Citizenship in the U.S and Europe: The Reinvention of Citizenship* (OUP 2002) 102
[638] Joseph H Carens, 'The Rights of Irregular Migrants' ibid, 166
[639] ibid, 167
[640] ibid, 168
[641] Mathew Gibney, 'Outside the Protection of the Law: The Situation of Irregular Migrants in Europe' (2000) *Refugee Studies Centre Working Paper* 6, see final sections of this report which synthesized empirical research on irregular migrants in three European states.

international human rights be if the rights were not to be enjoyed practically given that in *Airey v Ireland* [642] the ECtHR held that rights protected must be 'practical and effective' rather than 'theoretical and illusory'. The emerging questions are: Would an irregular migrant be able to report a crime to the police knowing his precarious status? Would an irregular migrant be able to serve as a witness to a crime without exposing himself to being apprehended by immigration authorities? It is therefore argued that the right of the state to apprehend irregular immigrants should not affect the State's obligation to guarantee their basic human rights. Engaging in the debate, Anderson thinks that it is important to make explicit those related rights that should be recognised for all migrants irrespective of immigration status. In her view, the issue can be looked at from a moral point of comparison in which work-related rights of irregular or visa holding migrants resemble or differ from those of settled migrants.[643]

Coming from an ethical normative approach, *Moan* espouses that legal rights reflect moral principles and values which civilized societies are committed of which formalization the rules is created to fulfill.[644] Agreeing with Carens, Moan reasons that the rights are meant to protect individuals against arbitrary intervention from the state, remarking that 'if these rules were not applied to lawful and irregular migrants within a state's territorial jurisdiction, the application would not only be arbitrary but would also violate the normative purpose of the rights in the belief that a right to emergency and life saving device is a reflection of the value the society places on respect for life in positive and negative obligations'.[645] Therefore, it is argued that a clear distinction should be made between the enforcement of immigration law on the one hand and the respect of human rights of migrants on the other hand as it concerns deportation on criminality grounds. If this is not done, human rights of irregular migrants may become a mere linguistic expression, with sound and fury signifying nothing. The UK's government recent policy of 'deport first, appeal later' is a reflection of the State's determination to remove migrants at all costs regardless of whether or not their rights

[642] [1979] ECHR 3, para 24

[643] Bridget Anderson, 'Migrants and Work-related Rights' (2008) 22 *Ethics and International Affairs* 199, 200; see also Bernard Ryan, 'The Evolving Legal Regime on Unauthorised Work by Migrants in Britain' (2005) 27 *Comparative Labour and Policy Journal* 27, 30

[644] Marit Hovdal Moan, 'Immigration Policy and the Immanent Critique' (2008) 22 *Ethics and International Affairs* 205, 207-208; see further morality argument of the rights of irregular migrants in Michael Walzer, *Thick and Thin: The Moral Argument at Home and Abroad* (University of Notre Dame Press, 1994) 42; see also Joel Feinberg, *Harm to Others: The Moral Limits of Criminal Law* (OUP 1984) 31

[645] ibid

are breached at the time of removal thereby making no distinction between enforcement of immigration law and the respect of human rights.[646]

3.6 Immigration Realities and Similarities, the United Kingdom and other Liberal States-Convergence, Divergence and Trends

It has been identified in this study that the Aliens 1905 Act in the UK permitted Immigration Service inspectors not only to detect and refuse aliens entry into the UK but also to deport.[647] At about this time, there appears to be a convergence of practice in immigration control with respect to other liberal democratic States such as Australia and the US. The idea behind this exploration is to assess whether the dilemmas faced by these countries are inherent in liberal democratic states as standard practices with the further aim of exploring the convergence, divergence and diffusion of practices or whether they are mere coincidence.

In 1901, the Commonwealth Parliament of Australia enacted the Immigration Restriction Act 1901 with respect to immigration and emigration prohibiting the immigration into the Commonwealth of any person who failed a certain dictation test in a European language.[648] This Act therefore was one of the first legislative measures that did not allow non-whites to enter the country except on a temporary basis under permit having already passed the Chinese Immigrants Regulation and Restriction Act 1861.[649] The Act also provided for the exclusion of other classes of immigrants such as criminals, later to be found in the Migration Act 1958.[650] This as this research finds, is similar to the UK's immigration practice as stated above.[651]

---

[646] The recent Immigration Act of 2014 continues the manifestation of this policy; see Immigration Act 2014, s 15. The Act now further restricts the right of appeal of migrants with a view to achieving deportation stating in addition that First Tier Tribunal must not consider a 'new matter' unless the Secretary of State has given consent to the Tribunal to do so. Furthermore, the 2014 Act allows the Secretary of State to certify a claim prior to appeal proceedings, during the course of the appeal or after exhaustion of the appeal, see s 17 of the Act, see also chapter five of this thesis for a general discussion on deportation and removal.

[647] See section 3.4 of this chapter above

[648] Robert French, 'The Role of the Courts in Migration Law' (Migration Review Tribunal and Refugee Review Tribunal Annual Members' Conference 25 March 2011) 10

[649] A typically non-white immigration policy as explained in Herbert Ira London, *Non-white immigration and the "White Australia" policy* (New York University Press, 1970) 11 cited in Robert French, 'The Role of the Courts in Migration Law' ibid, 6

[650] The Migration Act 1958 (Cth) s 6, s 12 and s 22

[651] See section 3.4 of this chapter

Drawing from the United States position, certain categories of people were also excluded in 1907 such as people with physical or mental defects or tuberculosis and children unaccompanied by parents and in addition, Japanese immigration became restricted.[652] This exclusion list was further expanded in 1917 with the addition of illiterates, persons of psychopathic inferiority, men as well as women entering for immoral purposes- alcoholics, stowaways, and vagrants.[653]

The research identified the UK's 1971 Immigration Act as the cornerstone of all immigration laws in the UK with the interplay and introduction of partiality, discretions, unpublished guidelines, rules and policies.[654] As it will be seen, about the period between 1971-1999 similar immigration revolutions were in operation in the US and France that relieves the argument whether such practices were simply co-incidental, a trend amongst liberal democratic states or mere convergence. It raises fundamental questions whether the style, form and pattern of immigration control in liberal democratic states is the emergence of a new legal framework of state power.

In the USA, in 1952, the multiple laws, which governed immigration and naturalization to that time, were brought into one comprehensive statute called the Immigration and Nationality Act (INA).[655] Then came the Immigration Reform and Control Act 1986 (IRCA) that was a comprehensive reform effort which amongst other things was created to legalize aliens who had resided in the United States in an unlawful status since January 1, 1982. The Legal Immigration and the Immigration Act of 1990 that provides for caps on immigration (similar to the UK's immigration cap policy) further provided for all grounds for exclusion and deportation, significantly rewriting the political and ideological grounds and repealing some grounds for exclusion.[656] The highpoint of all reforms in the USA was the Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA), enacted in 1996. This Act was and as it is presently aimed to have a lasting effect on immigration control with provisions aimed at adopting stronger penalties against illegal immigration, streamlining the deportation (removal) process by

[652] Federation For American Immigration Reform, 'History of U.S. Immigration Laws: Historical Immigrant Admission Data; 1821-2006' <http://www.fairus.org/site/PageNavigator/legislation.html>accessed 24 February 2012
[653] ibid
[654] See section 3.4 of this chapter as discussed above
[655] See the Immigration Nationality Act (INA) 1952 <http://www.uscis.gov/laws/immigration-and-nationality-act > accessed 15 December 2014
[656] Warren R Leiden and David L Neal, 'Highlights of the U.S. Immigration Act of 1990' (1990) 14 (1) *Fordham International Law Journal* 328, 329

curtailing the appeal process. The main provisions of the Act include inter alia the barring of legal admission for removed illegal aliens and permanently barred admission for deported or removed aggravated felons,[657] the creation and the facilitation of deportation of criminal aliens by expanding the definition of aggravated felony to include crimes carrying a prison sentence of one year or more rather than time served.[658]

In France, the governments from the mid-1970s and 1980s tried to stop immigration through different measures. An internal control was instituted through "*inspecteurs dutravail*" that made unexpected work checks and had the power to sanction employers if any illegal employee was found .[659] Charles Pasqua, as minister of the interior in the Chirac government, dealt with the problem through the border police – he increased the power of the "*Police de l''Air et des Frontières*" to undertake border controls, to detain and deport. [660] In the early 1980s, immigration became a major political issue with the rise of the National Front and growing challenges from North Africa.[661] In effect, the early 1990's saw France pursue a zero immigration policy where numerous regulations were tightened through the Pasqua Laws, which amongst other measures expanded the powers of immigration authorities to deport non-citizens leading to protests, by Africans and Chinese called the campaigns of the *'san papiers'*.[662]

Therefore the trend amongst all the liberal democratic states is that they all appear to have adopted a harder stance against migrants' admission and settlement between the years 1958-1990 and even to date. While the UK used 'not conducive to public good' term as a ground for deportation, the USA facilitated the deportation of criminal aliens by expanding the definition of aggravated felony to include crimes carrying a prison sentence of one year or more rather than time served. France as we saw used the Pasqua laws to expand the deportation regime through the grant of special powers to

[657] See the Illegal Immigration Reform and Immigrant Responsibility Act 1996, s 305, s 307, s 321
[658] See the Illegal Immigration Reform and Immigrant Responsibility Act 1996 s 321, s 324
[659] Labour Inspector <http://www.eurofound.europa.eu/emire/FRANCE/LABOURINSPECTOR-FR.htm> accessed 04 May 2012
[660] Police National <http://www.interieur.gouv.fr/sections/a_l_interieur/la_police_nationale/organisation/dcpaf > accessed 04 May 2012
[661] Virginie Guiraudon, 'Immigration Policy in France' Brookings <http://www.brookings.edu/articles/2002/0101france_guiraudon.aspx > accessed 06 May 2012
[662] Immigration Laws in France (by A J) <http://www.ac.aup.fr/~ggilbert/contentpages/Immigration_Laws.html >accessed 27 February 2012

immigration officers to detain and deport aliens.[663] In France, Schuster had specifically reported that there are those (Afghanistan nationals or residents) whose 'asylum applications had been refused by the French government, so are 'rejected asylum seekers' but as France finds it difficult to deport to Afghanistan, they are stuck in France without status as illegal migrants'[664], these remain in a legal limbo with no chance of regularizing their stay in the country.

3.6.1 The Exercise of Discretion: Diffusion or Coincidence?

The UK is not alone in the typical use of discretion in immigration control. By way of drawing from Australia's practice, another liberal democratic state, evidence shows a convergence in the use of discretion. The Australian Migration Act of 1958 and the Migration Amendment Act of 1983 are relevant here. The Migration Act 1958 is described by its preamble as 'An Act relating to the entry into, and presence in, Australia of aliens, and the departure or deportation from Australia of aliens and certain other persons'.[665] The Migration Act, 1958 contains a wide range of discretionary powers incumbent on the minister, "in his absolute discretion" including delegation of powers to authorized persons.[666] These discretionary powers are related to arrangement for entries and deportations. In the words of Ozdowski, 'The Migration Act 1958 contains a level of discretion unknown even in other "machinery" legislation conferring a wide range of discretionary power on the minister or those authorized by him'.[667] Viewed from the perspective of the UK Immigration system, Regulations are also made to implement the Act as can be seen from the perspective of the Migration Act 1958, which makes the Regulations addressing issues of procedures.[668] The Department of Immigration and Ethnic Affairs (DIEA) makes administrative and procedural rules, which are not usually subject to public announcement, but are communicated through the issuance of instructions and through periodical up-dates to the departmental manuals.[669]

---

[663] Eleonore Kofman, Madalina Rogoz and Florence Lévy, 'Family Migration Policies in France' (2010) *International Centre for Migration Policy Development* 1, 6
[664] Liza Schuster, 'Turning Refugees into illegal migrants: Afghan Asylum seekers in Europe' (2011) 34 Ethnic *and Racial Studies* 1392, 1393
[665] Sev Ozdowski, *'The Law, Immigration and Human Rights: Changing the Australian Immigration Control System'* (1985) 19 *International Migration Review* 535, 537 <http://www.jstor.org/stable/2545855 > accessed 24 February 2012
[666] Migration Act 1958 (Cth) s 7 (1)
[667] Ozdowski, (n665) 538
[668] Migration Act 1958 (Cth) s 51A-s 64
[669] Ozdowski (n665) 537

Arguing systematically from a normative standard as gathered from the various States' practices is the contention 'that there is an underlying tension between liberal values including the belief in the universality of human rights and democratic values which surfaces in form of an irresolvable dilemma when liberal democratic States are confronted with the issue of how they should treat migrants'.[670] Immigration control on its part has a strong reliance on spectacle where the migration regime must be perceived as competent and for the State to act powerfully in the defense of its borders.[671] Therefore the control of immigration is generally seen, as one of the central prerogatives of national sovereignty but international human rights obligations require States to comply with their treaty obligations regarding the treatment of aliens in their territory rather than mere exercise of discretion.[672]

However, given the strong presence of the European Union Law, it is commonplace and now a requirement of EU Law that the rights guaranteed under the European Convention of Human Rights (ECHR) are respected as general principles of EU law.[673] This is why Finch argues that it is 'plausible to construct an approach to immigration in the UK within the remit of liberal democracy with broad appeal which is neither open door nor fortress UK to manage and limit migration in the national interest while at the same time being a welcoming place for migrants and to build a new patriotism which embraces and encompasses diversity'.[674] Therefore the research shares the argument that 'immigration law serves as instruments to supply and refine parameters of both discipline and coercion largely through laws as tactics, which cannot totally guarantee certainly of their realization'.[675]

[670] Savitri Taylor, 'From Border Control to Migration Management: The Case for a Paradigm Change in the Western Response to Transborder Population Movement' (2005) 39 (6) *Social Policy and Administration 563*, 570
[671] Bridget Anderson, '"Illegal Immigrant": Victim or Villain?' (n643) 3
[672] Steve Peers, 'Free Movement, Immigration Control and Constitutional Conflict' (2009) 5 *European Constitutional Law Review* 173, 173
[673] Treaty on European Union, Art 6
[674] Tim Finch, 'Immigration under Labour' (Prospect Institute for Public Policy Research 2010) 9 www.prospect-magazine.co.uk accessed 07 April 2012
[675] Nicholas De Genova, 'Migrant "Illegality" and Deportability in everyday life' (2002) 31 *Annual Review Anthropology* 419, 425

3.7 Conclusion

The research identified that early measures controlling the movement of aliens were often connected with hostilities that gave rise to unfair and harsh laws against migrants. These seemingly repressive laws in spirit and character are incompatible with liberal democratic ideals and created the enabling environment for the detention and deportation of migrants.

The issue of certification and the tinkering with the right of appeal, the research argues, engages both the substantive and procedural rights of migrants as protected by international human rights law.

The use of discretion in immigration decisions by the UK on the one hand and other liberal democratic states on the other hand suggest a degree of impropriety capable of undermining the rights of migrants within the context of liberal ideologies.

It has equally been noted that precarious migrants are represented by undocumented migrants- those who reside in the State's territory unlawfully. They are considered not to be lawfully present in the State despite the grant of temporary admission; their position made worse as they remain in limbo without right to work or access to state benefits, yet are not deportable or removable. They are subject to detention at any time on the orders of the State and vulnerable to exploitation by the State or its agents, and other individuals given their immigration status. Some of them as highlighted are legally stranded when they are caught between actual removal from a state in which they are physically present and their inability to return to their state of nationality or even former residence compounded by the refusal of another state to grant entry. Aside from the fact that they became precarious by accident or design, the State at times creates their precarious status by forcing them into destitution with the end purpose of frustrating them to leave the State.

It has further been identified that there is a statutory creation of precarious immigration status in the UK by the 2008 Act. This is at variance with the duty of the State to respect and protect migrants while they remain within their territorial jurisdiction and to

facilitate their return safely to their country or as the case may be country of former residence in dignity.

In order to guarantee the rights of precarious migrants in a State, it is contended that there should be a clear bifurcation between immigration law enforcement on the one hand and the protection of basic human rights on the other hand. States should guarantee that individuals enjoy their human rights without being exposed to undue apprehension and deportation.

The convergence, divergence and trends in immigration control in the mentioned liberal democratic states appear not to exist by sheer co-incidence but an indication of some sort of policy transfer, diffusion or even legal transplant as exemplified by their respective State practices viewed in perspectives which may have implications for their international treaty obligations.

In essence, migrants may not be owed the benefits of citizenship but no doubt they are owed a modicum of protection under international human rights law given that human rights are guaranteed irrespective of an individual's immigration status acquired as a function of a person's status as human being and not as a citizen of a particular state.

Chapter 4. The Detention Estate

4.1 Introduction

Detention in law means deprivation of liberty-a confinement in a pre-arranged place such as prisons, closed camps, receptive centres or other restricted areas with certain restraints that inhibits detainees from the pursuit of their normal activities.[676] The term detention will be generically employed to cover both administrative and preventive detention.[677] The 2012 UNHCR Guidelines define detention as 'the deprivation of liberty or confinement in a closed place which an asylum-seeker is not permitted to leave at will, including, though not limited to, prisons or purpose-built detention, closed reception or holding centres or facilities'.[678] Silverman and Massa define immigration detention more generally, as 'the holding of foreign nationals, or non-citizens, for the purposes of realising an immigration-related goal'.[679] They stated that such detention represents a deprivation of liberty taking place in a designated facility in the custody of an immigration official'.[680]

As has been highlighted in the preceding chapter, ancillary to the power to control immigration is the power to detain. However 'the burgeoning phenomenon of immigration-related detention sits uncomfortably on the fault line separating the prerogatives of State sovereignty from the rights of non-citizens regardless of the broad discretion of States to control immigration'.[681] Therefore, there is in existence a tension

[676] See generally Guy S. Goodwin-Gill, 'International Law and the Detention of Refugees and Asylum Seekers' (1986) 20 (2) *International Migration Review* 193, 194; R Jennings and A Watts, *Oppenheim's International Law* (9thedn Longman 1992) 897-941; Alice Block and Liza Schuster, 'At the extremes of exclusion: Deportation, detention and dispersal' (2005) 28 (3) *Ethnic and Racial Studies* 491, 500; Stefanie Grant, 'Immigration Detention: Some Issues of Inequality' (2011) 7 *The Equal Rights Review* 69

[677] Preventive detention when specifically used will be to delineate detention of migrants with criminal convictions or those perceived to be a threat to public order. Administrative detention on its part will be typified by administrative convenience relative to detention in admission cases, pending applications for leave to remain or breach of conditions of leave.

[678] UNHCR 'Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers' (n24) 9; see Art. 2(h) recast RCD; Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast), OJ 2013 L 180/96.The RCD was originally adopted in 2003 -Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers, OJ 2003 L 31/18; the UK decided not to opt in to the Directive and is not bound by it, see Recital 33 recast RCD, but the UK had opted in to the original Directive 2003 is therefore bound by it.

[679] S. Silverman and E. Massa, 'Why Immigration Detention is Unique' (2012) 18 (6) *Population, Space and Place* 679

[680] ibid

[681] Michael Flynn, 'Who Must Be Detained? Proportionality As A Tool For Critiquing Immigration Detention Policy' (2012) 31 *Refugee Survey Quarterly* 40, 40

between the right to liberty of migrants against the broadly unfettered rights of States to control the admission and expulsion of migrants conferred on States by national and international law.[682] It is against this backdrop that the right to liberty has been expressed as 'ubiquitous in human rights instruments in protecting all individuals from arbitrary arrest and detention and any such deprivations of liberty require the strongest possible justification'.[683]

More so, the right to liberty is a jewel, prized and fundamental not only of English common law but an indicator and barometer of measuring a liberal democratic society.[684] In *Brogan v UK* [685] the ECtHR expressed the view that a liberal democratic state must strictly observe the rule of law when it interferes with personal liberty. In addition, the core concept in the ECHR in general is that of the rule of law which was described in the preamble to the Convention as part of a common heritage shared by all signatories and is one of the fundamental principles of a [liberal] democratic society.[686]

In view of the above, this chapter will discuss the contours and detention powers, legality of detention in the light of the principles of necessity, due diligence, arbitrariness and proportionality within the remit of liberal democratic paradigm. This chapter contends that the legality of detention require that the law, which authorizes detention, must accord with international human rights law standards. In short, an assessment of legality for our purpose would encompass a broader test of substantive arbitrariness to include decisions, which are unreasonable, unjust, delayed and unpredictable. This ultimately will engage the issue of proportionality that underpins the ECHR in Art 8-11 ECHR -'necessary in a democratic society' test. It will equally be contended that the reluctance or refusal of the ECtHR to require specific necessity in the detention of migrants does not sit comfortably with international human rights law.

---

[682] This right is entirely unfettered, see G Goodwin-Gil, 'The Limits of the Power of Expulsion in Public International Law' (1975) 47 *British Yearbook of International Law* 55, 156; cf the dictum of Lord Atkinson in *AG for the Dominion of Canada v Cain* [1906] AC 542 [546] on supreme State power; see generally *Abdulaziz, Cabales and Balkandani v UK* (1985) 7 EHRR 471EHRR 471; *Soering v UK* (1989) 11 EHRR 449; *Vilvarajah v UK* (1991) 14 EHRR 248; *Amur v France* (1996) 22 EHRR 533

[683] Cathryn Costello, 'Human Rights and the Elusive Universal Subject: Immigration Detention Under International Human Rights Law' (2012) 19 *Indiana Journal of Global Legal Studies* 257, 257-258

[684] *R (Abbasi) v SSHD* [2002] EWCA Civ 1598; Re *Wasfi Suleiman Mahmood* [1995] Imm AR 311

[685] (1988) 11 EHRR 117, para 58-59

[686] *Latridis v Greece* App No 31107/96 (ECtHR 25 March 1999) para 62; see comments by John Wadham and others *Blackstones Guide to the Human Rights Act 1998* (4thedn, OUP 2007) 30; David John Harris, Michael O'Boyle, Colin Warbrick, *The Law of the European Convention on Human Rights* (Butterworths 1995) 17

This chapter presents the argument that a State wishing to detain migrants must do so in conformity to international human rights standards rather than other latent reasons. In this connection, this chapter will therefore seek to highlight the test for the legality of detention both from the substantive and procedural limbs as a law may be substantively sound but procedurally unfair giving rise to the tension between substantive legality and procedural illegality or impropriety.

References in this chapter will equally be made to three other selected liberal democratic states-the United States of America, Australia and France whose detention reality offers significant similarities with the UK. This is in order to put the analysis of detention issues in the UK within the broader context of other liberal democracies by way of convergence, divergence, diffusion and dilemmas of practices in immigration control.

This research does not intend to give a separate treatment to the detention of refugees and asylum seekers, as they cannot be separated from the context of migrants in the light of the right to liberty. While it is true that there is clear rationale for differentiating refugees and asylum seekers on the one hand and irregular migrants on the other hand, but for the purpose of this thesis and in detention discourse, all non-citizens will be viewed as a single cohort in order to capture all facilities and procedures involved in detention and given that what is important is the "non-citizen" status that led to the detention.[687] But this does not mean that specific differentiations will not be made of refugees and/or asylum seekers when necessary.

4.2 The Contours of Detention

The detention of migrants pending removal or deportation is currently a common practice amongst liberal states, which has assumed exponential dimensions. In fact, it has been posited that States have resorted more frequently to detention for longer periods as a response in part to large volume of migrants entering their territories.[688] As Sawyer and Turpin observe, 'detention is now used far more routinely than before, to

[687] See also Michael Flynn, 'Who Must Be Detained? Proportionality as a Tool for Critiquing Immigration Detention Policy' (2012) 31 *Refugee Survey Quarterly* 40, 42-43

[688] Daniel Wilsher, 'The Administrative Detention of Non-Nationals Pursuant to Immigration Control: International and Constitutional Law Perspectives' (2004) 53 ICLQ 897, 897.

discourage entry and for immediate practical purposes with the detention of those whose applications have failed even in the longer term as more detention centres are built'.[689]

In the view of Mitchel and Sampson, detention in the global context has 'increasingly become a preferred means for States to maintain and assert their territorial authority and legitimacy, and respond to mounting political pressures regarding border and security'.[690] As Bloomfield Tsourdi and Petin commented, this preferred means of maintaining territorial authority and legitimacy finds justification in 'practical considerations such as having the migrant at the disposal of the authorities for identity checks or public health screenings at arrival; enforcement-related motivations such as securing public order or forced return of irregular migrants; or political arguments such as to deter any further arrivals or to protect host societies'.[691] In these circumstances, States assume that detention is essentially non-punitive but only incidental to immigration control.

The criminalization of immigration with reference to immigration detention and its corollary-deportation have become key aspects of border control of modern liberal democracies.[692] This has led to a tension between the right to liberty of migrants with the broadly unfettered rights of States to control the admission and expulsion of migrants conferred on States by national and international law.[693]

Detention elicits the question of constitutional rights of migrants with respect to security, liberty and equality. This, argues Caloz-Tschopp, produces a harmful effect on

[689] Caroline Sawyer and Philip Turpin, 'Neither Here Nor There: Temporary Admission to the UK' (2005) 17 (4) *International Journal of Refugee Law* 688, 727

[690] R. Sampson and G. Mitchell, 'Global trends in immigration detention and alternatives to detention: practical, political and symbolic rationales' (2013) 1(3) *Journal on Migration and Human Security* 97, 98

[691] Alice Bloomfield, Evangelina Tsourdi and Joanna Petin, *Alternatives to Immigration And Asylum Detention in the EU* (Philippe De Bruycker ed Odysseus Network 2015) 16; see also G. Cornelisse, *Immigration detention and Human rights – Rethinking territorial sovereignty* (Martinus Nijhoff publishers 2010) 247; S. Vohra, ' The Detention of irregular migrants and asylum seekers' in R. Cholewinski, R. Perruchoud and E. McDonald (eds), *International migration law – Developing paradigms and key challenges*, (T.M.C. Asser Institut 2007) 49

[692] Criminalisation of Immigration law otherwise coined 'crimmigration' see generally Mary Bosworth, 'Deportation, 'Detention and foreign-national prisoners in England and Wales' (2011) 15 *Citizenship Studies* 583,587; Juliet Stumpf, 'The Crimmigration Crisis: Immigrants, Crime, and the Sovereign Power; immigrants, crime and sovereign power' (2006) 56 *American University law Review* 367,420; A de Gorgio, 'Immigration control, post-fordism and less eligibility: a materialist critique of the criminalization of immigration across Europe' (2010) 12 *Punishment & Society* 147,167

[693] Wilsher 'The Administrative Detention of Non-Nationals Pursuant to Immigration Control: International and Constitutional Law Perspectives' (n688) 898

liberal ideologies by way of deterioration of liberal policies but may at the same time act as an indicator of deeper and more insidious change,[694] and reflected in the liberal democratic paradox or contradictions as previously discussed.[695]

Detention has also been described as a form of torture without physical violence, which instills fear, silence and isolation.[696] It thus severs contacts between detainees and the population given that detainees are located in isolation thereby extending the sphere of imprisonment.[697] McLouglin describes detention centres as a 'continuum of anxiety; a continuum in which post traumas and future uncertainties faced by asylum seekers are exacerbated and rendered continuous with psychological corrosive presence embedded in Immigration Detention Centres (IDC) itself where people are detained on grounds of breaches of immigration law and not for criminal conviction'.[698] The point is that a migrant who has not been convicted of a criminal offence is continuously detained like a criminal with some detained for a long period of time.

The present international legal position regarding fundamental importance of the right to personal freedom finds credence in Art 3 & 9 of the Universal Declaration of Human Rights (UDHR) 1948[699] and Art 9 & 10 of the International Covenant on Civil and Political Rights 1966.[700] In addition, the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) 1950, the American Convention on Human Rights (ACHR) 1969 and international soft laws such as the U.N. Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment 1988[701], the U.N. Standard Minimum Rules for the Treatment of Prisoners 1955 and Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention 1999 and 2012 are of key importance.[702]

---

[694] Marie-Claire Caloz-Tschopp, 'On the Detention of Aliens: The Impact on Democratic Rights' (1997) 10 *Journal of Refugee Studies* 165, 166-167

[695] For a full discussion on the liberal democratic paradox, see Chapter 2 of this Research

[696] Caloz-Tschopp, 'On the Detention of Aliens: The Impact on Democratic Rights' (n 622)

[697] ibid

[698] Pauline J McLoughlin, 'Serve, Subvert or Emancipate' Promoting Mental Health in Immigration Detention (2006) 5 *Australian Journal for the Advancement of Mental Health* 1, 10

[699] For the provisions of UDHR Art 3, see chapter 2.1 of this thesis.

[700] For the provisions of ICCPR Art 9 & 10, see chapter 2.1 of this thesis.

[701] For the provisions of UNGA 'Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment A/RES/43/173 76th plenary meeting 9 December 1988(9 December 1988) UN Doc A/43/49, see chapter 2.1 of this thesis

[702]Standard Minimum Rules for the Treatment of Prisoners, adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the

Nevertheless, the above legal instruments and standards do not guarantee a right to be free from detention but provide and impose limits on the use of the power of detention by the restriction of permissible grounds of detention and its attendant procedural safeguards. In the view of Moeckli, 'the fact that detention on national security grounds have become less acceptable by the international community, liberal states have now resorted to the use of immigration as a ground for detention in the justification of the exercise of sovereignty to admit or expel non-nationals'.[703] He argues that these two grounds notably national security and immigration control are now closely intertwined as States have adopted detention powers pursuing national security aims within the penumbra of immigration.[704] In support of this viewpoint, Migreurope thinks that that there may be a correlation between Immigration Removal and Detention Centres (IRC-IDC) which using the expression 'pops up like weeds in a turnip patch' and the approximately 180 such centres in Europe currently'[705] which illuminates the argument that detention may have assumed a business dimension in disregard to required international standards.

Furthermore, an insidious aspect of immigration detention, which has not attracted much attention for policy review, is the involvement of private companies. The growth of immigration detention in the opinion of James may not be based solely on restrictive asylum and immigration policies but can be attributed to the involvement of private companies whose concern is to win and maintain contracts and to keep their facilities full [706] even as immigration detention has been identified as a highly profitable venture for the growing incarceration business in recent years as bidding is done for prisons and

---

Economic and Social Council by its resolution 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977 (13 May 1977) UN Doc E/5988; Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention (n3)

[703] Daniel Moeckli, The Selective "War on Terror": Executive Detention of Foreign Nationals and the Principle of Non-Discrimination (2005-2006) 31 Brook J. Int'l L 495, 501, see also Stephanie J Silverman and Evelyne Massa, 'Why Immigration Detention is Unique' (2012) 18 *Population, Space and Place* 677, 677-678; Guy S. Goodwin-Gill, 'International Law and the Detention of Refugees and Asylum Seekers (n595); B MacGrady, 'Resort to International Human Rights in challenging conditions in U.S. immigration detention centres (1997) 23 *Brooklyn Journal of International Law* 271; A De Zayas, 'Human rights and indefinite detention' (2005) 87 *International Review of the Red Cross* 15

[704] Daniel Moeckli, ibid 502

[705] Migreurope, Foreigners' camps in Europe and in Mediterranean countries (2005) <http://www.migreurop.org/IMG/pdf/carte-en.pdf> accessed 20 August 2012

[706] Al James and others, Privatising Prisons: Rhetoric and Reality (Sage 1997); A Coyle, A Campbell and R Neufeld (eds) *Capitalist Punishment: Prison Privatisation and Human Rights* (Zed Books 2003)

immigration detention centres as well.[707] Contracts with the Home Office provide private contractors with a fee per inmate on a daily basis, with the United Kingdom Detention Services (UKDS) reporting a turnover of £12.18million for its Harmondsworth centre operation for the year ended 31 August 2002 compared to its Forest Bank Prison profit of £13.6 million.[708]

The Guardian[709] reported that the average cost of detaining an asylum seeker is £29,400 a year and the weekly cost of holding a person at the Oakington Detention Centre in Cambridgeshire (supposedly meant for fast track asylum cases) is £1,620.00, about £85,000.00 a year. This underpins the fact that the sheer expenses of detention in policy and practice may be responsible for the deeper structural factors and interests attracting private companies. There were 12 immigration detention centres [including short term holding centres] in the UK out of which 9 are managed by private contractors.[710] Currently there are approximately 4000 places in 15 centres,[711]with the centres consisting of 11 Immigration Removal Centres, 3 short-term holding facilities, and Cedars, meant for families only.[712] Most recently, The Verne in Dorset, which had a prison status till September 2014, has been remodeled as an IRC in September 2014 with a capacity of 595 places. The Home Office reported that 30,387 people entered immigration detention in the UK in the year ending September 2013.[713]

Consistent with the above information, is the argument that the market for private correctional facilities is growing internationally with small number of global providers

[707] S J A Talvi 'It Takes a Nation of Detention Centres to Hold Us Back' Interview with Michael Welch, Associate Professor of Criminal Justice at Rutgers University Lip Magazine (21 January 2003)
[708] Prison Privatization Report International No 60, (Public Services International Research Unit, University of Greenwich 2004)<http://www.psiru.org/justice/PPRI60.htm> accessed 11 September 2012
[709]*Melanie McFadeyan, 'Hard Labour' Guardian* (London, 14 September 2002) The Guardian reported about an answer to parliamentary question time answered in October 2001
[710] Home Office UK Border Agency, 'Immigration Removal Centres'<http://www.ukba.homeoffice.gov.uk/aboutus/organisation/immigrationremovalcentres/> accessed 11 September 2012
[711] AIDA, 'National Report for UK' (last up-date April 2014) 66 <http://www.asylumineurope.org/sites/default/files/report-download/aida_-_uk_second_update_final_uploaded.pdf> accessed 03 March 2015; see also Stephanie J. Silverman and Ruchi Hajela, The Migration Observatory, 'Briefing: Immigration Detention in the UK' (2012) 2 <http://www.migrationobservatory.ox.ac.uk/sites/files/migobs/Immigration%20Detention%20Briefing.pdf > accessed 03 March 2015
[712] Cedars are immigration detention centres opened in August 2011 for families with children <https://www.gov.uk/government/publications/guidance-on-cedars-pre-departure-accommodation/cedars-pre-departure-accommodation-information > accessed 03 March 2015
[713] Home Office, 'Immigration statistics, July to September 2013' (2013) <https://www.gov.uk/government/publications/immigration-statistics-july-to-september-2013/immigration-statistics-july-to-september-2013#detention-1 > 03 March 2015
These statistics do not include people detained under the Immigration Act powers in prisons.

competing for contracts in what has been described as 'healthy competition' with Global Solutions Limited (GSL) being the company running the largest number of immigration centres in the UK.[714] In addition, the private sector has taken prominent positions in escorting with Group 4 Securicor as the primary provider of UKBA's immigration escorting operation in the UK as well as accompanying foreign nationals to their home countries of about 60 charter flights and 1800 scheduled flights yearly.[715] This was expected to generate revenue in excess of £125 million in five years.[716]

The use of private companies in the immigration detention estate reflects the norm in most liberal democracies such as the USA, UK and Australia, which led Beyen and Snacken to remark that 'What happens in the USA today happens in the UK tomorrow'.[717] This could be interpreted to mean that liberal democracies appear more interested in encouraging detention than the respect of the right to liberty of non-citizens. Tim Newburn adds that the emergence of private prisons and detention centres in the UK owes its motivating developments to the USA in what is referred to as 'policy transfer'.[718] Garland describes it as shared culture of control, assisting to shape penal policies with increasing similar outlook. [719] Writing from a symbiotic, cross-pollinated and axiomatic viewpoint, Jones and Newburn see it as 'elements of globalisation emerging from policy ideas implemented across international boundaries when political conditions are ripe'.[720]

Nonetheless, there appears to be paucity of scholarly debates concerning the deeper structural factors and interests necessitating immigration detention and how this privatization of the detention estate has affected the evolution of immigration detention in liberal democracies.[721] The consequence is that immigrants are stripped of many of the legal safeguards granted to suspected criminals given that under criminal law; strict

[714] Christine Bacon, 'The Evolution of Immigration Detention in the UK: The Involvement of Private Prison Companies' (2005) Refugees Studies Centre RSC Working Paper 27/2005, 8 <http://www.rsc.ox.ac.uk/publications/working-papers-folder_contents/RSCworkingpaper27.pdf> accessed 20 August 2012
[715] Prison Privatization Report International No 62, (Public Services International Research Unit, University of Greenwich 2004)<http://www.psiru.org/justice/PPRI62.htm> accessed 11 September 2012
[716] ibid
[717] K Beyens and S Snacken, 'Prison Privatisation: An International Overview and the Debate'. (Prison 2000 Conference, University of Leicester 8-10 April 2000) 5
[718] T. Newburn, 'Atlantic Crossings: "Policy transfer" and crime control in the United States and Britain' (2002) 4 (2) *Punishment and Society* 165, 194
[719] D. Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (OUP 2001)
[720] T. Jones and T. Newburn, 'Comparative Criminal Justice Policy Making in the United States and the United Kingdom: The Case of Private Prisons' (2005) 45 *British Journal of Criminology* 58, 60
[721] Bacon, 'The Evolution of Immigration Detention in the UK' (n714) 4

time limits are imposed on arrested criminal suspects whereas an immigration detainee may be detained indefinitely especially in the UK. A criminal suspect must be released or charged after 24 hours unless an officer of the rank of an inspector or above authorizes detention but in any case detention without charge is not permitted after 96 hours.[722]

There is also a presumption in favour of release in criminal bail hearings as well as full access to legal assistance and appeal rights. This is not the case with immigration detention as there is no presumption in favour of release of immigration detainees, no full access to legal assistance and no appeal rights if bail was not granted to the applicant-these would be analyzed further in this chapter. The probable reason for this is that the State sees immigration detention only as administrative function of the State thus allowing the private nature of immigration detention to be invisible. In essence, the contours of immigration detention revolves amongst others; the quality of the national law authorizing detention, the conditions and place of detention, the reasons for detention and the duration of detention,[723] and these will be discussed subsequently in this chapter.

4.3 Detention and Liberal Democracies: Trends and Turns

The detention of migrants in the UK was first undertaken under the 1920 Aliens Act, which gave enormous powers to immigration officers to deport aliens. This was further elaborated under the 1971 Immigration Act (1971 Act) as provided under Schedule 2 & 3 to the 1971 Act.[724] This power, as observed by Johnston, can be exercised in conjunction with any of the three administrative acts notably examination, removal or deportation.[725] In the view of Block and Schuster, 'the powers to detain are very wide and not subject to any automatic scrutiny of the lawfulness, appropriateness or length of detention'.[726] The 1971 Act authorized detention in several situations concerning examination, decision to grant leave and administrative removal.[727] In *Khan v SSHD*[728]

[722] The Police and Criminal Evidence Act 1984, s 42
[723] Galina Cornelisse, 'Human Rights for Immigration Detainees in Strasbourg: Limited Sovereignty or a Limited Discourse?' (2004) 6 *European Journal of Migration and Law* 93, 96
[724] See Immigration Act 1972, Sch 2 on detention and deportation
[725] Connor Johnson, 'Indefinite Immigration detention: can it be justified?' (2009) 23 J.I.A.L 351, 352
[726] Alice Bloch and Liza Schutter, 'At the extremes of exclusion: Deportation, detention and dispersal' (2005) 28 *Ethnic and Racial Studies* 491, 499
[727] The 1971 Act, Sch 2, paras, 8,9, 16 (2) as amended by the 1999 Act, s.140 (1), cf The Immigration Rules para 2 HC 395 as a corollary to the Act.

the court confirmed that the prohibition on removal pending the pursuit of an asylum claim does not preclude the exercise of the power of detention.[729]

In offering significant similarities with the UK, the United States on its part in 1892, even prior to the advent of the UK laws and policies on detention, authorized mandatory immigration detention for all non-citizens seeking entry into its territory that led to the establishment of Ellis Island as the first immigration detention centre and the most frequently used, popularly referred to as the "Island of Tears".[730] Furthermore, the Immigration and Nationality Act (INA) 1952 gave special permission to the Attorney General to detain non-citizens for ninety days under the post removal detention statute-mandatory immigration detention.[731]

By way of diffusion and trends, immigration detention in the UK and the US has become restrictive over a given period of time. In characterizing the US immigration, Silverman opined that 'detention has become more restrictive with time, with periods growing larger and conditions becoming deleterious with less accountability'.[732] Of critical consequence here is the retroactivity clause entrenched in the Immigration Reform and Immigration Responsibility Act 1996 (IIRIRA) that streamlined removal proceedings through its Immigration and Custom Enforcement (ICE) of which immigration detention was the centerpiece and non-citizens as targets. In my view, the retroactivity clause of the US 1996 Act closely resembles section 32 of the UK Borders Act 2007, which has a retroactive effect against foreign nationals who may have committed offence before the law came into force. The massive expansive of immigration detention in the USA, argued Miller was a result of the retroactivity of the 1996 legislation mandatory detention provisions in addition to the expandable categories of deportable offences[733], as the Section 32 of the UK Borders 2009 made criminal conviction as a basis for deportation. As Loughran saw it, the 'pre-September 11 2001 legislation in the US marked a paradigm shift in immigration policy from

---

[728] [1995] Imm AR 348 (Leggatt LJ)
[729] See the Nationality, Immigration and Asylum Act 2002, s 62
[730] J F Hollifield, V F Hunt and D J Tichenor, 'The Liberal Paradox: Immigrants, Markets and Rights in the United States' (2008) 61 (1) SMU Law Review 67, 72
[731] This can be found at 8 USC. A 123 (a) (6); (8 USC Chapter 12-Immigration and Nationality) http://www.law.cornell.edu/uscode/text/8/chapter-12 accessed 21 September 2012
[732] Stephanie Silverman, 'Immigration Detention in America: A History of its Expansion and a Study of its Significance' (2010) *Centre on Migration, Policy and Society Working Paper* 80, 13
[733] T Miller, 'The Impact of mass incarceration on immigration policy' in M. Mauer and M. Chesney-Lind (eds) *Invisible Punishment: The Collateral Consequences of Mass Imprisonment* (New Press 2002) 214-238

individual –based focus to a categorical approach fed by the popular perception that migrants arriving the US are a faceless crowd that must be detained' just like the approach adopted in the UK.[734]

Another common nexus between State practice in the UK and the US relate to the criminalization of immigration detainees-an intersection between immigration enforcement following conviction for a criminal offence, as variously defined. State practice in these countries point to the multiple uses of immigration detention. In these countries, detention regime is at the nexus of foreign and domestic policies, instrumentalized at various times in response to both'. [735] Commenting on the US detention, Miller stated that immigration detention provides a unique variation as it showcases the manipulation of administrative policy in deterring potential future migrants.[736]

The above illuminates the fact that the right to liberty might be a mirage substantively and procedurally with unjustifiable discrimination espoused in several guises against international human rights obligations even as liberty is not simply confined to citizens but extend to aliens regardless of their legal status in the host country.[737]

In Australia and by way of convergence, the power to detain migrants is enshrined in the Australian Migration Act 1958 and tested under common law in the case of *Al Kateb v Goodwin*.[738] The Australian Migration Act 1958 provides for administrative detention of non-nationals and that detention is mandatory not discretionary.[739] Section 189 authorizes an officer to detain a person whose presence he suspects or reasonably believes to be unlawful. Section 196 (1) deals with the period of detention, which provides that detainees under section 198 must be detained until removed, deported, or granted a visa. Section 196 (3) prevents a person being detained from release even by a

[734] A E Loughran, 'Congress, Categories and the Constitution-Whether Mandatory Detention of Criminal Aliens Violates Due Process' (2003-2004) 18 (4) *Georgetown Immigration Law Journal* 681, 696
[735] Silverman, 'Immigration Detention in America' (n732) 20
[736] Miller T, 'The impact of mass incarceration on immigration policy' (n733) 217
[737] See ECHR Art 1; *A v SSHD* [2005] 2 AC 68 [106] (Hope LL) held that right to liberty belongs to everyone who happens to be in this country irrespective of his or her nationality; *Kwawaja v SSHD* (1983) 2 WLR 321 [344] (Scarman LL); see *YickWo v Hopkins* 118 U.S. 356, 369 (1886); The case of *Kwong Hai Chew v Colding* 344 U.S. 590, 596-97 (1953) held that the Fifth Amendment does not allow any distinction between citizens and resident aliens; *Zadvydas v Davis* 533 U.S. 678, 693 (2001); see also ICCPR Art 2 (1) and 26; see also U. N. Body of Principles for the Protection of All Persons under Any Form of Detention (n26) and the Standard Minimum Rules for the Treatment of Prisoners (n35)
[738] (2004) 208 ALR 124
[739] Sections 189, 196 and 198 of the Migration Act 1958

court of an unlawful non-citizen. In Al *Kateb v Godwin*[740], the Australian High Court (highest court in Australia under the hierarchy of courts) decided by a narrowest 4-3 majority rejecting the appellant's argument that he should be released from detention. The court stated the Migration Act 1958 interpreted clearly provides that he will be kept in administrative detention until he is removed, meaning that the appellant is to be kept in administrative detention indefinitely if not removed.

In his contribution to the Australian detention debate, Allan argues that the ability to detain flows from the purpose of detention which is removal and where that purpose no longer has any real likelihood of fulfillment, detention stops being lawful.[741] To him, that allows one to avoid the otherwise seemingly clear words of s 196 (3).[742] It is important to point out that the UK, US and Australia use similar phrases of 'reasonably necessary', 'reasonably foreseeable' or 'reasonably practicable' respectively to defend their practice of indefinite immigration detention against international human law standards - a dilemma faced by migrants in these liberal democracies.

Furthermore, it is argued that the power of the courts in Australia to specifically review the legality of such detention has been removed by operation of law.[743] This lack of effective means of appeal or review has invited the UN Human Rights Committee to hold that such detention is 'arbitrary' within the meaning of Article 9 of the ICCPR.[744] In addition, the High Court of Australia in late 2003 surprised human rights advocates and the international community by entering a unanimous decision, where it considered it not to be unlawful or unconstitutional to detain children in immigration detention, stating that there were no exceptions to the law for children.[745] Similarly, another High Court case added a salvo to the matter by finding that conditions of detention would not make an otherwise lawful detention, unlawful.[746] This decision appears to be at variance with the Human Rights Committee's views in which it held that article 9(4) of the

---

[740] *Al Kateb v Goodwin* (n738)
[741] James Allan, 'Do The Right Thing Judging? The High Court of Australia in Al- Kateb' (2005) 24 *Queensland Law Journal* 1, 7
[742] ibid
[743] Migration Act 1958, s 183
[744] *A v Australia, HRC Case No 560/1993*, para 9.4; see also *C v Australia*, HRC Case No. 900/1999; Report of the Working Group on Arbitrary Detention (24 October, 2002) UN Doc. E/CN.4/2003/8/Add.2
[745] *Woolley &Anor; Ex parte Applicants* M276/2003 by their next friend GS (M276/2003) [2004] HCA 29, 7 October 2004.
[746] *Mahran Behrooz v MIMIA*, Attorney-General of the Commonwealth of Australia, Australasian Correctional Management Pty Ltd and Australasian Correctional Security Pty Ltd, 6 August 2004

ICCPR requires that detained individuals be entitled to review by a court and that any review must be effective, most notably, that a court must be able to order release.[747]

France on the hand tilts towards a contrast to immigration detention as practiced in Australia, USA and the UK. It has been reported that as at 31 March 2004, migrants notably asylum seekers are generally not detained in France while decisions on their claims for asylum are pending.[748] It is recorded that the maximum time permitted in a waiting zone is 20 days,[749] and in the event of impossibility of detention, admission must be allowed with a functional appeal system that allows for a référéliberté to the Tribunal, which is decided upon very quickly-within a few days.[750] As at 2003, there were 24 centres (with 775 beds) registered as places of rétention in addition to over one hundred other places, which can be temporarily used as sites of retention, such as, police stations or, exceptionally, hotel rooms.[751] In 2003, the percentage of asylum seekers released from waiting zones and admitted to French territory was 68.8%.[752] Viewed in perspectives with state practices in the UK, USA and Australia, it appears that French detention policies and practice tilt more towards conformity to international human rights standards.

4.3.1 Detention Under Common Law in the United Kingdom and Implications for Strasbourg Jurisprudence

Under common law, efforts made to establish basic and effective safeguards against detention is as old as time, [753] and it has indeed been posited that freedom from arbitrary detention could be termed the oldest of human rights.[754] It is therefore crucial to mention that under common law, the detention powers outlined in the section above

[747] Ophelia Field and Alice Edwards, 'Alternatives to Detention of Asylum Seekers and Refugees' (2006) UNHCR Legal and Protection Policy Research Series Polas/2006/03 <http://www.unhcr.or> accessed 25 September 2012, 102; see also HREOC, 'A last resort?'The National Inquiry into Children in Immigration Detention, Executive Summary, April 2004, para 1
[748] Field and Edwards, ibid
[749] ibid; see also Clemence Richard and Nicolas Fischer, ' A legal disgrace? The retention of deported migrants in contemporary France (2008) 47 *Social Science Information* 581, 590
[750] See Article L-521-2 of the Administrative Justice Code
[751] Fields and Edwards (n747) 102
[752] ibid, 104
[753] See the Magna Carta (n160); 1215, Petition of Right 1628 'The Great Charter of the Liberties of England' (n161)
<http://www.constitution.org/eng/petright.htm> accessed 08 January 2014
[754] Tom Bingham 'Personal Freedom and the Dilemma of Democracies' (2003) 52 *International and Comparative Law Quarterly* 841, 842

were first tested in the case of *Hardial Singh*[755] concerning an Indian national detained for 6 months upon the completion of a prison sentence while the Home Office made preparations to deport him. His removal was delayed because the Indian High Commission did not cooperate with the Home Office in preparing his travel documents. The court held that his continued detention under para 2 of Sch 3 to the 1971 Act was unlawful because the power given to detain individuals is subject to express limitations as to purpose- only pending his removal or deportation. Moreover the period must be reasonable, given that if the Secretary of State cannot deport within a reasonable time, continuous detention will be unlawful. The question for common law was what constitutes a reasonable time within the remit of *Hardial Singh*? Therefore in *R (on the application of I) v SSHD*[756] the court found detention to be unreasonable in the light of several non-exhaustive factors namely: the length of detention; the nature of the obstacles in the way of removal; the diligence of the Secretary of State; the conditions of detention; the effect of detention on the detainee and his family.[757]

As seen from the above cases, necessity, reasonableness and due diligence were major factors necessitating detention under common law but it remains to be seen whether these continue to be factors considered under Strasbourg jurisprudence or typical of liberal democracies in the detention of migrants. Under common law, detention will be unlawful where it exceeds the period reasonably necessary for the purpose of removal or where it could be shown to be disproportionate because of interference to family. But evidence in practice shows that the contrary is the case as issues of necessity amongst others is seldom if ever considered. The question then is why would the requirement of necessity be irrelevant for the deprivation of liberty of non-citizens whose single offence stems from their immigration status? In essence, the reasonability of detention was not entrenched until the intervention of common law as explained by the *Hardial Singh* principles that laid down the principle that detention must be within a reasonable time, although reasonable time was not defined.

[755] *R v Governor of Durham Prisons ex p Hardial Singh* [1984] 1 WLR 704
[756] [2002] EWCA Civ 888
[757] Cf *R (on the application of A) v SSHD* [2007] EWCA Civ 804 where a different conclusion was reached where the court found detention to be lawful in that consideration was given to the risk of flight, etc.; At common law, any deprivation of liberty is *prima facie* unlawful and the following cases have reinforced the position of common regarding the fundamentality of the right to freedom from arbitrary detention: *R (von Brandenburg) v E. London & City NHS Trust* [2003] UKHL 58 [6] (Bingham LL) and *R (Lumba) v SSHD* [2011] UKSC 12, [2012] 1 AC 245 [32] (Dyson LL) and [219] (Collins LL); Most recently, in *The Queen on the application of Detention Action v SSHD* [2014] EWCA Civ 1634 [11]

By way of convergence, the most significant judicial intervention in the detention of migrants in the US came with the decision in *Zadvydas v Davis*.[758] In this case, the court held that a non-citizen's detention is permissible only if it was for a 'reasonably foreseeable' period in order to carry out deportation with recognition of the government's rights to set detention rules. This 'reasonably foreseeable' test is similar to detention under common in the UK as represented by the *Hardial Singh* principles, which in my view has a bearing on the legality of detention.

4.4 The Legality of Detention

Legality of detention requires that the law, which authorizes detention, must accord with international human rights law standards. This amongst others and specifically for refugees is contained in the Detention Guidelines of the United Nations High Commissioner for Refugees (UNHCR), which adds that the review of detention must inculcate the question of necessity of detention in the appropriate circumstance.[759] In the light of this, the UNHCR posits that the detention of asylum seekers is inherently undesirable and only accepted if it is brief, absolutely necessary and implemented where other options have been exercised leaving detention as the last resort.[760] This view is supported by Article 31 of the 1951 Refugee Convention which provides that penalties shall not be imposed on refugees on the account of illegal entry provided they present themselves without delay and show good cause for their illegal entry.[761]

The ECHR codified its protection of liberty under Art 5 of the ECHR 1950.[762] In *Engels v Netherlands*, the court explained that in a classic sense, the right protected is that of physical liberty rather than physical safety.[763] Article 5 ECHR may be seen as providing two safeguards for detainees notably the test for the legality of detention on the one hand and a set of procedural rights for detainees on the other hand.[764] The need for

[758] 533 US 678 (2001)
[759] UNHCR 'Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers' (n36)
[760] UNHCR EXCOM Conclusion 44 ' Detention of Refugees and Asylum Seekers' UN (1986) Doc A/AC.96/688
[761] See also Michael Flynn, 'Who Must Be Detained? Proportionality as a Tool for Critiquing Immigration Detention Policy' (n687) 42-43
[762] ibid, on the provisions of Art 5 (1) ECHR 1950
[763] (1976) EHRR 647 [58]
[764] Nicholas Blake and Raza Husain, *Immigration, Asylum and Human Rights* (OUP 2003) 115

procedural guarantees is predicated on the fact that rights can be substantively consistent with the law while procedurally defective.

The overall aim and legal rationale of Article 5 is therefore to ensure that no one is deprived of his liberty in an arbitrary manner inconsistent with its provisions thus emphasizing the security of the person.[765] This is anchored on Art 5 (4) of the ECHR 1950 which provides that no one can be deprived of their liberty save in accordance with a procedure established by law and for a purpose recognized by the ECHR.[766] Anyone deprived of his right in this regard has the right to apply to a court for a speedy review of the legality of the detention and to be released if detention is found unlawful. The supervening question is whether detention is in accordance with the law and permissible under Art 5 (1) (f) and what factors are engaged in deciding the legality of detention. Detention under Art 5 (1) (f) is permissible in two situations (two limbs): one is to prevent the migrant from 'effecting an unauthorized entry into the country' and the other is 'where action is being taken with a view to deportation or extradition' of a non-national (migrant) who has entered the country.

In essence, the factors identified by this research in answering the above questions specifically and discussing generally the legality of the detention revolves around the acceptable international human rights law standards: the issue of arbitrariness, conditions of detention; the necessity and proportionality debate in the light of procedural and substantive implications; length of detention and due diligence. These shall be considered below.

4.4.1 Arbitrary Detention

[A]rbitrariness is interpreted broadly to include not only unlawfulness but includes elements of inappropriateness, injustice and lack of predictability which demands for necessity in an individual case, reasonable in the circumstance and proportionate to a legitimate purpose.[767] Detention is 'arbitrary if it is random or capricious or not accompanied by fair and efficient procedures and/or when it is disproportionate and

[765] *Guzzard v Italy* (1980) 3 EHRR [92] ; *Bozano v France* (1986) 9 EHRR 292 [54]
[766] Article 5 is a qualified right because of its exception 'save in accordance with procedure established by law[…]'. Detention is authorized but must be lawful.
[767] UNHCR 'Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers' (n36) Guideline 4

indefinite'.[768] For detention not to be arbitrary, it should be prescribed by law-sufficiently accessible and precise excluding all elements of arbitrariness'.[769]

The remit of Art 5 ECHR is to protect the person against arbitrary detention, which is also made clear in Article 9 of the ICCPR[770] where it considered the case of *A v Australia*, [771] regarding the detention of a Cambodian asylum seeker-the Committee (HRC) noted that the notion of arbitrariness must not be equated with 'against the law' but has to be given a broad interpretation to include inappropriateness and injustice. The HRC remarked that remand in custody could be considered arbitrary if it is not necessary in all circumstances which hitherto invites the issue of proportionality, emphasizing that, periodic review of detention is required for which its continual exercise should not continue beyond an acceptable period where the State can no longer provide justification.

In essence, where there exists a presumption in favour of liberty, there is no corresponding requirement for its absolute protection against deprivation. This accords with Nowak's contribution that Article 9 ICCPR 'does not strive towards the ideal of a complete abolition of State measures that deprive liberty. [...] It is not the deprivation of liberty itself that is disapproved of but rather that which is arbitrary and unlawful'.[772] The HRC has further explained that liberty is not absolute; deprivation at times may be justified.[773]

Furthermore, in *C v Australia* [774] the Committee discussed the issue of the detention of an asylum seeker for 2 years who was eventually released on health grounds having been diagnosed to be mentally ill. Due to limitations placed on the review of his detention by primary legislation, no review of his detention was carried out. The Australian government argued that mandatory detention was in general justified on

[768] UNHCR 'Executive Committee of the High Commissioner's programme Standing Committee on Detention of asylum-seekers and refugees: The framework, the problem and recommended practice (4 June 1999) UN Doc EC/49/SC/CRP.13
[769] ibid
[770] See provisions of ICCPR Art 9, but note that the UK does not recognize the right of individual petition under the ICCPR but is a signatory to the ICCPR 1966
[771] *A v Australia* Communication No 456/1991 CCPR/C/51/D/456/1991
[772] M. Nowak, *U.N. Covenant on Civil and Political Rights – CCPR Commentary* (2nd edn, N.P. Engel Verlag 2005) 210.
[773] HRC 'General Comment No 35, Article 9: Liberty and security of person (Advance Unedited Version) CCPR/C/GC/35 (28 October 2014) para 11
[774] *C v Australia* Communication No CCPR/C/76/D/900/1999 Meeting of 28 October 2002

policy grounds arguing further that *C* was an absconding risk due to his dishonesty upon arrival. The Committee rejected these arguments and found breaches of Article 9 (1) and 9 (4) of the ICCPR[775]. The Committee concluded that whatever original reasons exist for detention, the continuation of his detention without individual justification and without any chance of substantive judicial review was arbitrary.

The concept of arbitrariness as further expressed in the UNHCR's guidelines on the detention of asylum seekers, sees freedom from arbitrary detention 'as a fundamental human right'.[776] The Human Rights Committee General Comment on the issue of right to liberty and security specifically includes immigration control.[777] It has been argued that this does not debar States from immigration control but requires 'the decision-maker to consider all other alternatives [alternatives to detention] such as the imposition of reporting conditions and the provision of sureties'.[778]

Analytically expressed, detention may be in 'violation of the applicable law but not arbitrary, or legally permitted but arbitrary, or both arbitrary and unlawful, therefore detention may be authorized by domestic law and nonetheless be arbitrary'.[779] O'Nions contends that 'what is required is not simply an assessment of legality but the definition should encompass a broader test of substantive arbitrariness to include decisions which are unreasonable, unjust, delayed and unpredictable'.[780] I argue that an unreasonable decision, delayed decisions or where the State's laws are not precise and predictable is an infraction on the rights of migrants and a harbinger for human rights violations contrary to the tenets of liberal democracies that emphasize the rule of rule of law.[781] O'Nions on her part finds support in the Commission of Human Rights comment on

[775] See also HRC 'General Comment No 35, Article 9: Liberty and security of person (Advance Unedited Version) CCPR/C/GC/35 (28 October 2014) para 11 ; the HRC cited *Mika Miha v Equatorial Guinea* CCPR/C/51/D/414/1990, para 6.5.
[776] UNHCR Guidelines (n34) para 1 of the Introduction
[777]HRC 'General Comment No 8, Right to Liberty and Security of Persons, (Art 9)' CCPR (30 June 1982) para 1
[778] Edward Alice, 'Human Rights, Refugees and The Right 'To Enjoy' Asylum' (2005) 17 IJRL 293, 319, see also HRC 'General Comment No 35, Article 9: Liberty and security of person (Advance Unedited Version) CCPR/C/GC/35 (28 October 2014) para 18.
[779] HRC 'General Comment No 35, Article 9: Liberty and security of person' (n775) para 11-12
[780] Helen O'Nions, 'No Right to Liberty: The Detention of Asylum Seekers for Administrative Convenience' (2008) 10 *European Journal of Migration and Law* 149, 157; Manifred Nowak, *UN Convention on Civil Political Rights: CCPR Commentary* (NP Engel 1993) 173; see also HRC 'General Comment No 35, Article 9: Liberty and security of person (n775) para 12; *Fongum Gorji-Dinka v Cameroon*, Communication No 1134/2002, CCPR/C/83/D/1134/2002, para 5.1
[781] For a full discussion on this issue, please refer to UK's liberal democracy and the rule of law at Chapter 2, Section 2.5 of this Thesis.

arbitrary detention[782] which requires broader test for arbitrariness and the case of *Van Alpen v Netherlands*[783] where the Committee emphasized that detention may be lawful but arbitrary, therefore detention could constitute a gross breach of Art 9 ICCPR. By extension, Art 12 of the ICCPR protects freedom of movement of persons 'lawfully' present within a State's territorial jurisdiction. By virtue of this Article, the Human Rights Committee regards asylum seekers as 'lawfully resident'.[784]

The UN Working Group on Arbitrary Detention sets out criteria for determining whether custody of migrants is arbitrary which applies only when a decision to detain has been made in accordance with the law. The working group's 1998 report on the UK expressed dismay over lack of judicial oversight and resultantly emphasized that detention should only be used when legitimate and according to international standards especially when other measures will not assist.[785] It is important to reassert that this research identified that prior to the coming into force of the I999 Immigration and Asylum Act; the detention of migrants was not subject to supervision by the courts.[786] The Working Group's Report recommends alternative and non-custodial measures in the manner of reporting conditions rather than actual detention and in addition states that 'the detaining authorities' must assess a compelling need to detain based on the personal history of the asylum seeker.[787]

The ECHR on the hand has determined that an avoidance of arbitrariness either in motivation or effect also encompasses cases of bad faith where detention is not consistent with the restrictions as enshrined in Art 5 ECHR .[788] The issue of bad faith

---

[782] HRC 'On the right to be free from arbitrary arrest, detention and exile' UN Doc. E/CN.4/826/Rev.1; Laurent MarcouxJr, 'Protection from Arbitrary Arrest and Detention Under International Law' (1982) 5 (2) *Boston College International and Comparative Law Review* 345

[783] (1990) No 305/1988 UN Doc CCPR/C/39/D/305/1988

[784] *Celepli v Sweden*, Communication No 456/1991 CCPR/C/51/D/456/1991

[785] UNHCR, Report of the Working Group on Arbitrary Detention, UN Doc E/CN.4/1999/63 (18 December 1999)

[786] See chapter 3 of this research.

[787] Report of the Working Group (n785) Recommendation 8 para 33 and Recommendation 9, para 34; on the issue of alternatives to detention see A. Edwards, UNHCR, 'Back to Basics: The Right to Liberty and Security of Persons and 'Alternatives to Detention' of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants', (April 2011) 85 <http://www.refworld.org/docid/4dc935fd2.html > accessed 27 February 2015; see also Alice Bloomfield, Evangelina Tsourdi and Joanna Petin, *Alternatives to Immigration And Asylum Detention in the EU* (Philippe De Bruycker ed Odysseus Network 2015) 22; Cathryn Costello and Esra Kaytaz, UNHCR, 'Building Empirical Research into Alternatives to Detention: Perception of Asylum seekers and Refugees in Toronto and Geneva' (June 2013) <http://www.refworld.org/pdfid/51a6fec84.pdf >accessed 02 March 2015

[788] *Amur v France* (1996) 22 EHRR 533; *Winterwerp v Netherlands* (1979) 2 EHRR 387, paras 37-39

finds explanation in *Bozano v France*.[789] In this case, an Italian national was convicted in his absence by an Italian court and the ECtHR held that the deprivation of liberty was arbitrary in motivation and unlawful given that the detention was obviously for the purpose of deportation but in reality was a disguised illegal extradition. The ECtHR also determined that arbitrariness might occur where an applicant is denied adequate reasons for the detention. According to the court, this obligation continues as detention may therefore become unlawful if the reason given initially ceases to apply.[790]

Applying what seems like a purposive approach in arriving at the scope of arbitrary detention with specificity to asylum seekers, the Executive Committee in a Standing Committee agreed that 'the detention of asylum seekers may be considered arbitrary if it is not in accordance with the law or if the law itself allows arbitrary practices or if it is enforced in an arbitrary way.[791] Goodwin-Gill observed that it might be argued that what is in accordance with the law cannot be arbitrary[792] but this is not the case as he postulated. For him, 'an infringement of personal liberty such as detention may be arbitrary not only in accordance with procedures established by law but extends to the provisions of the law contrary to liberty and security of the person'.[793] This thus embraces not only what is illegal but also what is unjust.

4.4.2 Necessity and Proportionality

The HRC emphasized that State parties need to show that detention does not last longer than absolutely necessary, that the overall length of possible detention is limited and that it accords with the guarantees provided for by Article 9 ICCPR.[794] The principle of proportionality presupposes that where an action to achieve a lawful objective is taken in a situation and the subsequent action appears to restrict a fundamental right, 'the effect on the right must not be disproportionate to the public purpose sought to be achieved'.[795] Proportionality is the most crucial element of the necessity test that

[789] (1987) 9 EHRR 297, para 60
[790] *Chahal v UK* (1996) 23 EHRR 413, paras 43, 112-113
[791] UNHCR 'Executive Committee of the High Commissioner's Programme Standing Committee on Detention of asylum-seekers and refugees (n768)
[792] Guy S Goodwin-Gill, 'International Law and the Detention of Refugees and Asylum Seekers' (1986) 20 *International Migration Review* 193, 195-196
[793] ibid 196
[794] HRC 'General Comment No 35, Article 9: Liberty and security of person (n775) para 15
[795] Michael Fordham, *Judicial Review Handbook* (Hart Publishing 2008) 81; *R (Daly) v SSHD* [2001] UKHL 26

involves a search for a fair balance between the demands of the general interest of community and the requirements of protection of the individual's human rights.[796] In *Daly* [797] the House of Lords adopted a three stage approach to establish proportionality: i) the legitimate objective should be of sufficient importance justifying the limitation of a fundamental human right; ii) the measures designed to meet the objective must be rationally connected to it; iii) the means used to impair that right must be no more than necessary to accomplish the objective.

Proportionality is in essence a balancing exercise underpinning the ECHR in Art 8-11 ECHR with the 'necessary in a democratic society' test. A restriction cannot be regarded as 'necessary in a democratic society' unless it is proportionate to the legitimate aim pursued.[798] The state cannot use 'a sledgehammer to crack a nut' as the pressing social need for the restriction of the right must accord with the requirements of a democratic society which supposes pluralism, tolerance and broadmindedness.[799]

In the European Union, detention rules with respect to asylum seekers can be found in the Directive on common procedures for granting and withdrawing international protection (Procedures Directive)[800] as well as in the Directive laying down standards for the reception of applicants for international protection (Reception Conditions Directive).[801] These instruments confirm that detention should be employed when it proves necessary. Art 26 of the Procedures Directive provides that Member States shall not hold a person for the sole reason that he/she is an asylum applicant and even where the applicant is held in detention, there should be a speedy judicial review. Art 7 (2) of the Reception Conditions Directive on its part provides that States are allowed to confine an applicant to a particular place when it proves necessary. It has been argued

[796] *Soering v UK* (1989) 11 EHRR 439, para 89
[797] *R (on the application of Daly) v SSHD* [2001] UKHL 26
[798] *Dudgeon v UK* (1981) 4 EHRR 149, paras 49-53, see particularly para 53
[799] *Handyside v UK* (1976) 1 EHRR 737, para 49
[800] Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast)
[2013] OJ L 180/60, this amends the Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers [2003] OJ L 31
[801] Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) [2013] OJ L 180/96, this amends Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing Refugee Status [2005] OJ L 326 and Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers OJ L 31

that these two instruments leave 'extensive discretion to States to detain asylum seekers for purported legal reasons or for reasons of public order'.[802]

The dilemma faced by the two directives are how to interpret the term 'necessary' for legal reasons or for public order under Art 7 (2) of the Reception Conditions Directive and whether detention requires an individual assessment of necessity based on a balancing test where accounts have been taken of all private and public interests and how to apply the principles of proportionality.[803] I argue that even if these instruments allow for detention, the operating word is 'necessity' which should be construed narrowly in order to avoid abuse of the powers of confinement enjoyed by receiving States as currently exercised. This view finds support in Bail for Immigration Detainees (BID) statement that detention is employed in the UK as a deterrent to asylum seekers where lack of procedural safeguards leads to widespread arbitrary detention.[804]

In addition, the Executive Committee's *Conclusion on detention of refugees and asylum seekers*[805] stressed the need for necessity to be related to legitimate aims as updated by the 2012 UNHCR Guidelines that describes detention as inherently undesirable .[806] According to it, 'detention should be a measure of last resort with liberty being the default position'.[807] The Guideline 2 recounts that the fundamental rights to liberty and security of person and freedom of movement are expressed in all the major international and regional human rights instruments, which are the essential components of legal systems, built on the rule of law.[808]

The idea being expressed is that even though national legislation is the primary source for ascertaining the lawfulness of detention, but it is not always the decisive element in the assessment of the justification of deprivation of liberty as special regard must be had

[802] Kay Hailbronner, 'Detention of Asylum Seekers' (2007) 9 *European Journal of Migration and Law* 159, 167
[803] ibid 168
[804] Bail for Immigration Detainees, 'Submissions to the UN Working group on arbitrary detention: Executive Summary' (2002)<http://www.biduk.org/154/consultation-responses-and-submissions/bid-consultation-responses-and-submissions.html> accessed 28 August 2012
[805] Ex Com Conclusion 44 (XXXVII) (1986) UN Doc A/AC.96/688
102 UNHCR 'Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers' (n36)
[807] ibid
[808] These include Articles 3 and 9 of the UDHR; Article 9, ICCPR, Article 5 ECHR

to the underlying purpose of preventing arbitrary deprivation of liberty.[809] It is equally of importance to the UNHCR that detention laws must conform to the principle of legal certainty, which requires that the law itself must be foreseeable and predictable without retroactive effect.[810] This research has explained that liberal democracies operate under the rule of law whose laws should conform to predictability, foreseeability and legal certainty.[811]

Wilsher is of the view that 'the Guidelines allow for detention in order to determine the elements of the claim but stressed that such detention is justifiable if it is within a prescribed period'.[812] The 2007 UN Working Group suggested that necessity was important to avoid the issue of arbitrary detention because the detention of migrants in general or asylum seekers in particular is not prohibited.[813] The critical issue therefore is how necessity is defined and/or construed. Hathaway is of the opinion that 'short-term detention only aimed for administrative purpose can be said to be necessary even though it is not specifically governed by the Guidelines'.[814] In his contribution, Grahl-Madsen opinionates that detention should be used to 'ascertain identity and for investigative purposes and limited by necessity but he specifically rules out the legitimacy of detention for administrative purposes'.[815]

The Home Office's EIG concedes that detention will be unlawful where it exceeds the period reasonably necessary for the purpose of removal or where it could be shown to be disproportionate because of interference to family.[816] Field adds that the consideration of non-custodial alternatives is a 'pre-requisite for satisfying the principle of necessity in relation to lawful detention'.[817] I argue that even if properly motivated

---

[809] UNHCR 'Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers' (n36) Guideline 3; see also *Lokpo and Toure v Hungary* App No 10816/10 (ECtHR, 20 Sept 2011) para 21

[810] *Bozano v France* (1987) 9 EHRR 297; *Amur v France* (1996) 22 EHRR 533; *Dougoz v Greece* App No 40907/98 (ECtHR 6 March 2001) para 55

[811] See Chapter 2.5 of this thesis

[812] Daniel Wilsher, 'Detention of asylum seekers and refugees and international human rights law' in P Shah (ed) *The Challenge of Asylum to Legal Systems* (Cavendish 2005) 159

[813] UNHCR 'Report of the Working Group on Arbitrary Detention (10 January 2008) UN Doc A/HRC/7/4

[814] James Hathaway, *The Rights of Refugees under International Law* (CUP 2005) 433

[815] Atle Grahl-Madsen, The Status of Refugees in International Law (Sijthoff Leiden 1972) 148

[816] UK Visas and Immigration, Chapters 46 to 62: detention and removals 'Enforcement Instructions and Guidance: Detention and Removals, Detention and Temporary Release' <https://www.gov.uk/government/publications/chapters-46-to-62-detention-and-removals> accessed 09 January 2015 (EIG) Chapter 55.3.A Decision to detain-CCD cases

[817] Ophelia Field and Alice Edwards, 'Alternatives to Detention of Asylum Seekers and Refugees' (2006) UNHCR Legal and Protection Policy Research Series POLAS/2006, Appendix I

and otherwise lawful, a deprivation of liberty may become arbitrary in effect if it is found to be disproportionate to the pursued aim. In *Witold Litwa v Poland* [818] a case concerning Art 5 (1) (e) of the ECHR 1950 the ECtHR emphasized the necessity of detention in that less severe measures would have been considered and found insufficient to safeguard the individual prior to detention.[819]

However, the Grand Chamber of the ECtHR appears to have applied a different parameter in discussing the issue of necessity and proportionality in the case of *Saadi v the UK.*[820] Saadi was an Iraqi asylum seeker who came to the UK in December 2000 and claimed asylum. He was initially granted temporary admission, but his detention was necessitated by a change in the Home Office policy that allowed detention at Oakington for a seven-day period if it appears that the application can be decided quickly with those certified as clearly unfounded. On 2 January 2001, Saadi was detained at Oakington but reasons for his detention were not given. His claim was refused and after two years as he was officially accorded refugee status and was granted asylum in the UK. Saadi and others challenged the legality of their detention citing unlawful deprivation of liberty. It was clear from available facts that Saadi was not detained under the second limb of Art 5 (1) (f) as his detention was not pursuant to removal. [821] The only key question was whether his detention was to prevent 'unauthorized entry'. The High Court under Collins J ruled that even though detention was lawful under domestic law, the detention was not needed to prevent his 'effecting unauthorized entry'. [822] He held that the detention was disproportionate and not 'reasonably necessary' to its stated purpose namely the speedy examination of his asylum claim.[823] Both the Court of Appeal[824] and the House of Lords[825] held that detention was lawful under domestic law and under Art 5. The House of Lords concluded that detention did not have to be necessary to prevent absconding or actions against public good and further stated that all entry was unauthorized until expressly authorized by the Home Office. Therefore providing the action was proportionate, it fell

---

<http://www.unhcr.org/refworld/pdfid/4472e8b84.pdf> accessed 29 August 2012

[818] App No 26629/95 (ECtHR4 April 2000)

[819] ibid para 78

[820] *Saadi v UK* (2008) 47 EHRR 17

[821] Detention under Art 5 (1) (f) is permissible in two limbs: one is to prevent the migrant from 'effecting an unauthorized entry into the country' and the other is 'where action is being taken with a view to deportation or extradition'.

[822] *R (Saadi et ors) v SSHD* [2001] EWHC Admin 670 (Collins J)

[823] See EIG Chapter 55.3 and the phrase 'reasonably necessary'

[824] [2001] EWCA Civ 1512, [2002] 1 WLR 356

[825] *R (on the application of Saadi) v SSHD* [2002] UKHL 41, [2002] 1 WLR 3131

within the exceptions listed in Art 5 (1) (f). The necessity limb was rejected but a breach of Art 5 (2) was found which requires that everyone arrested must be informed promptly about the reason for detention but Saadi was not informed until about a period of 76 hours.[826]

The ECtHR on their part in 2006 upheld the decision of the House of Lords by a narrow majority. The court appears to have given excessive prominence to the undeniable right of states to control the right of aliens to enter and reside in their country with the unfortunate conclusion that until a potential migrant has been officially granted leave, he/she has not effected a lawful entry. [827] This means detention is permissible under Art 5 (1) (f) to prevent unlawful entry. The Grand Chamber upheld the Chamber's decision on 28 January 2008.[828] The court attempted to separate notions of necessity from arbitrariness and proportionality. It stated:

> To avoid being branded as arbitrary… such detention should be carried out in good faith; it must be closely connected to the purpose of preventing unauthorized entry of the person to the country; the place and conditions of detention should be appropriate… and the length of detention should not exceed that reasonably required for the purpose pursued.

O'Nions remarks that the cautious approach adopted by the ECtHR 'was simply deference to state sovereignty, which led the court to reason that the detention of migrants including asylum seekers should confer a broader discretion than detention under other exceptions in Art 5 (1)'.[829] O'Nions adds that 'the outcome of this case legitimizes reasonably brief periods of detention for administrative convenience provided it is not seen as arbitrary'. [830] This according to her increases the restrictive European immigration policy.[831] Despite the ECtHR's ruling, necessity is a common thread that runs through international human rights discourse on detention as highlighted above given the numerous international instruments cited. Cornelisse raises

---

[826] *Saadi v UK* (n820)
[827] *Amur v France* (1996) 22 EHRR 533, para 52
[828] *Saadi v UK* (n820)
[829] Helen O'Nions, 'Exposing the flaws in the Detention of Asylum Seekers: A critique of Saadi' (2008) 17 *Nottingham Law Journal* 34, 37 citing Galina Cornelisse, 'Human Rights for Immigration Detainees in Strasbourg: Limited Sovereignty or a Limited Discourse?' (2004) 6 *European Journal of Migration and Law* 93, 105, see also W.G Werner and J.H De Wilde, 'The Endurance of sovereignty' (2001) 7 (3) *European Journal of International Relations* 283, 288
[830] Helen O'Nions, 'Exposing the flaws in the Detention of Asylum Seekers: A critique of Saadi' (2008) 17 *Nottingham Law Journal* 34, 37, see also generally Aileen McHarg, 'Reconciling Human Rights and the Public Interest' (1999) 62 (5) *The Modern Law Review* 671, 672; J McBride, 'Proportionality and the European Convention on Human Rights' in E Ellis (ed) *The Principle of Proportionality in the Laws of Europe* (OUP 1999) 23
[831] Helen O'Nions, (n829) 37

pertinent questions-'Why does immigration detention not need to be a necessary measure? Why does the Court with regard to immigration detention not require that other less sever measures have been considered and found insufficient to prevent unauthorized entry or to effect deportation? Why is it sufficient merely to start deportation proceedings in order to be able to detain a foreign national?'[832] The above portrays the existence of excessive executive deference, which arguably has become an instrument for state practice in immigration detention.

In essence, deference appears to have been an issue with the ECtHR. As stated by Lord Bingham in *A (FC) and Others v SSHD*[833] this executive deference owes its sanctity to the popular belief that great weight should be given to the judgment of political authorities because they do exercise pre-eminently political judgment which courts are not saddled to do. While it is agreed that it is the function of political authorities and not the courts to resolve political questions, but where the issue has more legal content, the greater the potential role of the court in this regard. It is therefore not sufficient for the ECtHR to remain nonchalant with the proportionality and necessity limbs in the detention of migrants-decisions devolving into questions that seem to have more legal than political contents.

My view finds support in the thinking of Fawcett who argues that 'execute deference operates in the form of margin of appreciation allowing a State to make decisions on detention in terms of necessity as in the case of Saadi'.[834] This notion has been located between objective and subjective powers where the state retains a degree of freedom of decision not by virtue of its sovereignty but because it is adjudged to be well placed to know the facts and determine it objectively. He opines that the decision in *Saadi v UK* is inherently dangerous for individual liberties.[835] Goodwin-Gill agrees and argues that 'no power in the context of international law is ultimately discretionary in the sense of unlimited and omnipotent given that the very idea of power involves an element of

[832] Galina Cornelisse, (n829) 96
[833] [2004] UKHL 56 [29] (Bingham LL)
[834] J.E.C Fawcett, *The Application of the European Convention on Human Rights* (2nd edn, OUP Oxford 1987) 248
[835] ibid

design, of a defined objective or purpose'. [836] He further explains that the role of the law is to set limits and prescribes the manner of the exercise of such rights.[837]

By and large, the reluctance or refusal of the ECtHR to require specific necessity does not sit comfortably with international human rights law. Strasbourg's approach is equally at variance with the Council of Europe's own recommendations which in respect of asylum seekers *inter alia* states that measures of detention of asylum seekers should be applied only after a careful examination of their necessity in each particular case.[838]

Furthermore, the legal interpretation of Art 5 (1) (f) that sparked controversy is the definition of unauthorized entry particularly the reasoning that all entry is unauthorized until expressly authorized by the State. As have been stated earlier on in *Celepi v Sweden,*[839] the Human Rights Committee agreed that an irregular [illegal] entrant whose status has been regularized was lawfully in the State within the meaning of Art 12 ICCPR which follows that an asylum applicant with temporary admission is lawfully present under the law. It has been suggested that Collins J's approach to the question of unauthorized entry accords with the spirit of Art 14 of the UDHR and Art 31 of the UN Convention on the Status of Refugees.[840] The use of the word 'prevent' in Art 5 (1) (f) argues Blake is that there must be a causal connection between detention and unlawful immigration, stating that an asylum seeker is not thereby without more seeking unlawful or unauthorized entry. [841] I argue that the use of Detained Fast Track System (DFT also referred to 'Oakington' process) is to speed up the asylum process but not directed at preventing unauthorized entry. Even at that, the Court of Appeal had recently found as unlawful detention pending an asylum claim under the Detained Fast Track System due to lack of clarity and transparency.[842]

---

[836] Guy S Goodwin-Gill, *International law and the movement of persons between states* (Clarendon Press, 1978) 300
[837] ibid
[838] Council of Europe 'Recommendation 5 of the Committee of Ministers to member states on measures of detention of asylum seekers' (Adopted by the Committee of Ministers on 16 April 2003 at the 837th meeting of the Ministers' Deputies) REC (2003) 5 <https://wcd.coe.int/ViewDoc.jsp?id=2121> accessed 10 January 2015
[839] Communication No 456/1991 CCPR/C/51/D/456/1991
[840] See the UN Convention relating to the Status of Refugees states, Art 31
[841] Nicholas Blake and Raza Husain, *Immigration, Asylum and Human Rights* (OUP 2003) 125
[842] *Detention Action v SSHD* [2014] EWCA Civ 1270 [16]-[22]

In *Saadi v UK*, the ECtHR concluded that 'until a State has authorized entry to the country any entry is unauthorized and the detention of a person who wishes to effect entry and who needs but does not have authorization to do so can be, without any distortion of language to 'prevent his effecting an unauthorized entry'.[843] Even though it is accepted that the Convention is a 'living instrument' which accepts proactive and teleological approaches but the Strasbourg court in *Saadi* seems to have used it in expanding the limitations on the fundamental right to liberty. As O'Nions argues, 'the consequence of that interpretation is that any person without express leave to enter or remain in the UK could now be detained as their presence is similarly unauthorized under Art 5 (1) (f)'. [844]

However, later developments tilt towards a contradiction of the necessity nexus in immigration detention rejected by the ECtHR in *Saadi v UK*. The ECtHR in *Rusu v Austria*[845], (a case postdating *Saadi*) surprisingly abandoned its previous stance and accepted that the necessity adjunct was very vital in the applicable domestic law but nevertheless refused to incorporate it into its interpretation of Art 5 (1) (f) on detention. Costello sees this 'as signaling a more intense judicial review of both adherence to domestic standards and the factual matrix surrounding the claim of unauthorized entry'.[846] She remarked that by 'rejecting the necessity test in the deportation-detention nexus, the Court explicitly sets a lower standard of protection for immigration detention than for other forms'.[847]

By way of divergence and trend, the US Supreme Court in *Denmore v Kim*[848] similar to *Saadi v UK*, had to decide the issue of necessity in immigration detention. *Denmore* was the second Supreme Court case decided in 2003. The court although divided, accepted that government's rationale for mandatory detention was a means to compensate for its own inefficiency and lack of resources but went ahead to reject information suggesting

[843] *Saadi v UK* (n820) para 65
[844] Helen O'Nions, 'Exposing the flaws in the Detention of Asylum Seekers: A critique of Saadi' (n748) 42, for general discussions regarding the 'presence' of asylum seekers and refugees, see Ralph Grillo, '"Saltdean can't cope" protests against asylum seekers in an English seaside surb' (2005) 28 (2) *Ethnic and Racial Studies* 235, 237; Rosemary Sales, 'Welfare for asylum seekers in Britain' (2002) 22 *Critical Social Policy* 456, 459
[845] *Rusu v Austria* App No 34082/02 (ECtHR 2 October 2008)
[846] Cathryn Costello, 'Human Rights and the Elusive Universal Subject: Immigration Detention Under International Human Rights Law and EU Law' (2012) 19 *Indiana Journal of Global Legal Studies* 257, 286
[847] ibid 287
[848] 538 US 510 (2003)

that necessity is required in immigration detention in all cases of criminal non-citizens.[849] Therefore the issue of necessity in immigration detention as was decided in *Saadi*[850] by the ECtHR in 2008, where the State does not have to show that detention was necessary only if removal of the migrant was pursued with due diligence, somehow suggests that the ECtHR borrowed extensively from *Denmore* by way of diffusion.

In essence, the debate is whether detention is necessary and proportionate to the aims to be achieved. While some scholars are in agreement that short-term detention will not be at variance with Art 31 of the UN Convention Relating to the Status of Refugees, the underlying issue is that detention undermines the efficacy of the spirit of Art 31 if an individual is still detained having complied with all reporting and monitoring conditions imposed by the host in the absence of an individualized assessment. [851] It is important to state that other migrants do not enjoy the protection of Art 31 UN Convention Relating to the Status of Refugees, (which prohibits imposing penalties on account of illegal entry or presence on refugees coming directly from a territory where their life or freedom was threatened), as they are not refugees. Mirroring this position, in *R v Naillie*[852], the House of Lords in 1993 decided that where an asylum seeker arrived but did not seek entry, by means including deception, they could not be treated as [irregular] migrants.

On the proportionality question, the ECtHR held in *Chahal v UK*[853]that proportionality does not apply to immigration detention where in this case, an Indian national was detained for over 6 years on national security grounds, the ECtHR found no violation of Art 5 (1) (f). The court reasoned that the Article does not demand that detention be considered reasonably necessary; therefore that the executive need not have reason at all for immigration detention beyond the fact that deportation was ongoing. This reason is not in accordance with other non-immigration case-laws on Art 5 where the court was

[849] J K Doucleff, 'Denmore v Kim: Upholding the Unnecessary Department of Legal Permanent Residents, Supreme Court Review' (2003) 94 *Journal of Criminal Law and Criminology* 625, 650
[850] *Saadi v UK* (n820)
[851] Christos Giakoumopolis, ' Detention of asylum seekers in the light of Art 5 of the ECHR' in *Hughes and Liebaut (eds) Detention of Asylum Seekers in Europe: Analysis and Perspectives* (Kluwer 1998) 161; Landgren Karin, Comments on the UNHCR position on detention of refugees and asylum seekers in Hughes and Liebaut above, 146
[852] [1993] AC 674
[853] (1997) 23 EHRR 137, para 112

prepared to 'read down' legislation [854] permitting detention under Art 5 with the aim of imposing a proportionality test even when there was no clear textual basis for doing so.

In *Winterwerp v Netherlands*[855] the ECtHR was confronted with a provision that authorizes detention for mental patients without any clear public interests being served. The court ruled that mental patients detained under Art 5 (1) (e) must present a threat to themselves or others if at large despite having the sub-Article providing no such limitations. Similarly in *Witold Litwa v Poland*[856] the ECtHR adopted similar approach for those detained being under the influence of alcohol which applies the same proportionality test as explicitly engrained in Articles 8- 11 of the ECHR. It beggars belief that detention could be authorized and refused to be subjected to the necessity test in Art 5 (1) (f) whereas the necessity test can be applied in Article 5 (1) (e) cases and even at that 'general assumptions on proportionality cannot replace a test of necessity in each individual case'.[857]

In the view of Bryan and Langford, 'the Court's interpretative attitude to Article 5 (4) when viewed together with its approach to Art 5 (1) (f) exposes a measure of incongruity because the Grand Chamber's acceptance that lawfulness for both Article 5 (4) and Article 5 (1) have the same meaning but held that an Art 5 (4) inquiry into the lawfulness of detention with a view to deportation is not expected to be of such magnitude to comprise all aspects of detention neglecting the conditions essential for the lawful detention under Art 5 (1) (f)'.[858] It is rather inexplicable that the court did not take into cognizance the significance of the Vienna Convention on the Law of Treaties 1969 which requires that the meaning of treaties should be determined not only of their wording, object, purpose and context but also with reference to well established principles of international law.[859]

---

[854] See Richard A Edwards, 'Reading down legislation under the Human Rights Act' (2006) 20 *Legal Studies* 353,355; Lord Steyn 'Incorporation and Devolution: A Few Reflections on the Changing Scene' (I998) 1 EHLRR 151, 153; *Marckx v Belgium* (1979) 2 EHRR 330 para 31; *Artico v Italy* (1981) 3 EHRR 1 para 33

[855] (1979-1980) 2 EHRR 387, para 37

[856] (2001) 33 EHRR 1267

[857] V. Moreno-Lax, 'Beyond Saadi v UK: Why the 'Unnecessary' Detention of Asylum Seekers is Inadmissible under EU Law' (2011) 2 *Human Rights and International Legal Discourse* 166, 184

[858] Ian Bryan and Peter Langford 'The Lawful Detention of Unauthorised Aliens under the European System for the Protection of Human Rights' (2011) 80 *Nordic Journal of International Law* 193,205

[859] Vienna Convention on the Law of Treaties (24 May 1969) 1155 UNTS 331

The issue of proportionality has also been viewed from the praxis of the physical sites of detention centres. Flynn posits that 'physical sites of the deprivation of liberty are critical factors in an effort to assess the proportionality of detention practices'.[860] He remarked that, this accounts for the reason why the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) created standards relative to detention of aliens.[861] The CPT provides that "care should be taken in the design and layout of [immigration detention facilities] to avoid as far as possible any impression of a carceral environment".[862] Proportionality will inadvertently take into account the general characteristics of detention centres such as facility type; operational characteristics such as security regime, segregation, management, private contractors etc; bureaucratic characteristics such as custodial and ownership. This mirrors Rule 94 of the UN Standard Minimum Rules for the Treatment of Prisoners, which prohibits restriction or severity of liberty greater than necessary.[863]

In their contribution, Silverman and Massa add that 'even though international law regulations stipulate that detention must be proportionate and legal; but given that the standards are poorly defined and the rarity of immigration detention watchdogs, the said regulations are difficult to enforce'.[864] According to them, the difficulty creates a disadvantage for detainees in the state's attempt to balance the basic rights of non-citizens with the sovereign imperative of immigration control.[865] It is therefore my view that the continuous detention of migrants at police stations, prisons and detention centres designed as prisons is not a proportionate reaction to the non-citizen status in the enforcement of detention actions.

4.4.3 Due Diligence in the Light of Substantive Legality and Procedural Illegality

Due diligence for our purpose is expressed as reasonable steps taken by the State to effect detention taken into account due processes involved in order to avoid prolonged and/or arbitrary detention.

[860] Michael Flynn, 'Who Must Be Detained?' (n687) 47
[861] ibid
[862] CPT, The CPT Standards, Council of Europe, (2009) 37-55; (CPT Standards) 38
[863] See Rule 94 of the UN Standard Minimum Rules for the Treatment of Prisoners (n35)
[864] Stephanie Silverman and Evelyne Massa, 'Why Immigration Detention is Unique' (n703)
[865] ibid

Remarkably, the ECtHR in *Chahal*[866] limited the power of detention under the limb of Art 5 (1) (f) with the proviso that detention would only be lawful as long as the underlying deportation proceedings were being pursued with due diligence. In addition, the court stated that even where the said proceedings were diligently pursued, they would become arbitrary if they continue for an exceptional length of time without explanations being provided.[867] In *Kolompar v Belgium*[868] the applicant was detained for almost three years because he had delayed proceedings and impliedly consented to prolonged detention; no breach of Article 5 (1) (f) was found. From the foregoing, it is no doubt clear that the protection afforded migrants under the ECHR is less as compared to other international organs.

Furthermore, Europe's own Parliamentary Assembly has recommended that member states be encouraged to introduce a maximum period of detention which should be specified in law.[869] This equally finds support with the UNHCR and the European Council for Refugees and Exiles dealing specifically with refugees in emphasizing that an absolute maximum period of detention should be specified in national law. [870] As already highlighted, this assertion enjoys the support of the UN Working Group on Arbitrary Detention which states that in no case should detention be unlimited or of excessive length.[871]

With respect to substantive legality and procedural illegality, it is my view that even though the law may be substantively sound but the procedure for the implementation of the law may give rise to illegality otherwise procedural unfairness. Therefore the manner of implementation of the power of detention itself may play a role in the

[866] *Chahal v UK* (1997) 23 EHRR 413, para 117
[867] See also *Lynas v Switzerland* (1976) 6 DR 141 (Commission Decision, 6 October 1976); see generally comments by the AIRE Centre, The AIRE Centre, 'Advice on Individual Rights in Europe-Response by the AIRE Centre to the European Commission's Green Paper on the Application of EU Criminal Justice Legislation in the Field of Detention' para 73 <http://ec.europa.eu/justice/newsroom/criminal/opinion/files/110510/aire_centre_advice_on_individual_rights_in_europe_response_en.pdf > accessed 10 January 2015
[868] (1992) 16 EHRR 197
[869] Council of Europe Parliamentary Assembly, 'Recommendations 1327 on the Protection and Reinforcement of Human Rights of Refugees and Asylum Seekers in Europe 1997'(Council of Europe Parliamentary Assembly, Arrival of Asylum Seekers and European Airports) Doc (2000) 8761<http://assembly.coe.int/Documents/WorkingDocs/doc00/edoc8761.htm> accessed 01 September 2012
[870] UNHCR 'Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers' (n36)
[871] U.N 'Commission on Human Rights Working Group on Arbitrary Detention, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment regarding the situation of immigrants and asylum seekers' (1999) UN Doc E/CN.4/2000/4/Annex 2

determination of its lawfulness. This was the position when the court decided in *Ashindgane v UK*[872]and in *Bouamar v Belgium*[873] that there should indeed be a relationship between the main ground of permitted deprivation of liberty relied on by the authorities and the manner of implementation of detention, if not so, detention may be deemed inappropriate.[874]

A case that will further illuminate the procedure for the implementation of detention that touches and concerns procedural illegality is the *Conka v Belgium*[875], a case of four Slovakian nationals who had alleged that the circumstances of their arrest and deportation amounted to an infringement of Art 5 and 13 of the ECHR and Art 4 of Protocol No.4. In this case, the Belgian Police sent a notice to a number of rejected asylum seekers requiring them to report to the police station. The notice informed them that the attendance was required for the purposes of updating their asylum applications whereas upon their arrival at the police station, they were served with removal/deportation order and taken to a transit centre. The court categorically condemned the use of 'ruse' where the authorities misled asylum seekers to gain their trust paving way for their arrest, detention and subsequent deportation. Leaving the remit of asylum seekers and moving to overstayers generally, the Court emphasized that 'even as regards overstayers, a conscious decision by the authorities to facilitate or improve the effectiveness of a planned operation for the expulsion of aliens by misleading them about the purpose of a notice so as to make it easier to deprive them of their liberty is not compatible with Article 5'.[876] The court remarked that 'where the "lawfulness" of detention is in issue, including the question whether "a procedure prescribed by law" has been followed, the Convention refers essentially to the obligation to conform to the substantive and procedural rules of national law, but it requires in addition that any deprivation of liberty should be in keeping with the purpose of Article 5, namely to protect the individual from arbitrariness'.[877] It could therefore be seen that the procedure for the execution of a lawful order could give rise to procedural illegality even when the law may be substantively legal.

---

[872] *Ashingdane v United Kingdom,* App No. 8225/78 (Commission Decision, 28 March 1985)
[873] *Bouamar v Belgium*, App No 9106/80 (Commission Decision, 16 October 1986)
[874] In the above cases, Ashingdane was a psychiatric patient while Bouamar was a minor detained under educational supervision grounds. The aim of their detention was held to have given a clear indication of the place and conditions of the deprivation of liberty because the restrictions were more than necessary.
[875] *Conka v Belgium,* App No. 51564/99 (ECtHR 5 February 2002)
[876] ibid para 42
[877] ibid para 39

4.4.4 Detention Conditions and the Treatment of Detainees

As a starting point, Principle 1 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment provides that 'All persons under any form of detention […] shall be treated in a humane manner and with respect for the inherent dignity of the human person'.[878] Principle 6 on its part provides that 'No person under any form of detention […] shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. No circumstance whatever may be invoked as a justification for torture or other cruel, inhuman or degrading treatment or punishment'.[879] Article 10 ICCPR corroborates and affirms that 'All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person' read together with Art 7 ICCPR, which prohibits torture and cruel, inhuman or degrading treatment.[880] It therefore follows that as much as detention may be permissible, conditions in which detainees are detained must conform to these acceptable international standards and the treatment meted to detainees must in itself meet these requirements without which detention will be unlawful not only in the context of Art 5 (1) (f) ECHR but in the context of Art 3 ECHR-the prohibition of torture-an absolute right.

Put in context, the consideration of detention conditions will equally take into account the treatment of detainees as both can be said to be connected for our purpose hence this joint consideration. With respect to asylum seekers, the UNHCR under Principle 2 above stated that asylum seekers should not be detained or as an exception under certain conditions.[881] More so, Guideline 10 of the Applicable Criteria and Standards relating to the Detention of Asylum- Seekers requires that conditions of detention should be humane avoiding the use of prisons for detention etc.[882]These instruments lay down the acceptable international human rights standards on acceptable conditions of detention of migrants in general and asylum and/or refugees as applicable.

[878] U.N. Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment 1988 (n34)
[879] ibid
[880] ICCPR Art 7
[881] UNHCR 'Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers' (n36)
[882] ibid

As much as detention may be authorized, 'Strasbourg jurisprudence has firmly established that the conditions in which a person is detained may give rise to the engagement not only of Article 5 but also of Article 3 ECHR (prohibition against torture and degrading treatment) even if there is no intention on the part of the State to humiliate or debase the victim'.[883] In *Hurtado v Switzerland*, the court held that not providing an applicant with the opportunity to change his clothes is degrading treatment and that failure to provide adequate medical treatment following a violent arrest was inhuman treatment.[884] In *Mubilanzila Mayeka and Kaniki Mitunga v Belgium*[885] the ECtHR held that the detention and subsequent deportation of a five-year-old child was a violation of Art 3 ECHR, the applicant had submitted that she was held in an adult world where liberty was restricted and she was in a vulnerable condition.[886] Similarly, the ECtHR held that in respect of a person deprived of his liberty, any recourse to physical force, which has not been made strictly necessary by his conduct, diminishes human dignity and an infraction of Article 3.[887] The court in *Ribitsch v Austria*[888] also held that severe bruises while in detention in police custody suggest ill treatment as much as shaving off of detainees' hair also constitutes degrading treatment contrary to Article 3.[889]

Moreover, in *Peers v Greece*[890], the court found that the refusal or inability of the State in taking positive steps to improve objectively unacceptable conditions of detention showed lack of respect for the applicant. The court arrived at this decision because in the Delta wing of the prison, the appellant claimed he shared a small cell with one other prisoner, with an open toilet, which often failed to work, in hot, cramped conditions with little natural light, without ventilation and considered unhygienic. In *Kalashnikov v Russia*[891] the court was particularly emphatic that the State must ensure that the conditions of detention are compatible with respect for human dignity including the measures of execution so that the detainee will not be subjected to distress or intensity of hardship exceeding the unavoidable level of suffering inherent in detention. The

[883] Helen Lambert, 'The European Convention on Human Rights and the Protection of Refugees: Limits and Opportunities' (2005) 24 *Refugee Survey Quarterly* 40, 49
[884] App No. 1754/90 (ECtHR 28 January 1994) para 12
[885] App no 13178/03 (ECtHR, 12 October 2006) paras 8-10
[886] ibid para 50-53
[887] ibid
[888] App No 18896/91 (ECtHR 04 December 1995), paras 33-40
[889] *Yankov v Bulgaria* App No. 39084/97 (ECtHR 11 December 2003) paras 108, 112-114
[890](2001) 33 EHRR 51, para 75
[891]App No 47095/99 (ECtHR15 July 2002) para 95

implication is that anyone deprived of his liberty must be treated with dignity deserving of human beings.

In addition, the court has emphasized the implied duty of States to investigate allegations of ill treatment. In *Assenov and Ors v Bulgaria*[892], the implied duty of States to investigate allegations of serious ill treatment by a State agent was fully articulated. In further deciding whether the conditions of treatment are sufficient to reach the level of severity consistent with Article 3, issues such as the size of the cell and overcrowding, sanitary conditions, opportunities for recreation and exercise, medical treatment and supervision are important.[893] This is because it is now settled that all forms of solitary confinement without appropriate or adequate mental and physical stimulation are likely in the long term to have damaging effects which results in the deterioration of mental faculties and social abilities.[894]

Furthermore, in the year 2000, David Ramsbotham, the UK HM Inspector of Prisons published a report of Rochester Detention that reported of a filthy dirty accommodation, poor treatment and conditions of asylum seekers.[895] The fallout of this report seems to have contributed to the creation of the Immigration Detention Centre Rules 2001.[896] In addition, in 2011, the HM Inspector of Prisons at Brook House Immigration Removal Centre (IRC), one of the eleven IRC's reported of the excessive and often illegitimate use of the separation unit.[897] The report emphasized that the use of Detention Centre Rule 15 – an administrative measure to certify all accommodation – as a 'catch-all' to authorize and justify the separation of many detainees was unacceptable, in addition to the finding that the regime and quality of facilities were limited and privileges were permitted or denied in a crude and sometimes unthinking way.

---

[892] App No 90/1997/874/1086 (ECtHR 28 October 1998)
[893] ibid, para 135
[894] *Iorgov v. Bulgaria* App No 40653/98(ECtHR 11 March 2004)
[895] HM Inspector of Prisons 'Report of a short unannounced inspection of HM Prisons Rochester' (31 August -03 September 1999) <http://www.justice.gov.uk/downloads/publications/inspectorate-reports/hmipris/prison-and-yoi-inspections/rochester/roch1-rps.pdf> accessed 02 September 2012
[896] The Detention Centre Rules is made under subordinate legislation- Statutory Instrument 2001 No. 238 see paragraph 15 concerning sufficiency of accommodation.
[897] HM Inspectorate of Prisons, 'Report on an unannounced full follow-up inspection of Brook House Immigration Removal Centre'(12 – 23 September 2011) <(http://www.justice.gov.uk/downloads/publications/inspectorate-reports/hmipris/immigration-removal-centre-inspections/brook-house/brook-house-2011.pdf> accessed 03 September 2012

In essence, the important point that emerges from the consideration of conditions and treatment of detainees inter alia - vulnerable conditions, severe bruises, inadequate medical treatment, overcrowding, bad sanitary conditions is that they engage Art 7, 9 & 10 of the ICCPR and in the regional context, Art 3 ECHR meaning that the conditions of detention may therefore amount to inhuman and degrading treatment. It then follows that when assessing conditions of detention, cognizance must be taken of the cumulative effects of the conditions.[898] As the Court stated in *M.S.S. v Belgium and Greece*[899] 'States must have particular regard to Art 3 of the Convention, which enshrines one of the fundamental values of democratic societies and prohibits in absolute terms torture and inhuman and degrading treatment or punishment irrespective of the circumstances of the victim's conduct'. The Court emphasized that 'the confinement of aliens, accompanied by suitable safeguards for the purpose concerned, is acceptable only in order for States to prevent unlawful immigration while complying with their international obligations'.[900]

Further stated, Art 1 of the ECHR places an obligation on State Parties to secure everyone within their jurisdiction the rights and freedoms defined in the Convention taken into account the absolute nature of Art 3 ECHR which requires States to take measures designed in ensuring that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment.[901]

4.4.5 Length of Detention

Of significant concern is the length of detention in the UK.[902] The ECtHR's position on the length of detention is that detention should not exceed that reasonably required for the purpose pursued- 'action being taken with a view to deportation'.[903] The ECtHR emphasized that any deprivation of liberty under Art 5 (1) (f) ECHR remains justifiable so long as deportation proceedings are in progress and such proceedings are executed with due diligence. In *Suso Musa v. Malta*,[904] the ECtHR recently found that 'it cannot

[898] *Dougoz v Greece* App no 40907/98 (ECtHR, 6 March 2001) para 46
[899] App no 30696/09 (ECtHR, 21 January 2011) para 218
[900] ibid, para 216
[901] *Mubilanzila Mayeka and Kaniki Mitunga v Belgium* (n885) para 53
[902] Suke Wolton, 'Barbed Wire Europe: Conference against Immigration Detention' (2000) 13 *Journal of Refugee Studies* 415, 415
[903] *Chahal v UK* (1997) 23 EHRR 413, paras 112-115
[904] *Suso Musa v Malta* App no 22414/93 (ECtHR, 23 July 2013), para 102

consider a period of 6 months to be reasonable' and in *Kanagaratnam v. Belgium*[905] it 'considered that a period of 3 months was unreasonably lengthy'. In contrast, in *Kolompar v Belgium*,[906] the Court held that delays of over 2 years and 8 months pending deportation did not amount to a violation of Art 5 ECHR because they were not attributable to the detaining State. Similarly in *Chahal*[907] the applicant was detained for more than six years while deportation proceedings were in progress but the ECtHR did not find the length of detention, unreasonable.[908]

However, the ECtHR is increasingly insistent that States need to demonstrate that there is a realistic prospect of deportation for detention to be termed reasonable. The Grand Chamber in *A & Others v UK*[909], a case concerning the detention of foreign terrorists suspects-the Court held that the applicants were non-removable under the standards established by ECHR. The Court was quick to reject the UK's argument that the matter was under active review in order to justify detention and bring it within the purview of Art 5 (1) (f) ECHR as amounting to 'action being taken with a view to deportation'. As Costello pointed out, the Court distinguished *Chahal* stating that in *Chahal*, proceedings were being actively and diligently pursued whereas in *A & Others*, the proceedings centred on the legality of detention given that the prohibition of deportation has been conceded.[910]

Detention in the UK has no time limit . Gurd argues that the indefinite detention is a failure given that it is 'increasingly seen as a symptom of a fundamentally dysfunctional detention system and an example of the UK's treatment of unwanted migrants'. [911] There is therefore 'an impasse between the sanctity of liberty and the interplay of the statutory purpose of effecting removal'.[912] Johnston remarked that 'the importance of

[905] *Kanagaratnam v Belgium,* App no 15297/09 (ECtHR, 13 December 2011), paras 94-95
[906] (1993) 16 EHRR 197
[907] (1997) 23 EHRR 413
[908] cf *Shamsa v Poland* App no 45355/99 (ECtHR, 27 November 2003) where the Court held that detention for a period of several days unauthorized by a court, judge or any other person authorized by law to exercise such judicial powers cannot be said to be lawful within the context of Art 5 (1) ECHR
[909] *A & Others v UK* App no 3455/05 (ECtHR, 19 February 2009) para 167
[910] Cathryn Costello, 'Human Rights and the Elusive Universal Subject: Immigration Detention Under International Human Rights Law' (2012) 19 *Indiana Journal of Global Legal Studies* 257, 282
[911] Ruth Gurd, 'Redefining the Borders: The Call for Indefinite Detention Reform in the United Kingdom' (2011) 9 *Journal of Migration and Refugee Studies* 304, 309
[912] ibid; see Helen MacIntyre, 'Report exposes "indefinite immigration detention"' (2009) 23 (2) *Journal of Immigration Asylum and Nationality Law* 117, 118 for further reports on indefinite detention in the UK.

liberty both to the individual and society is too great to justify indefinite detention'.[913] Bosworth argues strongly that 'a period of detention neither changes the detainee nor prepares them for eventual return; rather what detention does is to confirm their identity'.[914] The growth in immigration detention and deportation only reveals the scale of power the State is able and willing to use. The HM Inspector of Prisons found in 1997 that 10 percent of detainees have been locked up for more than one year.[915] Amnesty International in 1996 surveyed 150 detainees and found that 82% of them have continuously been detained since their application with less than 7% detained solely in order to facilitate removal. The sample records an average of five months incarceration. [916] In the year 2002, the Home Office Select Committee reported that 32% of migrants have been in detention for more than four months including children.[917] In 2007, it was recorded by HM Inspector of Prisons that 18 detainees in Colnbrook Removal Centre had been detained for over one year, 46 for more than two years and 9 for more than three.[918] The maximum recorded was eight years concerning an Algerian plumber.[919]

While the above figures might represent the position on ground, the open-ended nature of the statistics kept by the Home Office can mean that this cannot be with all amount of certainty. On surface, when the UK's state practice on detention is compared with international human rights standards, there exist some lacunae. In essence the length of detention of migrants in the UK is at variance with international human rights standards even as established by Art 9 ICCPR.[920] The HRC has explained that 'State Parties need to show that detention does not last longer than absolutely necessary, that the overall

---

[913] Connor Johnston, 'Indefinite Detention: Can it be justified' (2009) 23 (4) *Journal of Immigration, Asylum and Nationality Law* 351, 355

[914] Mary Bosworth, 'Subjectivity and identity in detention: Punishment and society in a global age' 16 (2) *Theoritical Criminology* 123, 134-135

[915] HM Inspector of Prisons, 'An Inspection of Campsfield House Immigration Removal Centre' (March2002)<http://www.justice.gov.uk/downloads/publications/inspectorate-reports/hmipris/immigration-removal-centre-inspections/campsfield-house/campsfieldhouse02-rps.pdf> accessed 03 September 2012. This document makes reference to the previous years' inspections.

[916] Richard Dunstan, *Cell Culture* (Amnesty International 1996) 1

[917] Home Affairs Committee *Asylum Removals 4th Report of Session* (HC 2002-03) 26

[918] HM Inspector of Prisons, Report on an unannounced follow-up inspection of Colnbrook Immigration Removal Centre' (18-22 June 2007) <http://inspectorates.homeoffice.gov.uk/hmiprisons/inspect_reports/ircinspections.html/544553/> accessed 03 September 2012

[919] London Detainee Support Group, 'Detained lives' (January 2009) <http://www.detainedlives.org/wp-content/uploads/detainedlives.pdf> accessed 03 September 2012

[920] ICCPR Art 9 (1)

length of possible detention is limited and that they fully respect the guarantees provided for by Art 9 in all cases'.[921]

With respect to refugees and/or asylum seekers, Guideline 6 of the UNHCR Detention Guidelines states that indefinite detention is arbitrary and law should establish maximum limit on detention.[922] Quite recently in August 2015, the Human Rights Committee expressed concern that 'no fixed time limit on the duration of detention in immigration removal centres has been established and that individuals may be detained for prolonged periods' while advising that 'a statutory time limit on the duration of immigration detention be established while ensuring that detention is a last measure of resort and is justified as reasonable, necessary and proportionate'.[923]

A multiplier effect of the legality of detention was exemplified when some detained migrants won thousands of pounds compensation for illegal detention. Notable amongst the cases were Vasyl Vovk, a Ukrainian national and Bironjit Kumar Datta from Bangladesh where the Home Office failed to make prompt decisions on whether or not they should continue to be detained awaiting deportation after serving their prison sentences- a case seen as failure to apply reasonable diligence and expedition.[924] Similarly, an asylum seeker was paid £150,000 compensation for unlawful detention where the appellant mother and family were detained while their appeal was in progress against the Home Office's own policy on asylum seekers.[925]

---

[921] HRC 'General Comment No 35, Article 9: Liberty and security of person (Advance Unedited Version) CCPR/C/GC/35 (28 October 2014) UN Doc no CCPR/C/GC/35, para 15, see also HRC 'Commission on Human Rights Working Group on Arbitrary Detention, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment regarding the situation of immigrants and asylum seekers' (1999) UN Doc E/CN.4/2000/4/Annex 2

[922] UNHCR 'Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers' Guidelines 6 (n36)

[923] HRC, Concluding observations on the seventh periodic report of the United Kingdom of Great Britain and Northern Ireland (2015) UN Doc CCPR/C/GBR/CO/7, para 21

[924] Editorial, 'Illegal immigrants win compensation over 'unlawful' detention' *Mail Online* (London 13 December 2006) <http://www.dailymail.co.uk/news/article-422429/illegal-immigrants-win-compensation-unlawful-detention-html> accessed 14 December 2012

[925] Tom Whitehead, 'Asylum Seeker family wins £150,000 compensation' *Telegraph* (13 February 2009) <http://www.telegraph.co.uk/news/uknews/law-and-order/4606367/Asylum-seeker-family-wins-150000-compensation.html >accessed 14 December 2012

4.5 Detention and Bail

It has been asserted that in the UK there is a presumption of liberty flowing from the Magna Carta[926], a pre-eminent right and the core foundation of the UK's liberal democracy. This means that no person within the jurisdiction of the State can be deprived of his liberty without cause irrespective of the person's immigration status.[927] It is common ground that the courts will seriously guard the liberty of persons and it will obviously require clear words in a statute to take away liberty or to interfere with it.[928] The courts have also expressed that the broad statutory discretion to detain will be narrowly and strictly construed while ensuring that they are only exercised for proper purpose.[929]

In the UK, it has been shown that detention is indefinite but the power is limited to duration and circumstances and must be reasonable. Article 5 (4) of the ECHR requires that anyone who is deprived of his liberty by arrest or detention shall be entitled to proceedings to determine the lawfulness of his detention, which shall be decided speedily by a court and released if detention is unlawful. Therefore the application for bail is a crucial safeguard for anyone in detention.

The typical argument in a bail application is that the discretion to detain should not be exercised in a given case implying that the applicant should be released. In immigration and asylum matters, there is no automatic bail hearing unlike in criminal cases but detainees have a right to apply for bail.[930] The rules do not allow an application for bail by those detained pending examination for less than eight days in the UK.[931] I contend that there is no justification for the eight days limitation prior to grant of bail if criminal defendants must be charged to court or released within 48 hours. An ordinary immigration offender or asylum seeker of vulnerable stature does not require to be detained for the purposes of examination for eight days; this evidently and as discussed

[926] Magna Carta 1215 (n160)
[927] *Kwawaja v SSHD* [1984] AC 74 [110-112] (Scarman LL)
[928] *Tan Te Lam v Superintendent of Tai A Chau Detention Centre* [1997] AC 97; *R v SSHD ex p Simms* [1999] 3 WLR 328
[929] *Re Mahmood (Wasfi)* [1995] Imm AR 311 (Laws J)
[930] This is provided in the 1971 Act Sch 2, paras 22-29 and section 54 of the 1999 Act
[931] This is provided under sch 16 (1) and paragraphs 22 (1B) of the 1971 Act

above is at variance with international human rights standards and an affront to liberalism.

The power to grant bail rests either on the Chief Immigration Officer (CIO) before eight days detention[932], with the Secretary of State[933] after the period of eight days and before an Immigration judge[934] thereafter usually with conditions attached to bail. Furthermore, the right to bail lies before the Special Immigration Appeals Commission for those whose detention have been certified by the Secretary of State as necessary in the interest of national security or deportation on national security grounds.[935] The lawfulness of detention on its part can only be challenged by way of judicial review or the prerogative writ of habeas corpus. [936]

However, the question that engages this research is not whether there is a right to bail but whether the procedures enabling the enforcement of those rights are substantively sound and procedurally fair consistent with international human rights standards even in the light of Art 5 (4) ECHR or whether they are carefully orchestrated to inhibit the release of the detainee or to frustrate them to take voluntary return.

4.5.1 Bail Hearing and Connected Procedures

The rule allowing for bail hearing in the UK is currently located in the Consolidated Asylum and Immigration (Procedure) Rules 2005[937] and in the Practice Directions of the Immigration and Asylum Chambers of the First Tier and Upper Tribunal[938] and the Practice Statements of the Immigration and Asylum Chambers of the First Tier Tribunal and Upper Tribunal[939] augmented by the 2003 Bail Guidance Notes and Note 1 Bail

[932] This is provided under Sch 2 paras 22, 29 and 34 of the 1971 Act
[933] Section 68 of the 2002 Act takes away the power of the CIO to grant bail after eight days to the Secretary of State.
[934] Sch 2, para 22 (1A) of the 1971 Act
[935] Special Immigration and Appeals Commission Act 1997 section 3 (1) and amended by The Nationality, Immigration and Asylum Act 2002 (Consequential and Incidental Provisions) Order 2003 SI 2003/1016, Schedule 10
[936] The writ of habeas corpus is an ancient remedy regarded as constitutionally important as a means whereby the court can investigate the reasons for any detention and to order release if unlawful, see Halsbury's Laws Vol 1 (1) para 208; note also that the relationship between judicial review and habeas corpus was pointed out in *R v SSHD ex p Sheikh* [1999] EWCA Civ 1320 with respect to time limits.
[937] This is a Statutory Instrument (SI No. 230)
[938] Part 3 (13) of the Tribunals Judiciary, Practice Directions of the Immigration and Asylum Chambers of the First Tier Tribunal and the Upper Tribunal (10 February 2010)
[939] Part 2 of the Tribunals Judiciary, Practice Statements of the Immigration and Asylum Chambers of the First-Tier Tribunal and Upper Tribunal (10 February 2010)

Guidance 2012.[940] The Home Office policy on bail is located at Chapter 57 of the Enforcement Instruction and Guidance (EIG) which rhetorically provides that Ministers have given a commitment that detention will only be used as a last resort given that the presumption is to grant temporary release where possible except when considered inappropriate.

In a bail hearing, the burden of proof rests on the Home Office to prove that bail is inappropriate. [941] The EIG refers to the common law presumption in favour of bail read together with the UNHCR's position, which holds that there is a presumption against detention and further accentuated by the State parties' obligations regarding the right to liberty. [942] Nevertheless, there is no statutory presumption in favour of immigration detainees as there is for those in criminal detention.

The Home Office Presenting Officer (HOPO) represents the State and is required to file a bail summary showing reasons for opposing bail. This should be done no later than 2 pm on the business day before the scheduled date of hearing. I argue that the service of bail summary by 2pm prior to the next day scheduled date for bail hearing is in itself not sufficient for the detainee to mount a solid argument against the Home Office's case as the detained individual, requires to successfully dispute the bail summary if bail must be granted. This practice of less than a day is not consistent with the ruling that the detainee must be allowed adequate time to prepare an application for release.[943] Moreover, the refusal to allow adequate preparation for bail hearing leads to the argument by legal representatives and detainees alike that immigration bail is played as a lottery in the light of the rules. This gives rise to the withdrawal of applications when they appear before certain judges whose antecedents are deemed hostile to applicants,[944] thus culminating to the number of repeat bail applications, which outnumber first time applications.

[940] AIT, 'Bail Guidance Notes for Adjudicators from the Chief Adjudicators' (May 2003); Clements J' President of the First Tier Tribunal Immigration and Asylum Chamber Presidential Guidance Note No 1 of 2012: Bail Guidance For Judges Presiding Over Immigration and Asylum Hearings' (11 June 2012)
[941] This mirrors the decision in *Zamir v UK* (1983) 5 EHRR 242, para 58 which holds that the burden for justifying detention falls on the State.
[942] ibid
[943] *Farmakopolous v Belgium* (1993) 16 EHRR 187, para 51
[944] BID, 'The Liberty Deficit: the long-term detention and bail decision-making; a study of immigration bail hearings in the First Tier Tribunal' (November 2012) 6

Bail applications in the eyes of legal representatives and the tribunal are ancillary to the main immigration case. It follows that if a migrant has been detained for a month or more without deportation or removal, there should therefore be heightened need for the bail system to operate as a proper check on detention. Therefore fairness in bail outcomes should be reflected in the structures and safeguards. Procedural rules should be followed and bail summaries served on time. The debate is that these safeguards are still failing. One reason is that despite clear and stronger guidance to First Tier judges on the use of bail in principle and the use of directions to parties, these elements nevertheless, are not reflected in practice in the light of the revised bail guidance.[945] The conclusion is that the Tribunal is not using its available powers sufficiently to ensure that detention does not become unnecessarily prolonged.

The timing of bail applications on its own raises fundamental issues about the willingness of the State to respect the individual's right to liberty and equality of arms. This is because there is no right to automatic bail hearing even after a set of number of days in detention, rather what is obtainable is for the detainee to know of such opportunity and to make the application with or without legal representation.[946] The implication is that a detainee is faced with the issue of securing legal representation, which may be funded publicly if the means test, financially eligibility and merit tests are passed before the provision of legal aid is granted.[947]

The critical issue is that detention is time related. How plausible would it be for a detainee who has been served with removal directions to be granted public funding when removal is imminent? How plausible would it be for an asylum seeker to easily source adequate legal representation in an alien country having just arrived in the country? As BID puts it, 'the availability of legal aid for immigration challenges exists only in name and may have been carefully planned with a view to maintaining detention of migrants'.[948] The obvious consequence is that the presumption in favour of release as rhetorically adumbrated by the State appears to fizzle out quickly which leads to the argument that there was no intention *ab initio* to grant bail and the use of detention as a

[945] ibid, 8
[946] BID, 'A nice judge on a good day: immigration bail and the right to liberty (July 2010) 16
[947] ibid, 16
[948] BID, Out of sight, out of mind: experiences of immigration detention in the UK (July 2009) 34-44

last resort.[949] The legal requirement that detainees must therefore be brought promptly before a court becomes a mirage, as this may not actually happen in practice. In *Torres v Finland* [950] the HRC found an infringement of Art 9 (4) where Finnish law did not allow access to court until after seven days of detention thereby mirroring the UK's practice of the 8-day rule in detention. What then is the rationale for the first week in detention without review by the courts? Have the powers of the courts not been usurped or emasculated by State detention authorities? Has the detainee enjoyed an effective opportunity to be heard promptly by a judicial or other authority in the light of these procedural barriers?

4.5.2 Procedural Barriers

It is contended that the processes and procedures have a multiplier and cumulative effect on the outcome of bail hearings and by extension on the right to liberty. Procedural fairness is 'an essential attribute of the judicial function which is guaranteed by the common law principles of natural justice, article 6 of the ECHR and the overriding objective'.[951] A tribunal must act fairly and judicially. Judges must act on all evidence before them in order to reach a rational judgment; a requirement that they must act with scrupulous fairness will add nothing.[952] Fairness is therefore expressed as the right to fair hearing. The relationship between fairness and procedural legislation is that the rules of procedure must endeavour to make specific provision for eventualities that may occur regarding proceedings.[953] The Tribunal, Court Enforcement Act 2007 (TCEA 2007) applies the rules of procedure and practice directions, which are subject to the overriding objectives.[954]

Many detainees who cannot access quality legal representation must know of the availability of how to make a bail application in addition to language difficulties that some detainees encounter. This problem led the Joint Committee on Human Rights to

[949] There appears to be a general consensus in the legal instruments that when detention has taken place, judicial review must be prompt ["without delay"] (ICCPR Art 9 (4), the American Convention on Human Rights Art 7(6), The ECHR Art 5 (4) ["decided speedily"]
[950] *Torres v. Finland* CCPR/C/38/D/291/1988 UN Human Rights Committee (HRC) 5 April 1990
[951] Edward Jacobs, Tribunal Practice and Procedure: Tribunals under the Tribunals, Courts and Enforcement Act 2007 (2nd edn, Legal Action Group 2011) 113
[952] *R (M) v Inner London Crown Court* [2003] 1 FLR 994 [45] (Henriques J)
[953] Edward Jacobs, *Tribunal Practice and Procedure: Tribunals under the Tribunals, Courts and Enforcement Act 2007* (n951) 113
[954] See The Tribunal Procedure (Upper Tribunal) Rules 2008, Part 1 Introduction-Overriding objectives

state that there are sufficient evidence that although the right to apply for bail exists after seven days but in reality many detainees are unaware or unable to exercise the right either because of language difficulties and/or lack of legal representation.[955]

There is also a connection between quality representation and successful bail applications. In a survey by BID and Refugee Council in 2008, it was reported that 50% of the applicants in the bail applications examined were not legally represented and none of the cases without legal representation were successful.[956] This could have informed the ECtHR to place a proactive duty on the State to provide legal assistance during Article 5 (4) hearings whenever this is considered necessary to enable the detainee to make effective application for release.[957] Furthermore, in *Amur v France*[958] the court held detention to be unlawful because no provision was made for legal, humanitarian and social assistance.

In practice, aside the seemingly inability to access legal aid and inability to access quality legal representation, detainees face an uphill task. A case in point is the introduction of the policy 'hub and spoke' in 2009 by HM Prison designed to increase the speed and efficiency of removals where male foreign prisoners can be removed quickly from the UK which arguably affect their chances to be granted bail.[959] When this is viewed alongside the expansion of detention regime and the inability to access legal aid and quality legal representations *inter alia* raise fundamental concerns for the lawfulness of detention.

4.6 Conclusion

Detention in the eyes of a detainee is seen as a form of torture without physical violence, which instills fear, silence and isolation, as detainees are located in complete

[955] Joint Committee on Human Rights, 'The Treatment of Asylum Seekers: Tenth Report from Session 2006-07' (22 March 2007 HL 81 HC 60) 280
[956] Bail for Immigration Detainees and the Refugee Council, Immigration bail hearings by video link: a monitoring exercise (March 2008) 6
[957] *Megveri v Germany* (1992) 15 EHRR 584, para 54; *Woukan Noudefo v France* (1988) 13 EHRR 549; *Winterwerp v Netherlands* (1992) 2 EHRR 387 and Principle 17 (1) of the UN Body of Principles on All Forms of Detention (n34)
[958] (1996) 22 EHRR 533, para 53
[959] Ministry of Justice National Offender Management Service and the Home Office UK Border Agency, 'Service Level Agreement to support the effective management and speedy removal of foreign national prisoners' (April 2009) <http://www.irr.org.uk/pdf2/FNP_SLA.pdf> accessed 17 September 2012; see also *R (Konan) v SSHD* [2004] EWCA 22 where the movement of a detainee from June 2002 where he was detained another detention in Scotland, delayed bail application until September 2002.

isolation. It has been identified that common law principles in immigration detention in the UK presupposes that the State must engage the issue of necessity, reasonableness, due diligence and proportionality as in the case of *Hardial Singh* and *ex parte I* string of cases. That position can be contrasted with the decision in *Saadi v UK* where the court refused to accept that necessity was required for immigration detention, which many have seen as an excessive executive deference. Strasbourg court seems to have thrown proportionality to the winds by its decision in *Saadi v UK* despite the fact that proportionality is in essence a balancing exercise underpinning the ECHR in Art 8-11 ECHR with the 'necessary in a democratic society' test. A restriction cannot be regarded as 'necessary in a democratic society' unless it is proportionate to the legitimate aim pursued. In its latter decision in *Rusu v Austria*, the ECtHR surprisingly abandoned its previous stance in *Saadi v UK* and accepted the necessity adjunct but did nothing to incorporate it into its interpretation of Art 5 (1) (f) on detention.

In essence the right to liberty which has been described as the oldest form of human right in the light of the Magna Carta 1215 and Petition of Rights 1628 has been compromised with debilitating effect on the rights of migrants. The UK's Home Office policies on its part mirror an amalgam of the common law principles and Strasbourg but actual practice with respect to the liberty rights of migrants remains a mirage. International human rights standards for the protection of liberty appear to have been compromised by the decision in *Saadi v UK* and numerous State practices in the UK, USA and Australia. It follows that States even in the face of treaty obligations are wont to following similar practices whether or not such decisions are in conformity to their obligations under international human rights law. Despite this seeming intransigence, the UNHCR posits that the detention of asylum seekers [migrants] is inherently undesirable and only accepted if it is brief, absolutely necessary and implemented where other options have been exercised leaving detention as the last resort.

The core concept in the ECHR in general is that of the rule of law described in its preamble as part of a common heritage shared by all signatories and is one of the fundamental principles of a [liberal] democratic society. With respect to Article 5 ECHR, what is paramount are two limbs notably the test for the legality of detention on the one hand and a set of procedural rights for detainees on the other hand. I argue that these may be substantively legal but the procedures for safeguarding those rights may be otiose and hence unreachable. It is lamentable to find that wider rights are afforded

to criminal suspects allowing them to apply to the court for the review of the desirability of detention pending trial in the light of Art 5 (3) ECHR, which do not apply to immigration detainees that are not charged with criminal matters.

It is further contended that detention may be lawful but arbitrary. In essence what is required is not simply an assessment of legality of detention as it is but the definition should encompass a broader test of substantive arbitrariness to include decisions, which are unreasonable, unjust, bad faith, delayed, and unpredictable. I argue that an unreasonable decision, delayed decisions or where the State's laws are not precise and predictable is an affront on the rights of migrants and a harbinger for human rights violations contrary to the tenets of liberal democracies that emphasize the rule of law. The important questions are: why would the ECtHR reject the requirements for necessity and proportionality while accepting due diligence or reasonable time into its lexicon of arbitrariness? Can arbitrariness be well defined without the requirement of necessity and why would the reasonable threshold of the EU standards of proportionality be subjugated to the arguably irrational standards of Strasbourg jurisprudence? The further question is if administrative detention is a measure taken to facilitate expulsion policies and where expulsion figures are dropping as against increasing detention, how can administrative detention be justified?

In the UK, anecdotal evidence confirms that detainees are detained in places with poor hygienic standards as revealed by the HM Inspector of Prisons in a published report in 2000. The same position applies to the USA and Australia with the exception of France. In the UK, the Vulnerable People Working Group of the Detention Forum (VPWG) published a catalogue of human rights breaches by the Home Office regarding the detention of mentally unwell persons in cases, which has been described as forming a pattern of systemic failings within the immigration detention system leaving the most vulnerable at risk.[960] Prominent amongst the catalogue of cases is the case of *R (S) v SSHD*[961] where the High Court found that the detention of a mentally ill man by the UKBA amounted to cruel, inhuman and degrading treatment under Article 3 ECHR.[962]

[960] Briefing by the Vulnerable People Working Group of the Detention Forum (VPWG) 'The Detention of Vulnerable People: Human Rights Breaches in the UK (10 December 2012) <http://detentionforum.wordpress.com/2012/12/10/briefing-paper-the-detention-of-vulnerable-people-human-rights-breaches-in-the-uk/> accessed 12 December 2012

[961] [2011] EWHC 2120 (Admin)

[962] See also *R (BA) v SSHD* [2011] EWHC 2748 (Admin)

It follows that liberal democracies do not reflect their liberal ideologies of fairness with respect to detention, which as highlighted above remains antithetical to their obligations as states where the rule of law holds sway. Here lies the fundamental contradiction or paradox at the heart, arteries and veins of a liberal democracy, which enunciates universality and the same time, indulge in the practice of closure.

Chapter 5. Deportation, Removal and the Contrivance of Deportability

5.1 Introduction

Detention as deprivation of liberty, discussed in the preceding chapter, is a prelude to deportation and/or removal. While 'detention serves as an enclosure and exclusion from the receiving society, deportation involves an explicit form of exclusion'.[963] Therefore deportation and/or removal, which function as a corollary to detention, aims to enforce the departure of the migrant out of the State, lending credence to the argument that deportation and/or removal have become integral and key aspects of immigration control.[964]

Relying on the customary rights of State sovereignty, States have in principle the freedom to expel aliens [migrants] in their territorial jurisdiction.[965] It is unarguable however that with the advent, emergence and development of global and regional human rights institutions, States by virtue of their treaty obligations incumbent on these developments have ceded a measure of their sovereignty.[966] In essence, the emergence of the ECHR characterized as an international human rights treaty with regional compass becomes germane[967] given that freedoms enumerated in the ECHR are resultantly predicated on the recognition by States that individuals have rights because they are human beings, regardless of certain differentiations between aliens and citizens as permitted under international law.[968]

---

[963] Liza Schuster, 'The Exclusion of Asylum Seekers in Europe' (2004) Centre on Migration, Policy and Society Working Paper No. 1, 3 <http://www.compas.ox.ac.uk/media/WP-2004-001-Shuster_Asylum_Europe.pdf> accessed 14 September 2014; Alice Bloch and Liza Schuster, 'At the extremes of exclusion: Deportation, detention and dispersal' (2005) 28 *Ethnic and Racial Studies* 491

[964] For full details of the discussion on Detention, see Chapter 4 of this Thesis

[965] See discussions on the issue by the following authorities- H. King, 'The Extraterritorial Human Rights Obligations of States' (2009) 9 (4) *Human Rights Law Review* 521; M P Pederson, ' Territorial Jurisdiction in Article 1 of the European Convention on Human Rights' (2004) 73 *Nordic Journal of International Law* 279

[966] C Dauvergne, 'Sovereignty, Migration and the Rule of Law in Global Times' (2004) 67 *Modern Law Review* 588, 589; C Schreuer, 'The Waning of the Sovereign State: Towards a New Paradigm for International Law?' (1993) 4 *European Journal of International Law* 447

[967] Ian Bryan and Peter Langford, 'Impediments to the Expulsion of Non-Nationals: Substance and Coherence in Procedural Protection under the European Convention on Human Rights' (2010) 79 Nordic Journal of Law 457, 459; Alison Harvey, 'Expulsion and Exclusion' (2007) 21 (3) *Journal of Immigration, Asylum and Nationality Law*, 208, see also ICCPR Art 7; ECHR Art 3

[968] See chapter 2.3 of this thesis; ECHR Art 1; Council of Europe Parliamentary Assembly Resolution 1031 (1994) < http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta94/ERES1031.htm> accessed 11 July 2013

This chapter will discuss the historical dimensions of deportation and/or removal, grounds and rationale for deportation, the trends and turns in contemporary deportation regimes and substantive legality as challenged by deportation inhibitions. This invites a further inquiry as to whether contemporary deportation regime in the United Kingdom and by extension in liberal democratic states is the emergence of a new legal framework of state power.

It will also discuss the role of the ECtHR on removal in order to ascertain its relevance in promoting or inhibiting removal of migrants in a liberal democracy given the necessary in a democratic society adjunct. In short, the legality of deportation and/or removal practices within the confines of the rule of law and minimum procedural safeguards as encapsulated by international human rights law will be engaged. The putative question is whether the United Kingdom complies with its treaty obligations under International Human Rights law in the act of deportation and removal of migrants?

Discussions will be taken further to the contrivance of deportability and/or removability, which for our purpose finds expression in the legislative and judicial architecture being that deportation or removal in the United Kingdom is unarguably constructed by a combination of legislative and judicial actions. The State can change its laws as it wishes in conformity with acceptable international human rights standards but the idea is to query whether legislation associated with deportation and/or removal are constantly and in an unrestrained manner, enacted, revised and re-enacted to achieve deportation in contrast to the doctrine of legitimate expectation encapsulated under the principle of legal certainty. This is given that evidence shows that the earlier Immigration Acts have been amended by a vast accretion of other Acts, with some provisions re-enacted, enlarged and some, consolidated-a complex set of immigration laws. [969]

By operating a complex set of immigration laws, described by a High Court Judge as a "disgrace"[970] the United Kingdom enhances deportation and/or removal which arguably

[969] Macdonald and Toal (n580) 1

[970] See *R (On the application of RA (and by his litigation friend) and another) v SSHD IJR* [2015] UKUT 00242 (IAC); *R (on the application of RA) v SSHD IJR* [2015] UKUT 00292 (IAC), the Judge in that decision criticized the complexity of Britain's immigration laws, describing the multiplicity of rules as a "disgrace"

means that, the more the 'laws', the easier it becomes to achieve deportation and/or removal, the more complex the laws, the easier it becomes to attract violation. Vehemently put, the more the laws are made, the more the atmosphere of deportation is created. It is therefore queried whether deportation or removal laws as they stand may have been contrived to enhance deportability or removability. As Edwards recounts, "the constantly changing laws and regulations lead much to confusion and lack of accountability"[971], given that the prevalence of a vast body of case law adds to the already difficult burden of operating these complex legislations, to the extent that keeping track of the law and practices have become a superhuman task.[972]

It is further argued that the ever increasing and shifting pattern of deportation laws (some of which are retroactive) appears to violate the basic principles of human rights norms. This is heightened by the fact that these laws are either discretionary or couched in rigid terms leaving less chance for compassionate considerations even in the light of unclear judicial interpretation given to some of these deportation laws. Discussions will revolve around the issues of legal certainty and legitimate expectation, the criminalization of immigration (hereinafter 'crimmigration') its effects and implication for the migrant in a deportation and removal regime.

Additionally, references in this chapter will equally be made to three other selected liberal democratic states-the United States of America, Australia and France whose deportation reality offers significant similarities with the UK even in the light of the growing nature of deportation and/or removal business. This is in order to put the analysis of deportation issues in the UK within the broader context of other liberal democracies by way of convergence, divergence, diffusion and dilemmas of practices in immigration control.

[971] Emmanuela Paoletti, 'Deportation, non-deportability and ideas of membership' (2010) *RSC Working Paper Series* 65/2010, 15 citing Alice Edwards, 'Rights of Immigrants in voluntary and involuntary return procedures in national law' (2009) Thematic Legal Study on rights of irregular immigrants in voluntary and involuntary return procedures <http://www.lepnet.org/sites/default/files/upload/og_files/RSC%20Deportation,%20non-deportability%20and%20ideas%20of%20membership.pdf> accessed 12 November 2013

[972] Macdonald and Toal (n580) 1

5.2 Conceptualization and Contextualization

Deportation and removal are inextricably intertwined but given their different statutory bases are distinctively defined. Deportation is defined by the Immigration Act 1971 section 5 (1) (2) and paragraphs 362 of the Immigration Rules, as a process where a non-citizen can be forcibly removed from the UK by virtue of an order and prohibited from returning unless the order is revoked.[973] It therefore authorizes detention of the person until the subject leaves the UK, prohibits re-entry while the order is in force and invalidates any leave to remain, which the person has during the subsisting order.[974] The power to deport is exercised by the Secretary of State consistent with Immigration Act 1971 s 5 (1) but may equally be performed by certain other officials as delegated to them by the Secretary of State.[975] A distinguishing feature of deportation from other compulsory or forceful removal is that deportation brings a particular application or entry to an end but may create further difficulties for a migrant seeking future re-entry.

Removal on the other hand refers to all enforced departures thus describing the actual embarkation, which is preceded by a removal direction.[976] With the coming into force of the 1999 Immigration Act, s 10, removal became known as 'administrative removal', which strictly speaking distinguishes removal from deportation. This is embedded in the fact that prior to the coming into force of the 1999 Act, deportation applied to persons who had leave to enter or remain whom the Secretary of State intended to remove or those recommended for deportation by a court following criminal conviction, whereas administrative removal applied to those who had no leave to enter or to irregular migrants.[977] Furthermore, while deportation is reserved for more serious cases of violation of immigration law where the non-citizen will be required to leave the UK and prohibited from entry while the order is still in force, administrative removal on its part is reserved for less breaches of immigration law that does not apply the prohibition clause but might create obstacle for re-entry for a particular period, as captured under the Immigration Rules, paragraph 320-321.

[973] Immigration Act 1971, Section 5 (1) and (2)
[974] Immigration Act 1971 Section 5 (1) and Paragraph 362 of the Immigration Rules
[975] See *Carltona Ltd v Commissioner of Works* [1943] 2 All ER 560 CA; *R (Munir) v SSHD* [2012] UKSC 32; *R (Alvi) v SSHD* [2012] UKSC 33
[976] Immigration Act 1971 Sch 2, para 9
[977] David Jackson and others, *Immigration Law and Practice* (4th edn, Tottel Publishing 2008) 974

In addition, deportation and removal attract different congeries of rights with respect to in country and out-country rights of appeal, as established in Section 10 of the Immigration Act 1999, section 47 of the Immigration, Asylum and Nationality Act 2006, section 82 of the Nationality Immigration and Asylum Act 2002, section 32 of the UK Borders Act 2007 with exceptions at section 33 and section 15 of the Immigration Act 2014 which amends Part 5 of the 2002 Act.[978] Quite recently, section 63 of the Immigration Act 2016 with the 'deport first and appeal later' provisions, which came into force on 01 December 2016, further distinguished appeal rights as it relates to deportation and removal.[979]

Walters refers to deportation as the removal of aliens [migrants] by State power from the territory of that State, either voluntarily under the threat of force, or forcibly.[980] For Clayton, deportation may take place where its grounds are either proved or deemed proved by statute while removal regardless of its devastating effect is an enforcement process; the grounds for it being regulatory and based on immigration control.[981] But for Jackson, there is no clear or principled distinction between the processes of deportation and administrative forms of removal except on statutory bases.[982] Gibney on his part, refers to deportation as the departure of individual non-citizens under the threat of coercion by State authorities for breaches of immigration or criminal law elaborated as a broad account that go under a range of different nomenclatures in different States such as expulsion, removal or judicial deportation.[983] He opined that while each of these may capture different congeries of rights, protections and entitlements, they nevertheless result in the expulsion from the State under the operation of the law.[984]

In short, the terms deportation and removal, for our purpose are used in this thesis distinctively because each attracts different rights of appeal. Deportation and/or removal are encapsulated under the term 'expulsion'. Several authors prefer the use of expulsion

[978] See also sections 82, 84, 92 and 94B of the Nationality Immigration and Asylum Act 2002 dealing with certification of human rights claims made by a person liable to deportation
[979] 'In-country' depicts appeals that are allowed in the UK while 'out-country' are appeals having been removed; see also the Nationality, Immigration and Asylum Act 2002 s 82; Section 51(3) of the Crime and Courts Act 2013 amended section 47 of the Immigration, Asylum and Nationality Act 2006; see also *Adamally and Jaferi (section 47 removal decisions: Tribunal Procedures)* [2012] UKUT 00414 (IAC)
[980] William Walters, 'Deportation, Expulsion and the International Police of Aliens' (2010) 6 *Citizenship Studies* 265, 266
[981] Clayton, (n465) 580
[982] Jackson and others (n977) 973
[983] Matthew J Gibney, ' Is Deportation a form of Forced Migration' (2013) 32 *Refugee Survey Quarterly* 116, 119
[984] Gibney, 'Is Deportation a form of Forced Migration' ibid

to describe deportation and/or removal.[985] Consistent with this is Goodwin-Gill who described expulsion as the exercise of State power that secures either the voluntary or enforced removal of an alien [migrant] from the territory of the State noting that terminologies vary from State to State.[986] However, Henckaerts observes that expulsion is more generally used in international law while deportation is preferred in municipal law.[987] For our purpose, expulsion will be used as an expression in international law to describe either deportation or removal but with the understanding that all successful deportation or removal results in the actual removal of a migrant from the territory of the State.

5.3 Historical Dimensions of Deportation and Removal

Deportation as a form of expulsion commenced with exile that has been described as the ancient custom of all nations used against the individual who is a member of a political community or nation.[988] Walter reconstructs that in Ancient Greece, exile was often the penalty for homicide while ostracism was for those guilty of political crimes.[989] Kedar recounts that the word *deportatio* was used by the Romans to mean banishment to some outlying place outside of the empire.[990]

By and large, modern forms of deportation commenced with the restriction of relief to the local poor and the denial of such relief to foreigners to the extent that the policing of the foreign poor became by the late nineteenth century, a major preoccupation of deportation policy.[991] Expulsion is 'a kind of convulsion that accompanied the birth of the modern state system that allowed political authorities to find other ways of regulating their population'.[992] As Arendt stated, 'the persecution of refugees and others

---

[985] Ian Bryan and Peter Langford, 'Impediments to the Expulsion of Non-Nationals' (n985); Alison Harvey, 'Expulsion and Exclusion' (2007) 21 (3) *Journal of Immigration, Asylum and Nationality Law*, 208

[986] Guy S Goodwin-Gill, *International Law and the Movement of Persons between States* (Clarendon Press 1978) 201

[987] J M Henckaerts, *Mass Expulsion in Modern International Law and Practice* (Martinus Nijhoff 1995) 5; see also Eric Fripp, Bowena Moffat and Ellis Wilford (eds) *The Law and Practice of Expulsion and Exclusion from the United Kingdom: Deportation, Removal, Exclusion and Deprivation of Citizenship* (Hart Publishing 2015) x in their use of the terms expulsion or exclusion.

[988] William Walters (n980) 269

[989] Walters ibid; see also Hannah Arendt, *The Origins of Totalitarianism* (Cleveland 1964) 296, in her commentary statelessness and what she described as having lost "the rights to have rights".

[990] B Kedar, 'Expulsion as an issue of world history' (1996) 7 (2) *Journal of World History* 165, 166

[991] William Walters (n980) 270

[992] Alfred J Rieber, 'Repressive population transfers in central, Eastern and South-eastern Europe: a historical overview' (2000) 16 *Journal of Communist Studies and Transition Politics* 16, 22

was not because of what they have done or thought but because of the fact that they were born into the wrong kind of race or class'.[993]

In the United Kingdom, the legal framework for deportation started with the 1905 Aliens Act where immigration officers were given the power to exclude 'undesirables'.[994] Schuster and Solomos see the importance of this Act as 'providing a mechanism of control for the first time since the reign of Elizabeth 1'.[995] Having further passed a more effective Aliens Restriction Act in 1914, targeting enemy aliens,[996] Holmes revealed that the Home Secretary and immigration officers were given the power to deport-a key political pledge by Lloyd George in 1918.[997] Following thereafter was the 1920 Aliens Order Act, where 'the Home Secretary retained the power to deport any alien whose presence was considered detrimental to the public good'.[998]

The next major Act, which had deportation as its central theme, is the 1962 Commonwealth Immigrants Act, followed by the 1968 Commonwealth Immigrants Act and the 1969 Immigration Appeals Act, s 16 authorising the deportation of Commonwealth citizens for breach of conditions, with the exception of those resident for five years. A further implication of the 1969 Appeals Act was that between 1904-1969 migrants subject to deportation did not have right to appeal their deportation.

The 1971 Immigration Act on its part cemented deportation for breach of conditions making aliens' easily deportable. This, in the view of Solomos introduced racialization of immigration control by targeting black and Asian migrants.[999] A paramount part of the Act was the granting of powers of deportation to immigration officers and use of

[993] Hannah Arendt, (n989) 294
[994] See particularly chapter 3.3 and 3.4 of this thesis for a discussion on immigration control in general; see also Robin Cohen, *Frontiers of Identity: The British and Others* (Longman 1994)
[995] Bloch and Schuster, (n882) 493-494 citing Liza Schuster and J Solomos, The politics of refugee and asylum policies in Britain: Historical patterns and contemporary realities' in Alice Bloch and C Levy (eds) *Refugees, Citizenship and Social Policy in Europe* (Macmillan 1999)
[996] Bloch and Schuster (n963) 494
[997] Block and Schuster, ibid 494 citing C Holmes, *A Tolerant Country: Immigrants, Refugees and Minorities in Britain* (Faber and Faber 1991)
[998] The Open University, 'Making Britain: 1920 Aliens Order' <http://www.open.ac.uk/researchprojects/makingbritain/content/1920-aliens-order> accessed 18 October 2014; see generally John Solomos, *Race and Racism in Britain* (3rd edn, Palgrave 2003) 217
[999] Solomos, ibid 185

fast track system for the prospective deportee. In a nutshell, 'what the Act did was the withdrawal of the right of appeal before an independent body'.[1000]

The Asylum and Immigration Act 1999 on its part under section 28 widened the ground for deportation that includes obtaining leave by deception with restricted appeal rights, dramatically translating most of the grounds for deportation into grounds for removal thereby further reducing the right of appeal of migrants and thus substantially eradicating the differences between deportation and removal.[1001] It is important to note that deportation powers were discretionary and exercised by the Secretary of State but with the UK Borders Act 2007, section 32-39 created a statutory obligation to make a deportation order in criminal cases automatically deemed as conducive to the public good.[1002] Block and Schuster therefore argue that 'the increase in deportation from the early 1980s onwards is due, in part, to the reduction of the powers of MPs to intervene to delay deportations […]'.[1003] They provided anecdotal evidence to show that despite increases in the serving of deportation orders only a minority are actually removed reasoning that regardless of the huge expenses incurred by government and distress experienced by deportees, there is still high indulgence by government.[1004]

5.4 The Contours of Deportation, Removal and the Liberal State

It is trite to posit that the power to deport flows from the State's exercise of sovereignty given that the grounds for deportation and/or removal of migrants may be determined solely by the State but the expulsion must not be abused but justified. Liberal States have resorted to the justification of deportation on criminality grounds,[1005] which has assumed exponential dimensions, as it is increasingly difficult to justify deportation on criminality grounds since the world today is gradually becoming a global village and what affect one State directly, affects others indirectly. Indeed, the commitment of a liberal state in the deportation of migrants is embedded in the fact that deportation is an inherently international act in a transnational setting requisite of a pact with another

[1000] Block and Schuster (n963) 495 citing Ann Dummet and Andrew Nicol, *Subjects, Citizens, Aliens and Others,* (Weidenfeld and Nicolson, 1990) 21-55
[1001] ibid; see further comments by D K Marrington, 'Commitment and contradiction in immigration law' (1986) 6 *Legal Studies* 272, 273
[1002] ibid
[1003] Block and Schuster (n963) 496
[1004] ibid
[1005] See section 5.7.5 of this thesis on detailed discussion on the effects of criminalization-over-criminalization (crimmigration) on the deportation of migrants.

state because deportation requires destination.[1006] The foreign criminal label or stereotype provides the amphitheatre and the lynchpin in the justification of deportation, which 'predominantly overcomes the lingering qualmishness of a liberal state to a politics of exclusion'.[1007] Crime control rhetoric is further added as justification for deportation by the liberal State thus expanding the scope of its power in the face of neo-liberalism,[1008] but the increased international coordination of policing through the instrumentality of deportation in my view, amounts to the international coordination of criminal justice system using immigration control as springboard.[1009]

From a sociological viewpoint, Walter notes that 'deportation is constitutive of citizenship and as such quite fundamental and immanent to the modern regime of citizenship in that its regulative function has become a sine qua non in the making of the world and a symbol of exclusion'.[1010] But for the lawyer, the State decides who becomes its citizen, thus international law allows States in the exercise of sovereignty to lay down rules governing the grant of its own nationality (citizenship) that may be immuned from deportation.[1011]

Kanstroom, referring specifically to American history, considers deportation as the evidence of the development and the refinement of a well focused but harsh government power, which is subject to minimal judicial oversight,[1012] but for the United Kingdom, deportation must meet the right to effective remedy standards enshrined under Art 13 ECHR.[1013] Put bluntly, deportation and/or removal is a key component that has done little to reduce irregular flow of immigration but has rather done much to drive irregular migrants into an underclass that degrades them and offends the moral sensibilities of liberal democracies.[1014] In the view of Kanstroom, deportation is a form of extended

[1006] Mathew Gibney, 'Asylum and expansion of deportation in the United Kingdom' (2008) 43 (2) *Government and Opposition* 146, 167
[1007] Mary Bosworth, 'Deportation, detention and the foreign-national prisoners in England and Wales' (2011) 15 *Citizenship Studies* 583,592-593
[1008] David Garland, *The Culture of Control: Crime and Social Order* (University of Chicago Press 2001) 167
[1009] See *Raghbir v Singh* [1996] Imm AR 507
[1010] William Walters (n980) 288
[1011] But note that historically the United Kingdom did deport its criminal population to Australia-between 1788-1868, see Alan Frost, *Botany Bay: the real story* (Black Inc 2011) 10; see also 'Immigration Control, Citizenship and the interplay of sovereignty' at chapter 3 of this thesis, see particularly chapter 3.2
[1012] D Kanstroom, *Deportation nation: outsiders in American history* (Harvard University Press, 2007) x
[1013] ECHR Art 13, cf Article 13 ICCPR
[1014] Jagdish Bhagwati, 'Illegals in our Midst: Getting Policy Exactly Wrong' (1998) Oct-Nov *Boston Review* 3, 7

border control, which enables states to exercise immigration control within their borders.[1015] Similarly De Genova and Peutz, state that deportation has emerged as a definite and increasingly convention of routine statecraft.[1016]

In short, deportation and/or removal is used to send individuals from a country where they do not belong or are not accepted as belonging, to a country where they belong,[1017] where deportable migrants are as a result, described as guests who have overstayed their welcome or vehemently put, as those through their criminal or other unlawful behaviour have abused the hospitality of their hosts.[1018] Walters on his part remarked that deportation is an act of "international policing of aliens" given that it is a practice which aims to return individuals to their rightful places of residence which in turn enforces a kind of international order entitling individuals who are qualified to remain in a State by virtue of their nationality.[1019] The foregoing illuminates the idea that the power of States in the pursuit of deportation are grounded on sovereignty and citizenship which seems constantly on the increase as compared to the decreasing power of migrants to resist deportation. But it remains to be seen whether this is justifiable and consistent with liberal democratic ideals or whether there are contradictions.

Pursuant to the above argument and specifically from a policy and political viewpoint is the postulation by Gibney and Hansen that the regulative function of deportation can be explained in terms of electoral politics and public expectation given that the state needs deportation to assure public opinion of its authority within national borders.[1020] However this is contrary to Baubcock's concept of liberal citizenship where he postulated that citizenship is disconnected from territory and formal legal status.[1021] This then sets in motion the universal argument for open borders as propounded by radical Universalists who argue that morally speaking, national borders are arbitrary and that the only morally consistent position will be open borders.[1022] Caren, a cosmopolitan

[1015] Kanstroom, *Deportation nation* (n1012) x
[1016] De Genova and N Peutz, *The Deportation regime: sovereignty, space and the freedom of movement* (Duke University Press 2010)
[1017] Gibney ' Is Deportation a form of Forced Migration' (n983) 122
[1018] Kanstroom, *Deportation nation: outsiders in American history* (n1012) x
[1019] William Walters, (n980) 267
[1020] Gibney and Hansen, 'Deportation and the liberal state' (n1) 1
[1021] Rainer Baubock, 'Citizenship and identity in the European Union', in Harvard Jean Monnet Working Paper 4/97 cited in Emmanuela Paoleti, 'Deportation, non-deportability and ideas of membership' (2010) 65 *Working Paper Series*, 4
[1022] Joseph H Carens, 'Aliens and Citizens: The Case for Open Borders' (1987) 49 (2) *The Review of Politics* 215, 270

liberalist holds strong commitment to the international right to free movement which to him, has a significant limitation on the State's exclusion claims, and to that extent, views all deportations as illegitimate given that it violates the fundamental human rights of migrants to reside where they wish.[1023]

The argument is that even if there may not be open borders in reality, the understanding of liberal democracies is that sovereignty claims are constrained by human rights which individuals are entitled to, not necessarily by virtue of being members of a polity but by their nature of being human beings.[1024] This is why Gibney and Hansen still believe that the very notion of universality of human rights, which extends to all persons, shapes the manner in which entry and exit norms are conceived, thereby exposing a paradox, which institutionalizes liberal values, and the same time hampers the authority of the liberal state.[1025] It is therefore incontrovertible to posit that of fundamental importance to a liberal state is the use of sovereignty in immigration control but this capacity is sometimes [in a muscular way] antithetical to liberal principles.[1026] This means that the legitimacy of deportation by a liberal state is measured by its adherence to domestic and international human rights norm such as prohibition against *refoulement* and collective expulsion, to mention but a few.[1027] In this connection, the grounds and rationale for deportation in a liberal state must recognize the full weight, implications and commitments to international human rights obligations such as respect for family life and the fracturing of social relationships given that migrants become part of the community where they reside regardless of their immigration status.[1028]

On the conditions faced by migrants during deportation, Fekete observed the 'frequency of denial of basic necessity, being manhandled, sometimes shackled, sometimes illegally sedated' which fits into the classification of inhumane and degrading treatment, some of which led directly to a number of deaths in recent years with the United Kingdom amongst those with indulgence in these practices.[1029] In the UK, the death of

[1023] ibid
[1024] S Benhabib, 'Citizens, residents and aliens in a changing world: political membership in the global era' (1999) 66 (3) *Social Research* 709, 711
[1025] Gibney and Hansen, 'Deportation and the liberal state: (n1) 1
[1026] ibid
[1027] ibid
[1028] Mathew Gibney, *The Ethics and politics of asylum: liberal democracy and the response to refugees* (CUP, 2004) 2
[1029] Liz Fekete, 'Analysis: Deaths During Forced Deportation' <http://www.irr.org.uk/news/analysis-deaths-during-forced-deportation >accessed 30 June 2013

Jimmy Mubenga illustrates the use of extreme coercion employed in the deportation enforcement process of a 46-year-old Angolan who died in October 2010 on a stationary aircraft at Heathrow during an attempt by the authorities to deport him from the United Kingdom, having restrained him with excessive force during the deportation attempt.[1030] Nonetheless, deportation and/or removal is continually pursued by the State and freely used as a major weapon for immigration control that arguably engages a gradual violation of the rights of migrants by the encouragement of the out-sourcing of contracts dealing with human rights. This, in my view has far reaching implications on the legality of deportation and removal in a liberal democracy as the United Kingdom. In the light of the above analysis, one might be tempted to say that modern deportation practices have assumed exponential dimensions of coercion only aimed at facilitating expulsion.

Balibar commenting on the liberal States' use of deportation as a weapon of immigration control opined that liberal States are in the habit of creating an 'immigration complex' a concept that describes the transformation of any social problem into a problem which is imputed and caused by the presence of migrants, if nothing, aggravated by them. It is only by deportation that this problem may be cured.[1031] But even with this expansion of state power which arguably is not totally grounded on the excuse of sovereignty, the grounds for deportation are no longer effective as the actual process of deportation has become unnecessary given that the traditional border is no longer located at the periphery but now passes through every non-citizen regardless of their immigration status.[1032]

The attitude of liberal States brings to the fore; the United Kingdom's position with respect to the Directive on 'common standards and procedures in Member States for returning illegally staying third country nationals' which the United Kingdom did not opt in to (European Return Directive).[1033] The European Return Directive aims at

[1030] Samira Shackle, 'Jimmy Mubenga's death: no prosecution, no surprise' *The Guardian* (London, 17 July 2012) <http://www.theguardian.com/commentisfree/2012/jul/17/jimmy-mubenga-death-no-prosecution> accessed 19 October 2013

[1031] Etienne Balibar, 'Racism and Crisis' in Etienne Balibar & Immanuel Wallerstein (eds) *Race, Nation, Class: Ambiguous Identities* (Verso 1991) 219

[1032] Mary Bosworth, 'Deportation, detention and the foreign-national prisoners in England and Wales' (2011) 15 *Citizenship Studies* 583, 593

[1033] Directive 2008/115/EC of the European Parliament and the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals [2008] OJ L 348/98-348/107 (the Return Directive)

providing common standards and procedures in the deportation and/or removal of migrants, laying down minimum rules on how illegally [irregular] staying migrants can be removed from the territory of EU member states.[1034] The Directive applies to all irregular (unlawful or illegally staying) third-country nationals in a Member State[1035] with the core obligation to issue a 'return decision' to every third-country irregular migrant on their territory.[1036] But the general rule is that migrants will be given an opportunity to take a voluntary return within stated period-7-30 days, but they can also leave earlier if they choose to.[1037] Article 8(4) of the Directive provides that any application of coercive measures applied to return the irregular migrant must nonetheless must be a last resort, proportional and not exceeding reasonable force and in accordance with human rights standards-dignity and physical integrity of the person concerned.

Askola observes that the European Return Directive constructs migrants targeted as posing threats, leading to the default position that as a rule, migrants must be forcibly removed speedily from the territory of the Member States.[1038] The adoption of these common rules leave much discretion to adopt domestic approaches that have the capacity of truncating interference in the harmonization of returns,[1039] yet the United Kingdom did not opt in, arguably, it does not want its deportation regime for third country nationals, controlled. Contrary to expectations, the Directive has not operated a harsh mechanism (as far as possible) for the detention and subsequent removal of irregular migrants from their territories. This is simply due to judicial intervention, i.e. the jurisprudence of the CJEU as will be summarized i*nter alia* by the following cases hereunder analysed. These cases raise common ratio of trying to balance humane treatment of irregular migrants whilst maintaining the underlying objective of removing

[1034] The United Kingdom did not opt in to the Return Directive. See European Parliament 'Parliament adopts directive on return of illegal immigrants' <http://www.europarl.europa.eu/sides/getDoc.do?type=IM-PRESS&reference=20080616IPR31785&language=EN >accessed 20 August 2013
[1035] Art 2(1) of the Return Directive
[1036] Art 6 (1) but note that Art 3(3) defines 'return' as permitting return to either to a country of origin or transit, or to another third country which the person concerned chooses to return to and in which that person will be admitted but there is no definition of 'third countries', see also Art 3(4) for the definition of 'return decision'.
[1037] Art 7(1)
[1038] Heli Askola, 'Illegal Migrants', Gender and Vulnerability: The Case of the EU's Returns Directive' (2010) 18 *Fem Leg Studies* 159, 173; see also A. Baldacini, 'The EU Directive on Return: Principles and Protests' (2010) 28 *Refugee Quarterly Review* 115, 138
[1039] Baldacini, 'The EU Directive on Return: Principles and Protests' ibid, 138

them as soon as possible.[1040] The Directive has therefore not escaped without judicial oversight as the CJEU in *El Dridi,*[1041] ruled that the use of coercive measures should be subject 'to the principle of proportionality and effectiveness' in order to accord with EU objectives. In the light of the above ruling, it might be said that dealing with removal at the European level can lead to a guarantee of minimum rights of irregular migrants faced with exclusion order,[1042] given that the Directive as decided in *El Dridi* should streamline deportation processes within the remit of proportionality and not simply enhancing deportation.

In *Zaizoune*[1043], the CJEU aimed to clarify the issue of whether Member States have powers to set more favourable conditions if they are found compatible with the Directive. This happened in Spain where the State chose to fine some irregular migrants than to expel them, a case seen as choosing efficiency over humanity. The CJEU ruled that this went beyond the right of Member States to set more favourable conditions for irregular migrants given that it is a contradiction of securing removal as originally intended by the Directive.[1044]

Furthermore, the issue of criminalization of irregular migration regarding the Directive did not escape the radar of the CJEU, which engaged its attention in *El Dridi*[1045] highlighted above adding that irregular migrants who have committed immigration offences are captured within the scope of the Directive but that a custodial sentence for an immigration offence has the consequence of delaying removal which should not be imposed.

[1040] Steve Peers, 'Irregular Migrants: Can Humane Treatment be Balanced against Efficient Removal?' (2015) 17 (4) *European Journal of Migration and Law* 289, 291; Steve Peers, 'Irregular Migrants: Can Humane Treatment be Balanced against Efficient Removal? <http://repository.essex.ac.uk/15874/1/Irregular_migrants_Can_humane_treatment.pdf >accessed 24 December 2016
[1041] Case C-61/11 PPU El Dridi [2011] (First Chamber, 28 April 2011)
[1042] Elisa Fornale, 'The European Returns Policy and the Reshaping of the National Reflections on the Role Of Domestic courts' (2012) 31 *Refugee Survey Quarterly* 134, 156
[1043] Case C-38/14 *Zaizoune* [2015] (Fourth Chamber 23 April 2015)
[1044] Steve Peers (n1040), see also discussions by Cristina J. Gortazar Rotaeche, 'A Fine or removal? The impact of the ECJ's Zaizoune Judgment on the Spanish Doctrine' Return Directive Dialogue http://euredial.eu/blog/a-fine-or-removal-the-impact-of-the-ecjs-zaizoune-judgment-on-the-spanish-doctrine/ accessed 24 December 2016
[1045] Case C-61/11 *PPU El Dridi* [2011] (First Chamber, 28 April 2011)

Remarkably, the CJEU had cause to deal with the issue of *non-refoulement* as it concerns the Return Directive in the case *Abdida*.[1046] This case concerns a terminally ill Nigerian national who required access to health care while being an irregular migrant. The CJEU held that the *non-refoulement* clause in Article 5 of the Directive prevented the enforcement of the return decision, and this accords with prohibition against torture or other inhuman or degrading treatment as enshrined in Art 3 ECHR. Even though, the ECHR does allow migrants to stay and enjoy social or medical assistance but the CJEU was quick to point out that removing such a foreign national in the circumstance of ill-health to a country with inferior medical facilities may still raise issues under Art 3 ECHR in exceptional circumstances especially where there are compelling humanitarian grounds. The CJEU further took it upon itself to hold that Mr. Abdida's removal order should have suspensive effect regardless of the wording of the Directive, if not, the applicant will suffer irreversible or irreparable harm if returned to his country of origin.

The overall implication of the jurisprudence of the CJEU regarding the Return Directive is that the CJEU has tried to strike a balance between ensuring the respect of human rights of irregular migrants on the one hand while at the same time ensuring effective removal on the other hand. While *Zaizoune* sets a limit on Member States' application of compassionate treatment as seen above, *El Dridi* enhances the principle of proportionality and effectiveness and *Abdida* enthrones the use of health cases against removal-*non refoulement* obligations, in addition to the application of the suspensive effect of returns in health cases.

Furthermore, with specificity to detention and return (expulsion) of migrants as it concerns France, some legal developments will be briefly examined in the two cases that follow. The first is the *Achughbabian*[1047] case that originated from a preliminary reference made by a French Judge to the CJEU. Mr Achughbabian, an Armenian national, in 2008, entered France and remained in France unlawfully. He was later subjected to a decision requiring him to leave the French territory within one month but he refused. Following this, a new decision was made against him in the form of deportation and an order was made to place him in police custody and subsequently in detention for illegal stay, a decision that Mr Achughbabian challenged. The question

[1046] Case C-562/13 *Abdida* [2014] (18 December 2014), see further discussion of this case at section 5.6.1 below
[1047] Case C-329/11 *Alexandre Achughbabian v Préfet du Val-de-Marne* [2012] CMLR 52

posed to the CJEU by the French court hearing the appeal was whether the Return Directive precludes national legislation which provides for the imposition of a sentence of imprisonment on a third country national on the sole ground of the person's illegal entry or residence in the national territory.

In response to the question, the CJEU elucidated two clear principles, namely, member States may criminalize illegal entry[1048] or stay and member States may equally place third country nationals in detention in order to determine whether their stay is illegal. In stating so, the CJEU emphasized that the State cannot simply delay the implementation of the Return Directive by subjecting irregular migrants to a custodial sentence and by so doing postpone the application of the decision on return.[1049] The Court espoused that once an irregular migrant has been identified, diligent steps should to be taken to ensure a return decision is issued and enforced. The Court clarified that following the wording of Art 2(2)(b) of the Return Directive, which permits the Member State not to apply the directive to third country national who are subject to a criminal law sanction but in stating so emphasized that this provision cannot be interpreted as permitting States not to apply the directives to third country who have only committed the offence of illegal stay as doing so will vitiate and defeat the purpose and binding effect of the directive which should encourage return.

Then comes the recent case of *Affum*[1050] decided on 7 June 2016 by the CJEU arising from a preliminary reference from the French *Cour de Cassation* concerning the detention of irregular migrants. The facts were that Ms Affum, a Ghanaian national, without a valid document, had illegally crossed the EU border heading towards the Channel Tunnel and was stopped by the French authorities, apprehended and placed in detention-*garde a vue* under Article L. 621-2 of the Code of Entry and Residence of Foreigners and Asylum Law. The Court ordered her administrative detention for a period of five days pending removal, which was later extended. Upon appeal, the *Cour de Cassation* submitted a reference for a preliminary ruling to the CJEU on the compatibility of the Return Directive with national law allowing the imposition of a

[1048] ibid, para 44, the CJEU referred to the *El Dridi* case, supra
[1049] See discussions by Ana Beduschi, 'Detention of Undocumented Immigrants and the Judicial Impact of the CJEU's Decisions in France' (2014) 26 (3) *International Journal of Refugee Law* 333; Rosa Raffaelli 'Illegal migration: the "Returns" Directive in the recent case-law of the ECJ' (2012) European Area of Freedom Security & Justice <https://free-group.eu/2012/03/07/illegal-migration-the-returns-directive-in-the-recent-case-law-of-the-ecj/> accessed 31 March 2017
[1050] Case C-47/15 *Affum* [2016] (07 June 2016)

term of imprisonment of a third country national on the basis of illegal entry and stay.[1051]

The CJEU followed its decision in *Achughbabian* and held that the Return Directive is applicable in Ms Affum's case by virtue of Article 2(1) and Article 3(2) of the Return Directive[1052] having entered the territory of a Member State illegally and being regarded as staying there illegally. The CJEU therefore reasoned that a third-country national is thus not excluded from the scope of the Return Directive merely because the person was in a situation of mere transit and only briefly present on the territory of the Member State. The Court thus emphasized that no duration conditions are attached to the term 'staying' and in following *Achughbabian* stated that even though the Return Directive does not preclude Member States from imposing criminal penalty on the basis of illegal entry and non-return but doing so will defeat the purpose of the Directive and will undermine its efficacy. The CJEU thus went ahead to adopt what appeared to be a pragmatic approach where the Court preferred procedures such as prohibiting detention in order to achieve fast return.

5.5 Deportation, Removal and Liberal Democracy: Trends and Turns

Prior to the nineteenth century, actions of states regarding deportation were restricted to criminal matters but post events now include the use of migration policy to prevent aliens from disturbing public order.[1053] Deportation as a form of state practice has therefore been employed to deal with failed asylum seekers, foreign criminals and those whose presence are considered detrimental to the public interest.[1054] Bosworth[1055] and Gibney[1056] share the view that the terrorists attacks in USA of 11 September 2001 and consequent bombings in London on 07 July 2005 triggered a somewhat expansion of

[1051] *Affum* para 43, see also Giovanni Zaccaroni, 'The Pragmatism of the Court of Justice on the Detention of Irregular Migrants: Comment on Affum (2017) European Forum 1; European Database of Asylum Law (EDAL) CJEU - Case C‑47/15, *Sélina Affum v Préfet du Pas-de-Calais, Procureur général de la cour d'appel de Douai* <http://www.asylumlawdatabase.eu/en/content/cjeu-case-c-4715-sélina-affum-v-préfet-du-pas-de-calais-procureur-général-de-la-cour-d'appel> accessed 30 March 2017

[1052] See Article 2 (1) regarding application of the Directive and Art 3 (2) of the Return Directive regarding the meaning of 'illegal stay'

[1053] F Castecker, 'The Changing modalities of regulation in international migration within Continental Europe 1870-1940' in A, Bocker and Others (eds) *Regulation of Migration: International Experiences* (Het Spinhus 1998) 74

[1054] Gibney 'Is Deportation a form of Forced Migration' (n983) 146

[1055] Mary Bosworth, 'Border control and the limits of the sovereign state' (2008) 17 *Social Legal Studies* 199, 201

[1056] Gibney 'Is Deportation a form of Forced Migration' (n983) 146

the deportation estate and the use of migration laws as key elements in the reduction of risk from dangers posed by certain communities. This has led to the argument that deportation has become the main device to enforce modern migration policies.[1057] The liberal state has now employed deportation from being a state's response to specific events and crises throughout much of the twentieth century to being a normalized part of immigration control.[1058]

A further seemingly innocuous but pernicious development is the construction of deportable subject using the springboard of securitization, criminalization and race.[1059] This, in the view of De Genova, accounted for the ideology that supported the deportation of Arabs and Muslims in the aftermath of the terrorist attacks in the USA and the UK.[1060]

On the racialization discourse, some scholars are in agreement that the deportation turn should be seen as that part of a greater hostility to immigrants from the Third World states rooted in racism and xenophobia.[1061] As De Genova observed, 'the elision of European racism renders invisible 'post-coloniality' and colludes with the insinuation that racist or nativist outbursts lie in continuum with populist reactions of citizens provoked by the presence of migrants'.[1062] Bigo applying a prognostic approach, comments that the immigrant as folk devil has completely replaced the ideological function, which was served by the Soviet bloc during the cold war era .[1063]

[1057] F Castecker (n1053) 94

[1058] G Cornelisse, 'Immigration detention and the territoriality of universal rights' in N De Genova and N Peutz (eds) *The Deportation regime: sovereignty, space and freedom of movement* (Duke University Press 2010) 101

[1059] Anderson, Gibney and Paoletti, 'Citizenship, deportation and the boundaries of belonging' (n3) 552; see generally Robert A Williams, 'Encounters on the Frontiers of International Human Rights Law: Redefining the Terms of Indigenous Peoples' Survival in the World' (1990) 4 *Duke Law Journal* 660; Ricardo Delgado and Jean Stefancic, *Critical Race Theory: An Introduction* (2nd edn, New York University Press 2012) 3, 10

[1060] N De Genova, 'The production of culprits: from deportability to detainability in the aftermath of 'Homeland Security' (2007) 11 *Citizenship Studies* 421, see also D Kanstroom, *Deportation nation: outsiders in American history* (n1012) x

[1061] Liz Fekete, 'The Deportation machine: Europe, Asylum and human rights' (2005) 47 *Race & Class* 64, 64-91; L Weber and B Bowling, 'Valiant Beggars and global vagabonds: select, eject, immobilize' (2008) 12 (3) *Theoritical criminology* 355,361

[1062] Nicholas De Genova, 'Inclusion Through Explosion: Explosion or Implosion' (2008-2009) 1 *Amsterdam Law Forum* 43, 48

[1063] Didier Bigo, 'Liaison Officers in Europe: New Officers in the European Security Field' in J Sheptycki (ed) *Issues in Transnational Policing* (Routledge 2000) 93

On criminality limb, Bosworth on her part espouses the growing reliance on criminal justice system by the UK in the construction of immigration and asylum policies.[1064] Chan[1065] and Warner[1066] reconstruct that if the migrant who has already been conceived as criminal carries a heavy load in the form of stereotypes with its attendant stigma, then it is possible to expect the migrant who has been convicted of a criminal offence to be doubly targeted for exclusion. This is supported by Weber and Bowling who postulated that criminality accounted for the furore raised by the 'foreign criminal scandals' in 2006 where it was reported that 1023 prisoners had been released between 1999 and March 2006 without being considered for deportation.[1067] Gordon Brown, the then Prime Minister in setting deportation targets of 4,000 foreign criminals, stated 'I want a message to go out. If you come here you work and learn our language. If you commit a crime you will be deported from our country', [1068] which as Weber and Bowling reported, led to the deportation of a record 45,000 failed asylum seekers, foreign national prisoners and other immigration offenders in the first quarter of 2007.[1069]

In the light of the above, the trend for liberal democracies in the enhancement of deportation is the reliance on the construction of deportable subject using the springboard of securitization, criminalization and race in such a manner that diminishes the liberal philosophy of fairness and inclusion which will be further discussed below.

5.5.1 Deportation and Removal: Trends, Turns and Factual Matrix

The deportation turn in the UK according to Huysmans and Buonfino further finds explanation in the alarmist and securitized rhetoric formulated by politicians. These rhetorics are usually expressed in the electronic and print media or during parliamentary

[1064]Mary Bosworth 'Border control and the limits of the sovereign state' (2008) 17 (2) *Social & Legal Studies* 199, 201
[1065] W Chan, 'Crime, Deportation and the Regulation of Immigrants in Canada' (2005) 44 *Law and Social Change* 153
[1066] Judith Ann Warner, 'The Social Construction of the Criminal Alien in Immigration Law, Enforcement Practice and Statistical Enumeration: Consequences for Immigration Stereotyping' (2005) 1 (2) *Journal of Social and Ecological Boundaries* 56, 57
[1067] Weber and Bowling (n1012) 367
[1068] Philip Webster, 'I'll Deport 4000 Foreign Criminals by the End of Year, Brown Promises' *The Times* (London, 25 July 2007) <http://www.thetimes.co.uk/tto/news/politics/article2023656.ece > accessed 15 July 2013
[1069] Weber and Bowling (n1012) 368; 'Home Office Says 4,000 Foreign Criminals Deported' *Reuters* (London, 26 December 2007) http://uk.reuters.com/article/2007/12/26/uk-britain-deportations-idUKL2636834620071226 accessed 15 July 2013

debates.[1070] Charles Clark, the then Home Secretary in 2005 reported to Parliament the efforts of the government to increase the removal of failed asylum seekers.[1071] In general, the continuous deportation and/or removal of migrants is hot on the government's agenda with Keith Vaz, the Chairman of the House of Commons Select Committee recently advocating for a tougher action against irregular migrants, emphasizing regrettably that in every hundred reports of irregular migration, only six is actually investigated and in every hundred arrests made, only about '1.5' results in actual removal.[1072]

The UK is not alone in the upward trend in deportation and removal. Kanstroom revealed that since 1925, the number of time foreign nationals in the United States has been caught during enforcement for removal exceeded 46 million where 44 million were actually ordered to leave.[1073] Australia equally follows the trend by way of convergence. Nicholls reports that the power of deportation became part of Australian jurisprudence as a dormant power at the time of federation in 1901 and it took some time for its strength and scope to become clear.[1074] By and large, the general trend is that migrants are usually deported for conducts that were not deportable offenses at the time they occurred, referred to as 'post entry social control deportation laws' or succinctly put, an 'eternal guest model'.[1075] The reality is that all migrants are subject to an ever increasing and shifting pattern of retroactive deportation laws that violates the basic principles of human rights norms.[1076]

In addition, recent deportation and removal laws across liberal democracies are either discretionary or couched in rigid terms, a seemingly "antiseptic uniformity" which

---

[1070] J Huysman and A Buonfino, 'Politics of exception and unease: Immigration, asylum and terrorism in parliamentary debates in the UK' (2008) 56 (4) *Political Studies* 766

[1071] HC Deb 5 July 2005, vol 436, col 191; see reports by Emmanuela Paoletti, 'Deportation, non-deportability and ideas of membership' (2010) RSC Working Paper Series 65/2010, 10 < http://www.lepnet.org/sites/default/files/upload/og_files/RSC%20Deportation,%20non-deportability%20and%20ideas%20of%20membership.pdf> accessed 11 December 2011; see also HC Deb 10 February 2009, vol 487, col 1828W

[1072] House of Common Select Committee, 'Home Office still failing to get to grips with backlogs' <http://www.parliament.uk/business/committees/committees-a-z/commons-select/home-affairs-committee/news/ukba-q1-pubn/ > accessed 08 November 2013

[1073] D Kanstroom, *'Deportation nation: outsiders in American history'* (n934) 3; see also Department of Homeland Security, 'Immigration enforcement actions 2008' < http://www.dhs.gov/xlibrary/assets/statistics/publications/enforcement_ar_08.pdf> accessed 11 July 2013

[1074] Glenn Nicholls, Deported: *A history of Forced Departures from Australia* (University of New South Wales Press 2007) 13

[1075] Daniel Kanstroom, 'Post-Deportation Human Rights Law: Aspiration, Oxymoron, or Necessity?' (2007) 3 *Stanford Journal of Civil Rights and Civil Liberties* 195, 202

[1076] See ECHR Art 7

leaves little room for compassionate considerations.[1077] The underlying questions are: are these exclusionary powers a new phenomenon for liberal states and do they represent an emergence of a new legal framework of State power against liberal ideals of fairness? We will therefore show in consequent debates to follow that contemporary deportation and removal regime in the United Kingdom and by extension in liberal democratic states, regardless of legal inhibitions against certain State practices in this area, continue their indulgence. It could then be argued that the use of deportation and/or removal targets by the UK is to ensure consistent removal of migrants thereby indirectly becoming a corner stone of its migration policy rather than respect for the requisite international human rights standards.[1078] This requires anxious scrutiny in the light of its implications.

Deportation and/or Removal Targets

The issue of targets in my view raises crucial questions for the legality of deportation and removal as carried out by a liberal state such as the United Kingdom. In a bid to meet or exceed its targets within a given period, a liberal state may encroach on its international human rights obligations given the interplay of domestic policies. When deportation rates become targets coupled by policy transfer and/or legal transplants that exist between and amongst liberal states, with respect to techniques and exchange of ideas and information, then the issue becomes that of illiberal democracy rather than of liberal democracy.[1079]

A further emanating issue is that when deportation and/or removal targets are not met and removal specifically becomes impossible due to logistics and difficulties resulting from receiving states, the State unwilling to grant any kind of leave deliberately creates a non-deportable status whose status could better be described as precarious.[1080] My view is supported by the debate in Parliament as the government made it clear that it

[1077] Bill Ong Hing, 'Detention to Deportation-Rethinking the Removal of Cambodian Refugees' (2005) 38 *University of California Davis Law Review* 891, 950
[1078] Emmanuela Paoletti, 'Deportation, non-deportability and ideas of membership' (n1071)10
[1079] For a discussion on Liberal democracy, see chapter 2 Sections of this thesis. William Walters using the phrase 'governmentalization of government' discusses the issue of deportation targets; William Walters, 'Deportation, Expulsion and the International Police of Aliens' (n980) 280
[1080] Precarious migrants are discussed at Chapter 3 of this thesis

will not grant leave to remain because of a person's 'irremovability' or 'non-deportability'.[1081]

Deportation Agreements in the Context of Memorandum of Understanding (MoU)

Another recent trend on deportation is the use of Memorandum of Understanding (MoU) to deport migrants to countries reputed for human rights violations. In this type of arrangement the receiving state assures the deporting state that it will comply with human rights obligations.[1082] Nina argues that diplomatic assurances seemed to host an inherent paradox.[1083] She opined that 'the sending state's insistence on additional guarantees in certain cases is an acknowledgement of the existence of a widespread practice of torture in the receiving State while asking for an exception to the practice in the individual case'.[1084] The argument is that if States consider a person as a security risk, the use of deportation may not be an adequate solution given that making safe diplomatic assurances are increasingly problematic and loaded with portent difficulties of sensitive legal and political nature.[1085]

In rejecting such diplomatic arrangements, Amnesty argues that State's resort to seek assurances in this form amounts to the tacit acquiescence of torture of others similarly situated in the receiving country and states that "such arrangements cannot be trusted and that reliance on them when seeking to expel people to countries where they risk torture or other ill-treatment violates states' obligations under international law"[1086], and the UK has been identified as one of the states that use the MoU in this form.[1087] Gibney and Hansen report that the UK, USA and Australia amongst others had to enter into complex and drawn out negotiations with China to enable deportation of its citizens.[1088]

[1081] Emmanuela Paoletti (n1071) citing HC Deb 30 April 2008
[1082] Paoletti ibid 10
[1083] Nina Larsaeus, 'The Use of Diplomatic Assurances in the Prevention of Prohibited Treatment' (2006) RSC Working Paper No. 32, 19 <http://www.rsc.ox.ac.uk/publications/working-papers-folder_contents/RSCworkingpaper32.pdf > accessed 08 November 2013
[1084] Nina Larsaeus ibid 19
[1085] ibid 7
[1086] Amnesty International 'Diplomatic assurances' – No protection Against Torture or Ill-Treatment, (2005) <http://www.amnesty.org/en/library/info/ACT40/021/2005> accessed 08 November 2013
[1087] See HC Deb 29 October 2008, vol 481, col 1083w
[1088] Gibney and Hansen (n1) 11; HC Deb 29 April 2004, vol 420, col 1300

Quite recently the Human Rights Committee in its latest report on the United Kingdom has expressed concern that the 'State party continues to rely on its "deportation with assurances" policy to justify the deportation of foreign nationals suspected of terrorism-related offences to countries where it is reported that they may face a real risk of torture'. The Committee further remarked that 'despite the memorandums of understanding on deportation with assurances that have been concluded with some countries with post-transfer monitoring arrangements, the Committee remains concerned that these measures may not ensure the protection of the affected individuals contrary to articles 6 and 7 of the Covenant (arts.2, 6 and 7)'.[1089]

In general, it is one thing to sign such readmission agreements; it is a different thing to respect it, as non-compliance amongst States remains a significant problem,[1090] given that when a source country refuses to cooperate, deportation becomes impossible in the absence of a valid nationality document or a deportee's travel document, which had either expired or no longer exists. The Guardian reported that the Home Office celebrated the deportation [extradition strictly speaking] on grounds of terrorism to Jordan of Abu Qatada (Omar Mahmoud Othman) on 07 July 2013 based on a MoU between Jordan and UK.[1091] In *Othman (aka Abu Qatada) v SSHD*[1092], the Court of Appeal followed the Strasbourg judgment in *Othman (Abu Qatada) v. United Kingdom*[1093], where the key issue had been whether there was "a real risk of a flagrant denial of justice" so as to render Abu Qatada's deportation a breach of the UK's obligations under Article 6 of the European Convention on Human Rights. The court stated: "the applicant's deportation to Jordan would be in violation of Article 6 of the Convention on account of the real risk of the admission at the applicant's retrial of evidence obtained by torture of third persons".[1094]

[1089] HRC, Concluding observations on the seventh periodic report of the United Kingdom of Great Britain and Northern Ireland (2015) UN Doc CCPR/C/GBR/CO/7, para 19
[1090] Antje Ellermann, 'The Limits of Unilateral Migration Control: Deportation and Interstate Cooperation' (2008) 43 (2) Government and Opposition 168; Joel Sutherland, 'Deporting illegals is not always easy' *The Morning Call* (Pennsylvania, 22 January 2010) <http://articles.mcall.com/keyword/deportation/recent/2 accessed 13 August 2013>
[1091] Patrick Wintour, Robert Booth and Hamza Al Soud, 'As Abu Qatada leaves, Theresa May vows to change human rights law' *The Guardian* (London, 7 July 2013) <http://www.guardian.co.uk/world/2013/jul/07/abu-qatada-human-rights >accessed 11 July 2013
[1092] [2013] EWCA Civ 277
[1093] App No. 8139/09 (ECtHR, 17 April 2012)
[1094] *Othman (Abu Qatada) v. United Kingdom* App No. 8139/09 (ECtHR, 17 April 2012) para 290

It therefore beggars belief that given these numerous constraints inhibiting deportation, liberal states continue to pursue the deportation of migrants. The fact remains that, it is difficult if not impossible for a State to actually remove from its territory all criminal non-citizens and/or irregular migrants.[1095] This therefore leaves a huge the gap between the deportable and the actual number of deportees. The quarterly statistics produced by the Home Office on deportation only indicates the number of enforced removals as against the number of deportation orders or removal directions issued. This means that the number of people liable to deportation but whom the State cannot deport is missing.[1096] Recent statistics corroborates the figures.[1097] The Migration Observatory observes that the Home Office does not publish data on the cost of deportations, but some information about costs were obtained from written answers to Parliamentary Questions, as well as in a National Audit Office (NAO) report from 2005.[1098] Therefore the use of the MoU has not closed the gap between the deportable and the actual number of deportees due to constraints inherent in these MoUs with the consequence that non-deportability and/or removability has multiplier implications as will be seen below.

The Implications of Temporary Non-Deportability and Removability

A further underlying concern revolves around those who cannot be deported or removed for reasons highlighted earlier and if circumstances warrant detention, for how long? But if the affected migrants were on temporary admission without a right to work, how long would that be? The unassailable fact is that migrants who are not deportable and/or removable but not in detention are kept in a legal limbo (precarious situation) which

---

[1095] Gibney and Hansen (n1) 11

[1096] Emmanuela Paoletti (n1071) 14; The Home Office Statistics reveals that the total enforcement actions initiated in 1999 was 22,950 resulting to 6,440 actual removals; 50,570 enforcement actions was initiated in 2000 resulting to 7,820 actual removals while 76,110 enforcement attempts were made in 2001 resulting to 10,290 actual removals see Home Office, 'Control of Immigration: Statistics United Kingdom 2001' <http://www.archive2.official-documents.co.uk/document/cm56/5684/5684.pdf> accessed 13 August 2013

[1097] Home Office, 'Control of Immigration: Statistics United Kingdom 2001'
see Home Office, 'Statistics - national statistics, Immigration statistics, January to March 2012' <https://www.gov.uk/government/publications/immigration-statistics-january-to-march-2012--2/immigration-statistics-january-to-march-2012#removals-and-voluntary-departures-1> accessed 13 August 2013

[1098] Rob McNeil, 'Deportations, Removals and Voluntary Departures from the UK' (The Migration Observatory, 19 December 2012) <http://www.migrationobservatory.ox.ac.uk/briefings/deportations-removals-and-voluntary-departures-uk> accessed 13 August 2013

gives rise to the issue of destitution.[1099] It could therefore be inferred that this practice is inconsistent with the liberal democratic principles of right to fair treatment, procedural equality and the rule of law. But in order to forestall the continuation of this practice, and to remove inhibitions and maintain deportation and removal targets, the Home Office awarded a contract worth up to £40m in 2012 to CAPITA- a services company to help find and specifically remove more than 150,000 migrants who have purportedly overstayed their visas.[1100] The implication is, since targets have been set for removing a certain number of people and given that payment to this company depends on results, it could be reasonably argued that the main concern will be to remove these migrants without ensuring that their rights are respected-the UK Border Agency has revealed that CAPITA will get £40m from the taxpayer if it meets its targets.[1101]

By and large, the furore generated by the campaign for migrants to leave the UK and the use of text messages by CAPITA even to UK nationals themselves, albeit mistakenly, are all engaged to force migrants out of the country or remove them through enforcement actions. This could be explained within the remit of immigration complex culminating into protracted deportability and removability with underlying intent to meet targets as highlighted above. The CAPITA's text message coercion style lies in continuum with the 'Campaign to go home' mounted by the Home Office against irregular migrants with criticisms that trailed the controversial campaigns,[1102] even as Vince Cable, the then Liberal Democratic Business Secretary calls it "stupid and offensive" with the Labour Party describing the government's tactic as "shambolic and incompetent".[1103] It could be reasoned that the practice where citizens themselves also

[1099] Alice Edwards,'Thematic National Legal Study on the Rights of Irregular Immigrants in Voluntary and Involuntary Return Procedures: United Kingdom' (2009) cited in Emmanuela Paoletti (n977) 16; for further details on circumstances of a precarious migrant, see chapter 3.14 of this Thesis.
[1100] BBC News-Politics 'Capita gets contract to find 174,000 illegal immigrants' *BBC News* (London, 18 September 2012) <http://www.bbc.co.uk/news/uk-politics-19637409> accessed 13 August 2013
[1101] ibid
[1102] Andrew Sparrow, ' 'Go home' campaign against illegal immigrants could go nationwide' *The Guardian* (London 29 July 2013) <http://www.theguardian.com/uk-news/2013/jul/29/go-home-campaign-illegal-immigrants> accessed 20 October 2013
[1103] ibid; see also Robert Myles, 'UK Government 'go home' text campaign harasses UK immigrants' *Digital Journal* (London 19 0ctober 2013) <http://www.digitaljournal.com/article/360533#ixzz2iFl2VEZZ> accessed 20 October 2013; 'Go Home Immigration Van Campaign Branded 'Misleading' By Advertising Standards Authority' *The Huffington Post* (London 20 October 2013) <http://www.huffingtonpost.co.uk/2013/10/08/go-home-van_n_4063643.html> accessed 20 October 2013; Liberty targets Home Office campaign' http://www.bbc.co.uk/news/uk-england-london-23589448 accessed 20 October 2013; Hayley Dixon, 'Home Office 'go home' texts sent to people with right to remain' *The Telegraph* (London 18 October 2013)

receive text messages to be deported together with irregular migrants exposes the overzealousness of the State in deportation and resultantly the deep malaise pervading the deportation and removal regime thus illuminating the fact that the State is *prima facie* interested in meeting targets rather than complying with acceptable standards required of a liberal democracy.

It can therefore be further argued that when a State contracts out a service that is embedded with human rights obligations to a private company, the natural tendency of sacrificing legality on the altar of profit making is clear. The privatization of removal together with the privatization of detention invites the argument that migrants are juggled and used in order to protect profit-an overriding interest of privatization. In essence, deportation and/or removal illuminate big business nature of this practice where the rule of the law may be easily sacrificed to dictates of free market forces.

Costs and the Resolve to Deport and/or Remove

Similarly, costs also presents inhibitions against deportation and/or removal. The cost of flights i.e. actual removal makes up only about 8% of the cost of enforced removals. In comparison with an assisted voluntary return, the difference is clear. A return through an assisted voluntary return program cost about £1,100 in 2003-04 according to the National Audit Office's (NAO) 2005 calculation. On its part, the UKBA's internal impact assessments estimate the average cost of actually removing a person directly from port at £500, or £1000 for cases that include overnight detention. In short, the UK Border Agency paid more than £28 million for removal flights in the financial year 2010-2011 and pays an estimated £11,000 for each enforced removal of a rejected asylum applicant.[1104]

The above analysis shows that the inhibitions against deportation are real and the cost on the taxpayer, staggering. Regardless of these exorbitant costs and inhibitions, the United Kingdom continues to pursue vigorously, the deportation and/or removal of migrants. In addition, given that deportation is expensive involving the use of scarce

[1104] Home Office, 'Control of Immigration: Statistics United Kingdom 2001' <http://www.archive2.official-documents.co.uk/document/cm56/5684/5684.pdf> accessed 13 August 2013

public resources, time consuming and resource intensive,[1105] with the further difficulty that without a valid deportation order and co-operation of Airlines in transporting deportees, actual removal might be a mirage.[1106] The mirage of actual removal encumbered by the gap between the deportable and the actual number of deportees due to the inherent constraints discussed above raises more questions than answers for the legality of deportation and removal as practiced by liberal democracies. This challenges the 'necessity in a democratic society' nexus that considers whether a violation of rights is necessary in such democracies.

5.6 Deportation and Removal Inhibitions and the 'Necessity in a Democratic Society' Nexus

Deportation inhibitions are those constraints that limit the State's power in effecting deportation. Joppke refers to it as self-imposed limits of State sovereignty where domestic courts are constrained by the mores of international human rights law, when applied, limits the expulsion powers of States.[1107] Guiraudon further espoused that the limits of State's power in effecting deportation is self-imposed by virtue of the State's acquiescence to conventions while domestic courts usually articulate the precise associated obligations.[1108] The requirement of Art 3 ECHR adds to the inhibition given that States are prohibited from returning migrants to where they will face torture, degrading or inhuman treatment-*non-refoulement*.

5.6.1 *Deportation and Removal Inhibitions in the Context of Non-Refoulement Obligations*

As argued at chapter 2.4.2 of this thesis, *non-refoulement* obligations over time has acquired the status of customary international law given that such status is clear. The

[1105] Gibney and Hansen (n1) 11
[1106] See Deportation Alliance <http://www.noborder.org/archive/www.deportation-alliance.com/faqs.html> accessed 12 August 2013; Alasdair Palmer 'Asylum airlines-your one-way flight to deportation' The Telegraph (London, 23 May 2009) <http://www.telegraph.co.uk/news/uknews/5374109/Asylum-airlines-your-one-way-flight-to-deportation.html> accessed 12 August 2013; Corporate Watch, 'Grounding deportation airlines June 25th, 2010' <http://www.corporatewatch.org/?lid=3664> accessed 12 August 2013
[1107] Christian Joppke, *Immigration and the Nation-State: The United States, Germany and Great Britain* (OUP 1999) 17
[1108] V Guiraudon, 'Citizenship Rights for Non-Citizens: France, Germany and the Netherlands,' in Christian Joppke (ed) *Challenge to the Nation-State* (OUP 1998) 272

idea is that the deportation of a person to a country where there is a risk that they will suffer, torture, and cruel, inhuman and degrading treatment is prohibited and the State in breach will be held responsible.[1109] But the implied *non-refoulement* prohibitions especially under the ECHR are certainly unclear and highly contentious, which has not provided the necessary panacea against deportation and/or removal, only acting to an extent, as a check. Arguing vehemently, Greenman stated that 'there is something problematic about the way the prohibitions on *refoulement* are read into human rights provisions using the 'removal plus risk' formulation that can be seen in the medical cases with unfortunate consequences and detriment for individual protection, submitting that *non-refoulement* under the ECHR is a castle built on sand'.[1110]

In the medical cases[1111] under Article 3 ECHR, the underlying issue is that if the deportee would be exposed to torture or ill treatment in the destination state, deportation would be unlawful. In deciding *D v UK*, the ECtHR stated:

> The Court must reserve to itself sufficient flexibility to address the application of that Article [Art 3] in other contexts, which might arise. It is therefore not prevented from scrutinizing an applicant's claim under Article 3 where the source of risk of proscribed treatment in the receiving country stems from factors which cannot engage directly the responsibility of the public authorities of that country, or which, taken alone, do not in themselves infringe the standards of that Article. To limit the application of Art 3 in this manner would be to undermine the absolute character of its protection.[1112]

In reaching this judgement, the ECtHR emphasized the absolute nature of *D v UK* that the Grand Chamber had the opportunity to reconsider in *N v UK*, the ECtHR stated:

> 'The decision to remove an alien who is suffering from a serious mental or physical illness to a country where facilities for the treatment of that illness are inferior to those available in the Contracting State may raise an issue under Article 3, but only in a very exceptional case where the humanitarian grounds against the removal are compelling'.[1113]

[1109] See discussions on this issue at chapter two, 2.4.2 of this thesis and Strasbourg jurisprudence with the *Soering v UK* (1989) 11 EHRR 439 as *locus classicus*; also note that the issue of 'state responsibility' here is not intended to mean State responsibility for an internationally wrongful act for the purposes of the International Law Commission (ILC) Draft Articles on Responsibility of States for Internationally Wrongful Acts 2001 (ASR)

[1110] Kathryn Greenman, 'A Caste Built on Sand? Article 3 ECHR and the Source of Risk in Non-Refoulement Obligations in International Law' (2015) 00 (00) *International Journal of Refugee Law* 1, 2

[1111] *D v UK* (1997) 24 EHRR 423 and *N v UK* (2008) 47 EHRR 39

[1112] *D v UK*, ibid para 49

[1113] *N v UK* (n1111) para 43

The Court explicitly aimed to strike a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights without placing an obligation for the provision of free and unlimited health care to all irregular aliens.

In short, the significance and/or ratio from the medical cases may be interpreted to mean that if there are substantial grounds for believing that the deportee would face a real risk of harm in the destination country, emanating from circumstances giving rise to responsibilities of the destination State, the expelling State is under a *non-refoulement* obligation. But if otherwise, the expelling State can only be under an obligation of *non-refoulement* if the deportee can show exceptional circumstances in addition to economic considerations. As Greenman pointed out, 'in reshaping *non-refoulement* in the medical cases, the ECtHR is undermining the absolute nature of Art 3 ECHR and the indivisibility of civil and political and socio-economic rights'[1114] with the unfortunate creation of uncertainty due to the Court's inconsistency leaving deportees helpless, without knowing on what side the pendulum will swing.

Interestingly, recent legal developments in medical cases have thrown up arguments regarding the absolute nature of Art 3 ECHR. One of those was the case of *Abdida*[1115] decided by the CJEU in December 2014.[1116] *Abdida* has enthroned the use of health cases against removal-*non refoulement* obligations and has gone ahead to apply suspensive effect of returns in health cases. Mr. Moussa Abdida, a Nigerian national was an irregular migrant residing in Belgium who submitted an application to the Belgian state requesting leave to remain on medical grounds- he was diagnosed with AIDS. This was refused and he was asked to leave the country and whilst appealing against the decision to remove him, Mr. Abdida was not allowed an in-country right of appeal, which means the decision has no suspensive effect. Furthermore, Mr. Abdida's basic social security and medical care were withdrawn. In the legal proceedings that ensured at the Belgium domestic courts, which finally reached the Brussels Employment Court regarding Abdida's entitlement under EU law, the issue was what sort of judicial remedies, (suspensive or otherwise) and social rights should be available to a third-country irregular immigrant when he claims to remain in the country to

[1114] Kathryn Greenman (n1110) 14
[1115] Case C-562/13 *Abdida* [2014] (18 December 2014)
[1116] See also discussions at chapter 5.4 above on the Return Directive, *Abdida* and other cases.

receive medical treatment. The Belgian court held that under Belgian law, Mr. Abdida had no judicial remedy with suspensive effect in refusing permission to remain in Belgium and that he was not entitled to any form of social assistance other than emergency medical assistance.

Nonetheless, the Belgian court referred two questions to the CJEU. The questions were whether Mr. Abdida under EU law should have a suspensive effect remedy regarding the removal decision and whether he should receive basic social assistance other than the emergency medical care pending his appeal. Impressively, the CJEU answered yes to both questions holding that such an immigrant must be able to challenge the decision to send him back to his country of origin with suspensive effect and must also, in the meantime, get social assistance to cover his basic needs pending his appeal. The CJEU applied the Return Directive, supra, in addition, referred to Art 47 of the Charter in reaffirming the principle of effective judicial protection.[1117] In further applying the Charter, the Court also noted that Article 19(2) of the Charter states, *inter alia*, that no one may be removed to a State where there is a serious risk that he or she would be subjected to inhuman or degrading treatment. This shows that the CJEU is willing to interpret the provisions of EU law in such a way that they comply with the Charter of Fundamental Rights and with the ECHR.

Furthermore, in accordance with Art 52(3) of the Charter, the CJEU pointed out that the case-law of the ECtHR must be taken into account in interpreting EU law with respect to human rights.[1118] And in doing so, the CJEU commented on the authority of *N v UK*[1119] where the Court explained that, while non-nationals subject to a decision authorizing their removal cannot, in principle, claim any entitlement to remain in the territory of a State in order to continue to benefit from medical, social or other forms of assistance and services provided by that State, a decision to remove a foreign national suffering from a serious physical or mental illness to a country where the facilities for

[1117] Charter of Fundamental Rights of the European Union [2000] OJ C 364/1, Art 47 of the Charter provides that 'everyone whose rights and freedoms guaranteed by EU law are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this article', see also judgments in Case C-432/05 *Unibet (London) Ltd and Unibet (International) Ltd v Justitiekanslern* [2007] ECR 1-2271, para 37, and Case C-93/12 *Agrokonsulting-04*-Velko Stoyanov [2013] ECR para 59
[1118] Art 52(3) of the EU Charter states: 'In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection'.
[1119] *N v UK* (2008) 47 EHRR 885

the treatment of the illness are inferior to those available in that State may raise an issue under Article 3 ECHR in very exceptional cases, where the humanitarian grounds against removal are compelling.[1120] The CJEU emphasized that those very exceptional cases are characterized by the seriousness and irreparable nature of the harm that may be caused by the removal of a third country national to a country in which there is a serious risk that he will be subjected to inhuman or degrading treatment. Therefore, in order for the appeal to be effective in respect of a return decision whose enforcement may expose the third country national concerned to a serious risk of grave and irreversible deterioration in his state of health, that third country national must be able to avail himself, in such circumstances, of a remedy with suspensive effect. This is to ensure that a competent authority has examined the matter before a return decision is enforced in compliance with Art 19(2) of the Charter.[1121]

Following this authority, it is now clear that the CJEU has firmly established the standard that Member States are required to follow in providing for the basic needs of a third country national suffering from a serious illness who has appealed against a return decision and whose enforcement may expose him to a serious risk of grave and irreversible deterioration in his state of health. This decision in essence reignites the argument of exceptionality decided by the ECtHR in the case of *N v UK*, supra but the CJEU in the *Abdida* case took a purposive and pragmatic position in its ebullient pronouncement.

It might be that given the CJEU's position in *Abdida*, the ECtHR has now seized an opportunity in the very recent case of *Paposhvili v Belgium*[1122] decided on the 13 December 2016 to remove the exceptionality threshold in medical cases concerning third country nationals which softens the unduly restrictive approach that had so far been followed in cases concerning the expulsion of seriously ill migrants. The facts are that Mr. Paposhvili, a Georgian national living in Belgium, was seriously ill and claimed that his expulsion to Georgia would put him at risk of inhuman treatment and an earlier death due to the withdrawal of the treatment he had been receiving in

[1120] ibid para 42
[1121] See discussions on this at EU Litigation<https://eulitigationblog.com/2015/03/01/case-c-56213-moussa-abdida-return-of-illegal-immigrants-and-proper-judicial-remedy-with-suspensive-effect/ > accessed 29 March 2017, see also EDAL-European Database of Asylum Law, CJEU: Advocate General Opinion in Case C-562/13 Abdida <http://www.asylumlawdatabase.eu/en/content/cjeu-advocate-general-opinion-case-c-56213-abdida> accessed 29 March 2017
[1122] App no 41738/10 (ECtHR, 13 December 2016)

Belgium. Unfortunately, he died in June in Belgium in June 2016 whilst the case was pending before the Grand Chamber. The ECtHR did not strike his application out of the list but in reliance on its case management powers[1123] proceeded to give a very important and spectacular judgment affecting third country nationals with medical cases whilst facing expulsion. The Court held that there would have been a violation of Article 3 if Belgium had expelled Mr. Paposhvili to Georgia without having assessed the risk faced by him in the light of the information concerning his state of health and the existence of appropriate treatment in Georgia. The ECtHR equally found that there would have been a similar violation of Article 8 if Belgium had expelled him without having assessed the impact of his return on his right to respect for his family life in view of his state of health.[1124]

Paposhvili thus comes to fill what Judge Lemmens in his concurring opinion calls a 'gap in the protection against inhuman treatment'[1125] in so doing included as exceptional more than just cases of imminent death that now appears to open up what in practice has resulted in a limited application of the high threshold.

The Grand Chamber equally seized the occasion to meticulously set out a range of procedural duties for the domestic authorities in the ECHR state parties solely aimed at a more rigorous assessment of the risk as required by the absolute nature of the Article 3 ECHR prohibition. The Court emphasized that in assessing the alleged risk of ill treatment; the domestic authorities should verify whether the care available in the receiving state is 'sufficient and appropriate in practice for the treatment of the applicant's illness so as to prevent him or her being exposed to treatment contrary to Article 3'.[1126] The ECtHR reiterated that domestic authorities should also consider 'the extent to which the individual in question will actually have access to this care and these facilities in the receiving State such as cost of medication and treatment, the existence of a social and family network, and the distance to be travelled in order to have access to the required care'.[1127]

[1123] Art 37(1) ECHR, see para 133 of the judgment
[1124] *Paposhvili* (n1122) paras 222-226
[1125] ibid ,Concurring Opinion of Judge Lemmens para 3
[1126] ibid para 189
[1127] ibid para 190

The ECtHR further took a proactive approach in requiring that the returning State must obtain individual and sufficient assurances from the receiving State, as a precondition for removal, in addition to ensuring that appropriate treatment will be available and accessible to the persons concerned so that they do not find themselves in a situation contrary to Article 3 which appears to be a nascent approach by the Court to move its corpus of case law principles closer to its principles on the absolute nature of the Article 3 prohibition.[1128]

From the ratio of the above cases, it can now be seen that the 'swinging pendulum' of medical cases involving third country nationals facing expulsion is gradually been narrowed to reflect clear rationality and practicality. This approach by the CJEU in *Abdida* and the ECtHR in *Paposhvili* now attacks the high threshold required of medical cases to a purposive, reasonable, and humane level.[1129]

5.6.2 'Necessity in a Democratic Society' Nexus

In the exercise of its sovereign rights in the deportation and removal of migrants, liberal democratic states are not only constrained by the international norms limiting its sovereignty but also by its self-imposed standards. The expansion of these international standards lie in a continuum with the complementary decline in sovereignty,[1130] which leads to the argument that inherent tensions between universal human rights and the territorial sovereignty of States are built into international legal documents.[1131] These tensions find expression in the 'necessity in a democratic society nexus, nay a liberal democracy. Strasbourg jurisprudence introduced this necessity concept to assess whether a violation of a right is necessary in a democratic society, which thus incorporates the notion of proportionality.

The raison detre for the necessity adjunct is to regulate the judgment of States in that where the law allows a restriction, it follows that it will be in accordance with the law and justified by a legitimate aim.[1132] Therefore any such interference has to be

[1128] ibid para 120
[1129] ibid para 183
[1130] Jelka Zorn, 'The right to stay: challenging the policy of detention and deportation' (2009) 12 (2) *European Journal of Social Work* 247,249
[1131] Seyla Benhabib, *The rights of others. Aliens, residents and citizens* (CUP 2004) 49
[1132] John Wadham and others, *Blackstone's Guide to the Human Rights Act 1998* (4th edn, OUP 1999) 36

'necessary in a democratic society'.[1133] In *Handyside v UK*[1134], the ECtHR explains that the term 'necessary' is synonymous with 'indispensable' or 'strictly necessary' as in Article 6 (1) ECHR or Article 2 (2) 'absolutely necessary' or even at Article 15 (1) 'to the extent strictly required by the exigencies of the situation'. The point being made is that when decisions are taken by a liberal democracy that involves the restriction of a right, that restriction must be strictly necessary; otherwise the State will be in clear violation of international obligations as well as its status as a democratic state. The test is a rigorous test that requires the assessment of a 'pressing social need' described as a stringent standard given that the protection of a legitimate aim by the State does not warrant the disproportionate restriction of the individual's right.[1135] Simply put, the State cannot use 'a sledgehammer to crack a nut'.[1136]

The ECtHR affirms that proportionality is the most crucial element of the necessity test that requires the application of a fair balance between competing interests i.e. between the requirements of the general interest of the community versus the requirement for the protection of human rights.[1137] In *Fayed v UK*[1138], the court stated that proportionality requires a reasonable relationship between the pursued goal and the means chosen to achieve that goal. Without proportionality as the element of the 'necessary in a democratic society test', the 'very essence' of a right will be impaired leading to flagrant breaches.[1139] In this connection, ruses, deceits, high handedness, excessive coercive force and arbitrary actions comes within the confines of disproportionate actions, which are not considered necessary in a democratic society.

The necessity adjunct as enshrined in Art 8 ECHR is often engaged in challenging deportation. It is noted that the recorded first invocation of Article 8 ECHR to protect an

---

[1133] The concept of 'necessary in a democratic society' is replete in the ECHR 1950 as mentioned in Articles 8, 9, 10 and 11, typically applied when such rights are qualified or limited as against absolute rights.
[1134] (1976) 1 EHRR 737
[1135] *Sunday Times v UK* (1979) 2 EHRR 245
[1136] *R v Barnsley MBC, ex p Hook* [1976] 3 All ER 452; *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374; *Brind v SSHD* [1991] 1 All ER 720; *Smith and Grady v UK* (1999) 29 EHRR 493, para 138; *R v SSHD, ex p Daly* [2001] 3 All ER 433; Amanda Brown, 'A Sense of Proportion: The Principle of Proportionality in the European Community, United Kingdom and New Zealand' (2006) 3 *The New Zealand Postgraduate Law E-Journal* <http://www.nzpglejournal.auckland.ac.nz/webdav/site/nzpglejournal/shared/Subscribe/Documents/2006-1/6_amanda.pdf> accessed 15 August 2013
[1137] *Soering v UK* (1989) 11 EHRR 439, para 89
[1138] (1994) 18 EHRR 393
[1139] *Rees v UK* (1986) 9 EHRR 56

individual from deportation was in 1988 in the case of *Berrehab v Netherlands*[1140] where the applicant Moroccan national was facing deportation from Netherlands following his divorce from a Dutch woman. With a young daughter from the marriage, the applicant argued that if deported, their right to private and family life would be breached. The ECtHR then held that the restriction on family rights, which involves deportation, had to be justified as 'necessary in a democratic society'. The court reasoned that the very close ties between father and daughter and threatened by proposed deportation will require a balance to be made between the legitimate aim of deportation on the one hand and the means to achieve that aim on the other hand. In short, the court accepted the fact that deportation which will result in the separation of families across international boundaries was an interference with family life, and in the instant case, disproportionate and unlawful given that in *Berrehab*, the only person whose removal was anticipated by the deportation order was the applicant and there was no question of his wife or daughter joining him.

It is observed across the board that in numerous cases before the ECtHR[1141], Article 8 ECHR has been invoked by migrants to frustrate deportation following criminal conviction while the concerned States had at all relevant times argued a prevention of crime or wellbeing of the country as its legitimate aim. But the ECtHR had in them accepted that deportation that leads to separation of families across international boundaries would not be necessary in a democratic society. Therefore the reference to both private and family life became a regular feature in the ECtHR's jurisprudence. The difficulty for the 'private life' limb is that national courts are not properly guided as to what should be accorded weight in the applicant's personal circumstances especially when private right is pleaded in order to determine whether deportation is proportionate to the protection of the public as the State is wont to argue.[1142] A guide was given in *Niemietz v Germany*[1143] as to what factors courts should be considered in reaching a decision on the private life limb. Despite the guide in *Niemietz v Germany*[1144] that

[1140] (1989) 11 EHRR 322; Yael Ronen, 'The ties that bind: family and private life as bars to the deportation of immigrants' (2012) 8 *International Journal of Law in Context* 283, 284. Ronen discusses the issues impinging on Article 8 ECHR and why the ECtHR accorded weight to family ties.
[1141] *Boughanemi v France* (1996) 22 EHRR 228; *Moustaquim v Belgium* (1991) 13 EHRR 822; *Boulifa v France* (1997) 30 EHRR 419; *Omojudi v UK* App no 1820/08 (ECtHR, 24 November 2009)
[1142] Vanessa Bettinson, 'European Court Of Human Rights: Deportation of Migrant Following Criminal Conviction; European Convention on Human Rights, Article 8; Omojudi v United Kingdom' (2010) 74 *Journal of Criminal Law* 113,115
[1143] (1993) 16 EHRR 97
[1144] ibid para 29

provided a set of considerations, these have not have been strictly followed rendering the decision, merely cosmetic.

On criminality grounds related decisions, *Boultif v Switzerland*[1145] provided some criteria in assessing the effect of deportation on the migrant's family life following a criminal conviction which now serves as a benchmark for proportionality assessment in deportation proceedings. In the United Kingdom in particular, there have been a somewhat fluctuation of the necessity adjunct in deportation matters. In 2004, the House of Lords [Supreme Court] in *Razgar v SSHD*[1146] [Razgar test] held that a deciding authority should adopt a five stage approach in Article 8 cases bordering on removal of a person.[1147] At stage four, the court applies the 'necessary in a democratic society' nexus in determining the reasonability of such a decision necessitating removal not in every society but in a democratic society where the rule of law operates.[1148] In *JO (Uganda); JT (Ivory Coast) v SSHD*[1149] the court held that where it was sought to deport a person who has committed a criminal offence, the State has to show very serious compelling reasons to justify the decision.

By way of interpretative obligations incumbent on United Kingdom courts[1150], in typical deportation cases following a previous conviction, the United Kingdom courts have followed the *Boultif* criteria.[1151] In addition to that, the courts have also followed a recent decision in *Uner v Netherlands*[1152] where the ECtHR revisited *Boultif* and expanded the criteria adding the best interests of the children as a consideration in determining the proportionality of removal decisions involving the separation of families where children are involved. The fluctuations and lack standards in deportation of migrants may have been caused by several approaches taken by the ECtHR, which

[1145] App no 54273/00 (ECtHR, 2 August 2001) The factors listed by the court includes the applicant's family relationship, whether the spouse knew of the offence when they entered into the relationship; whether there are children of the marriage and their ages; the seriousness of the difficulties which the spouse is likely to face should the applicant be deported and the length of the applicant's stay in the country.
[1146] [2004] UKHL 27
[1147] ibid, para 17 '(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?'
[1148] See also *Huang and Others v SSHD* [2007] UKHL 11 on the extension of the Razgar test to ultimate exceptional test bordering on reasonable expectation.
[1149] [2010] EWCA Civ 10
[1150] See the Human Rights Act 1998, s 2 (1)
[1151] *Boultif v Switzerland* (n1145)
[1152] App no 46410/99 (ECtHR, 18 October 2006)

the United Kingdom courts have followed. The following decisions will highlight these seeming inconsistencies. In *Maslov v Austria*[1153], the court at paragraph 70 stated:

> The court would stress that while the criteria which emerge from its case-law and are spelled out in the *Boultif* and *Uner* judgments are meant to facilitate the application of Article 8 in expulsion cases by domestic courts, the weight to be attached to the respective criteria vary according to the specific circumstances of each case [...]

At paragraph 74 it stated:

> Although Article 8 provides no absolute protection against expulsion for any category of aliens (see *Uner* para 55) […] the court has already found that regard is to be had to special situations of aliens [migrants] who have spent most, if not all, his childhood in the host country, were brought up there and received his education there.

In *Maslov*, the court found in favour of the application and concluded that the imposition of an exclusion order [deportation order] even of limited duration was disproportionate to the legitimate aim pursued.

In *Grant v UK*[1154] a Jamaican national came to the UK at age 14 and committed series of criminal offences, the court distinguished Maslov stating that it could not ignore the sheer number of convictions. Furthermore, in *Onur v UK*[1155] which concerns the deportation of a Turkish national who had come to the UK at age 11 and committed several criminal offences, the ECtHR applied *Uner* stating that deportation would not be disproportionate. The difficulty is that rather than treat long-term migrants as special category of non-citizens whose expulsion will require very weighty and obvious reasons; the ECtHR only ephemerally took account of individual circumstances which has produced different outcomes which may not be explained by the severity of the committed offences nor by the degree of integration of the applicant in the host country.[1156]

Therefore, this lack of clear focus and clarity in what should be accorded weight and or the necessity in a democratic society adjunct in deportation matters may have invited a

[1153] App no 1638/03 (ECtHR, 23 June 2008)
[1154] App no 10606/07 (ECtHR 8 January 2009)
[1155] (2009) 49 EHRR 38
[1156] Charlotte Steinorth, 'Uner v Netherlands: Expulsion of Long-term Immigrants and the Right to Respect for Private and Family Life' (2008) 8 *Human Rights Law Review* 185, 186

barrage of criticisms even by the court's judges themselves who characterized the ECtHR casuistic approach as a "lottery for national authorities and a source of embarrassment for the court".[1157] Judge Marten opined that the embarrassment arises since it makes it impossible for the court to make comparisons between the merits of cases before it and those already decided.[1158] Such a fluctuating approach does not allow for legal certainty, consistency and precision, which should be a parameter of measuring the rule of law but the court, has adopted different standards thus culminating in different findings since 1991.[1159] Nevertheless, it has been reported that many States through the instrumentality of their migration laws do no longer deport long-term migrants even when they commit criminal offences; they are therefore indirectly treated as nationals.[1160] Similarly, the Parliamentary Assembly in its 2001 Recommendation advised that the expulsion of migrants should not be applied under any circumstances to those born or brought up in the host State except on verifiable grounds affecting state security.[1161]

It can therefore be argued that it is not sufficient to deport on criminality grounds if the State cannot particularly provide relevant and sufficient reason why deportation is for the prevention of disorder or crime. The argument is that deportation on the basis of criminal convictions alone may amount to double jeopardy. This is because the committing of criminal offences is not peculiar to non-nationals as nationals equally commit criminal offences and no further punishments are meted out to them. Pursuant to this argument, in *Autronic v AG Switzerland*[1162], the court reasoned that the state requires factual evidence for believing that there was real danger to the interest, which the State claims to be protecting on the guise of pressing social need. Even though *Autronic* is not directly applicable to deportation proceedings, it might be reasoned that incontrovertible reasons are required by liberal democracies such as the United

[1157] *Boughanemi v France* (1996) 22 EHRR 228, para 4 (Judge Martens)
[1158] ibid
[1159] Marie-Benedicte Dembour, 'Human rights law and national sovereignty in collusion: the plight of quasi-nationals at Strasbourg' (2003) 21 *Netherlands Quarterly of Human Rights* 63, 64;
[1160] *Uner v Netherlands* (n1049) At the Comparative Law Section of this judgment, paragraph 39, it was reported that eight member States have provided in their laws that second-generation immigrants cannot be deported on the basis of their criminal record or activities: Austria, Belgium, France, Hungary, Iceland, Norway, Portugal and Sweden. Apart from Iceland and Norway, this protection is not confined to those who were actually born in the host country but also applies to foreigners who arrived during childhood (varying from before the age of three in Austria to before the age of fifteen in Sweden).
[1161] Parliamentary Assembly, Recommendation 1504 (2001) para 7 and 11 (ii) (g) <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta01/EREC1504.htm> accessed 26 October 2013
[1162] (1990) 12 EHRR 485

Kingdom to continue to justify the deportation of a migrant who has committed a criminal offence on the basis of the prevention of crime.

In the light of the foregoing, I argue that deportation on criminality grounds is an extension of the policy of exclusion, which is against liberal ideals, anathema to the necessity in a democratic society nexus, which should have considered rehabilitation rather than deportation.[1163]

Taking a purposive and teleological approach, the Human Rights Committee (HRC), quite recently, has considered the rationality of deportation of migrants. Expanding the concept of "the right to enter his own country" consistent with its Article 12 of the ICCPR[1164] which provides that an individual should not be barred from entering his own country, the HRC held that this may include the country where the migrant was born and or had lived the majority of his life. Such was the decision on 18 July 2011 when the HRC published its views in the case of *Nystrom v Australia*.[1165] The facts are that a 30-year-old non-citizen had lived in Australia for 27 years. He was convicted of aggravated rape and armed robbery, which led the Australian government to cancel his visa to remain forcing him to move to Sweden. The HRC found that his deportation breached his right to enter his 'own country' as in this case, Australia where he developed special ties rather than Sweden being his country of nationality thus allowing his re-admittance to Australia in the light of sufficient ties accruing therefrom. This case has been seen as a springboard for the gradual broadenings of the scope of art 12(4) to cater for the unique factual circumstances of the relevant applicants thus significantly weakening the nexus previously required by the Committee between art 12(4) and nationality.[1166] It could be suggested that the HRC may have been influenced by *Autronic* highlighted above in applying the factual evidences of the circumstances of *Nystrom* who even though does not hold Australian nationality but has remained in the country as a 'citizen' given the length of his stay and ties in the country.

[1163] See Nicholas De Genova, 'Inclusion Through Explosion: Explosion or Implosion' (2008-2009) 1 *Amsterdam Law Forum* 43, 48
[1164] ICCPR (n29) Art 12(4) provides that 'No one shall be arbitrarily deprived of the right to enter his own country'.
[1165] *Nystrom v Australia*, Communication No CCPR/C/102/D/1557/2007 Meeting of 18 July 2011
[1166] Devon Whittle, 'Nystrom v Australia, UN Doc CCPR/C/102/D/1557/2007' (2012) 19 *Australian International Law Journal* 235, 237

Analytically, the common issue that emerges from our discussion on the 'necessity in a democratic society' nexus is that of proportionality between the legitimate aim of deportation on the one hand and that the means to achieve it on the other hand. This becomes very pronounced when the reason for deportation is laced with criminal conviction, which raises a spectrum in the determination of liberal democracies to deport migrants regardless of their level of integration in the host country sufficient to qualifying them as nationals that are usually immuned from deportation.

5.7 The Contrivance of Deportability and Removability

The contrivance of deportability and removability for our purpose finds expression in the legislative and judicial architecture being that deportation in the United Kingdom is unarguably constructed by a combination of legislative and judicial actions. This part argues that legislation associated with deportation and/or removal are constantly and in an unrestrained manner enacted, revised and re-enacted to enhance and achieve actual removal in contrast to the doctrine of legitimate expectation encapsulated under the principle of legal certainty. It further opens a vista of argument that deportability and/or removability is a state contrivance which commences from the very point the migrant enters the territory of the state whether regular or irregular and such can be articulated through the interplay of policy encumbered by legislative and judicial architecture.

5.7.1 Legal Certainty and Legitimate Expectation

The rule of law requires that the law must be accessible and so far as possible intelligible, clear and predictable.[1167] This invites its conformity and adherence to the principles of legal certainty.[1168] Legitimate expectation in the immigration context was first applied in *Schmidt v Home Secretary*[1169] in 1969 to differentiate aliens [migrants] facing removal as a result of expired leave and those whose leave were terminated or curtailed prematurely. For Lord Denning, the latter not the former had a legitimate expectation, considered unfair to deprive them of such rights without a right to fair

[1167] Lord Bingham, 'The Rule of Law' (Centre for Public Law Lecture Series, 16 November 2006) < http://www.cpl.law.cam.ac.uk/past_activities/the_rt_hon_lord_bingham_the_rule_of_law.php> accessed 05 April 2012
[1168] Koffi Annan, 'Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post Conflict Societies' UN Doc S/2004/616 (2004)
[1169] [1969] 2 Ch 149

hearing.[1170] In *Abdi and Nadarajah v SSHD*[1171] the court described legitimate expectation as a requirement for good administration that fosters confidence in the administrative authorities.

In essence, when a law is procedurally and legally transparent, predictable and legally certain, arbitrariness is avoided given that certain laws may still be legal but arbitrary. Persons who are subject to the law must be able to explicitly predict the law, as the law should be adequately accessible in order to help them regulate their conduct.[1172] This means that the law must, as much as possible, allow a person subject to it, the latitude to predict or foresee within reasonable circumstances the consequences of any action before taking it.[1173] The accessibility rule, in the opinion of Wadham, aims to counter arbitrary display of power by the provision of a restriction that is unjustifiable even if authorized in domestic law unless there is publication of the rule made in a form accessible to those to be affected by it.[1174] In the phone tapping cases of *Malone v United Kingdom*[1175] and *Govell v United Kingdom*[1176] the ECtHR agreed that internal guidelines from State departments or agencies do not fulfill the accessibility requirement unless when published. In *Malone*, the court held that the tapping of the applicant's telephone by the police, which at the time was governed by internal regulations, not made public, was not in accordance with the law therefore an interference with his right to private and family life.

The certainty rule on its part is intended to enable individuals likely to be affected by the restriction of their rights to understand the circumstances giving rise to the imposition of such a restriction and to enable individuals foresee with a reasonable degree of accuracy the consequences of their actions.[1177] Nonetheless, what is sufficiently certain is at times a product of circumstances given that absolute certainty may be unrealizable as it may come with excessive rigidity.[1178]

[1170] Ibid [Lord Denning MR]
[1171] [2005] EWCA Civ 1363
[1172] *Fothergill v Monarch Airlines* Ltd [1981] AC 251, for full details and discussions on the rule of law, see chapter 2, section 2.7.3 of this Thesis.
[1173] *Sunday Times v United Kingdom* (1979) 2 EHRR 245, para 49
[1174] John Wadham and others, *Blackstone's Guide To The Human Rights Act 1998* (OUP 2007) 31
[1175] (1984) 7 EHRR 14
[1176] [1999] EHRLR 121
[1177] Wadham and others (n1174) 31
[1178] See *Sunday Times v UK*, (n1173) para 49

Drawing from an institutional background, Sales opined that the doctrine of legitimate expectation operates as a control over the exercise of the public authority's discretionary powers which ensures that they are judiciously exercised having due regard to the particular circumstances of individual cases before the decision maker.[1179] This is particularly so given the fact that Parliament could not have predicted all circumstances of the matter at the time of passing the legislation. Bradley and Ewing on their part describe legitimate expectation as an aspect of legal certainty where an individual is said to hold a public authority accountable to its words and actions and the extent where the public authority cannot be allowed to change its mind having led the individual to believe that a certain decision would be made.[1180]

For our purpose, legitimate expectation has been captured in four main situations notably:

> (a) where the public authority [Home Office] has made a decision affecting a migrant which it later seeks to replace with a fresh decision[1181]; (b) the Home Office gives an assurance that certain procedures or policies will be applied in a matter affecting the migrant but then acts differently[1182]; (c) without any assurance given, the Home Office had followed a consistent practice (course of dealing) which led the migrant to believe that the practice will continue in the absence of notice that it has been changed[1183]; (d) finally the Home Office makes public the policy it will follow in a matter but changes that policy before deciding the migrant's case thereby making a different decision from that which the migrant had expected.[1184]

In *Re Findlay*[1185], the Home Secretary changed the policy on the granting of parole to convicted criminals that caused some ineligibility of certain prisoners for parole earlier than expected under the former policy. The court held that their legitimate expectation would be that their cases would be decided individually in recognition of a policy that would have made them eligible for early release than for a latter release.

Legitimate expectation may be substantive or procedural. Procedural legitimate expectation comes into being when as in (b) above, a public body led an individual to believe that he will have a particular procedural right over and above the general

---

[1179] Philip Sales and K Steyn, 'Legitimate Expectations in English Public Law: An Analysis' (2004) *Public Law* 564

[1180] A W Bradley and K D Ewing, *Constitutional and Administrative Law* (14th edn, Pearson 2007) 753

[1181] *R v SSHD ex p Hargreaves* [1997] 1 WLR 906; see also *Associated Provincial Pictures Houses Ltd v Wednesbury Corporation [1984] 1 KB 223*

[1182] *R v SSHD ex p Khan* [1981] 1 WLR 1337

[1183] *R v Inland Revenue Commissioners ex p Preston* [1985] AC 835

[1184] Bradley and Ewing (n1071) 754

[1185] [1985] AC 318 [338]

requirement of the principles of fairness and natural justice.[1186] On the contrary, if an individual had been made to believe that he would receive a substantive benefit, then this will be protected by substantive legitimate expectation.[1187] As Forsyth stated, a substantive expectation arises where a favourable decision is expected.[1188] In *A-G of Hong Kong v Ny Yuen Shiu*[1189] the basic concept is that of legitimacy where the applicant expects a favourable decision. Nevertheless, whether legitimate expectation is substantive or procedural, may be insignificant. What is important is the duty of good administration where public authorities are held to their promises that may undermine the law if was not insisted that any failure to comply is objectively justified as proportionate measure in the circumstance.[1190]

Cartwright finds a similarity between public law doctrine of legitimate expectation and the private law doctrine of estoppel.[1191] To him, the paradigm of each case involves a clear unambiguous promise in the form of undertaking or representation by one party, which creates in the other party an expectation of belief for the happening of an event, which the other party relied on.[1192] In *R (Bibi) v Newham LBC*[1193], it was held that the reason for the enforcement of legitimate expectation is anchored on the broader principles of fairness and the prevention of abuse of power similar to detrimental reliance under estoppel.[1194] In *R v Secretary of State for Education and Employment, ex p Begbie*[1195] detrimental reliance was identified as an important factor in substantive legitimate expectation claims.

The Court of Appeal in *R v North and East Devon HA ex p Coughlan*[1196] seized the opportunity to clarify the doctrine of legitimate expectation. The applicant and others having been displaced in a road accident was placed in the care of a local health

[1186] Paul Craig, *Administrative Law* (5th edn, Sweet & Maxwell) 13
[1187] Craig, ibid
[1188] C Forsyth, 'Wednesbury protection of legitimate expectation' (1997) *Public Law* 375, 376
[1189] [1983] AC 629 Lord Fraser opined that legitimate expectation includes all expectations that go beyond enforceable rights on the proviso that they have some reasonable basis.
[1190] *Abdi and Nadarajah v SSHD* [2005] EWCA Civ 1363 [68] (Laws LJ)
[1191] John Cartwright, 'Protecting Legitimate Expectation and Estoppel in English Law' (2006) 10 (3) *Electronic Journal of Comparative Law* 1, 6
[1192] Cartwright ibid
[1193] [2002] 1 WLR 237
[1194] ibid [29-31] see similarly *CCSU v Minister for the Civil Service* [1985] AC 374 In this case Lord Roskill captured legitimate expectation as a "manifestation of the duty to act fairly"; *R v Inland Revenue Commissioners ex p Unilever* [1996] S.T.C 681 [690] per Bingham MR where he stated: "the categories of unfairness are not closed and that precedent should act as a guide and not a cage"; *R v SSHD ex p Khan* [1984] 1 WLR 1337
[1195] [2000] 1 WLR 1115 [1124]
[1196] [2001] QB 213 [4] [52-71]

authority on the assurance that they could live there (Mardon House) as long as they choose but the local authority thereafter closed Mardon House and transferred the applicant and others to a local authority home. Upon their judicial challenge, the Court held that the applicants had a clear promise that Mardon House would be their home for life, finding that, if a public body induced a legitimate expectation of a substantive benefit, any frustration of that benefit might be unfair, unjustifiable and sufficient to amounting to an abuse of power.

Similarly in *R (Rashid) v SSHD*[1197] the claimant was an Iraqi Kurd who sought asylum in the United Kingdom on 4 December 2001 but his asylum application was refused. He argued that if the Home Office had applied their asylum policy between his arrival and March 2003, he would have been granted asylum, a subsequent change in asylum policy made his claim unsuccessful. In the protracted case, the key question for the Court of Appeal was whether the Secretary of State's decision was "invalid on grounds of unfairness". The court referring to *Bibi* above stated:

> In all legitimate expectation cases, whether substantive or procedural, three practical questions arise. The first question is to what has the public authority, whether by practice or promise, committed itself; the second is whether the authority has acted or proposes to act unlawfully in relation to its commitment; the third is what the court should do.[1198]

The court then concluded that it was clear that the Secretary of State committed himself to applying his policy during the period December 2001-March 2003 and that must follow from the existence of the policy itself. The argument therefore is that those who rely on published guidelines by public authorities are obviously entitled to expect them to be followed.[1199] By extension, public authorities are duty bound to adhere to their own policies whether or not there is reliance or application of that policy.[1200] If anything, good administration requires that public authorities adhere to policies they promulgate and equality of treatment requires that like cases are treated equally.[1201] The rationale behind the expectation that public authorities adhere to their policies can be

[1197] [2005] EWCA Civ 744
[1198] ibid [46]; (Schiemann LJ) [29] in reference to *R (Bibi) v Newham London Borough Council* [2002] 1 WLR 237
[1199] Richard Clayton, 'Legitimate Expectation, Policy and the Principle of Consistency' (2003) 62 (1) *Cambridge Law Journal* 93, 102
[1200] Yoav Dotan, 'Why Administrators should be Bound by their Policies' (1997) 17 (1) *Oxford Journal of Legal Studies* 23, 24
[1201] Richard Clayton (n1199) 103

explained within the remit of the application of the principle of consistency.[1202] Steyn stated:

> The requirement of consistency is deeply rooted in English law. The rule of law requires that laws be applied equally, without unjustifiable differentiation. The courts of equity have long since embraced the principle that decisions must not vary "like the Chancellor's foot" and the law of precedent seeks to ensure, inter alia, that like cases are treated alike. Inconsistency is one of the most frequent manifestations of unfairness that a person is likely to meet.[1203]

As the court stated in *R v SSHD ex p Urmaza*[1204] the idea is that consistency follows the pattern and assumption that a public authority will follow his own policy and will in turn view inconsistency as inkling towards manifest absurdity and *Wednesbury unreasonableness.*[1205]

In the light of the foregoing, it is argued that the contrivance of deportability or removability runs contrary to the doctrine of legitimate expectation. Evidence shows that ninety statements of changes in Immigration Rules have been laid before Parliament since May 2003-2013.[1206] This excludes Immigration Acts, Statutory Instruments and policies. The said Immigration Rules is a product of the negative resolution procedure of Parliament consistent with the Immigration Act 1971 section 3 (2) that enables the policy content of the rules to be considered in either House, chosen in the interest of flexibility.[1207] This flexibility with little parliamentary scrutiny allows the Home Secretary to change policies, as she may consider necessary in the light of the government's agenda given that recent government policies set targets for the deportation and removal of migrants.[1208]

The obvious implication of this constant inconsistency and unfairness is that even during the currency of the migrant's leave to remain, constant changes of the

---

[1202] Karen Steyn, 'Consistency-a Principle of Public Law' (1997) 2 (1) *Judicial Review* 22, 22
[1203] Steyn ibid; See also *Matadeen v Pointu* [1999] 1 AC 98
[1204] The Times 11 July 1996 (QBD); [1996] COD 479
[1205] See similarly *CCSU v Minister for the Civil Service* [1985] AC 374, 'the Wednesbury case established a high threshold for review of actions of public authorities, which was reinforced by Lord Diplock in formulating his "rationality" test', see also Lord Carnwath, 'Judicial review in a changing society-From Rationality to Proportionality in the Modern Law (UCL-HKU conference, Hong Kong University, 14 April 2014)
[1206] Home Office UK Border Agency, Statement of Changes in Immigration Rules <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/statementsofchanges/> accessed 13 November 2013
[1207] HC Deb 16 June 1971, vol 819, cols 482-483
[1208] Parliamentary Joint Committee on Human Rights, *Highly Skilled Migrants: Changes to the Immigration Rules* (Twentieth Report)(2006-07, HL 173, HC 993) 16

immigration rules and policies create deportable status as the migrant may not be able to meet up the new requirement of the rules some of which were not in place at the time of the initial grant of leave. The consequence of the inability to renew leave due to inconsistency of the law, abrupt change of policies, and detrimental reliance on previous published rules is that the migrant becomes deportable or removable. It is therefore the legitimate expectation of a migrant that the law, which regulates his conduct, is not devoid of legal certainty, accessibility, and predictability consistent with international human rights standards. While it is accepted that the State enjoys the discretion or prerogative to deport migrants that violate the State's immigration laws, the issue of constant changes breed uncertainty, uncertainty breed unpredictability leading to unaccountability.[1209] This is due to the fact that the history of immigration laws on deportation and/or removal is possessive of intricate and calculated interventions, which are a function of a by-product of presumed action and agenda, therefore 'the law serve as instruments to supply and refine parameters of discipline on the one hand and coercion on the other hand'.[1210]

As Foucault observes "the existence of legal prohibition creates around it a mass field of illegal practices".[1211] The argument is that in order to effect deportation, the deportee must have been put in a deportable state through the instrumentality of the law of the State. Therefore migrant irregularity is produced and sustained as an effect of the law within the realm of discursive formation and lived through a palpable sense of deportability and removability.[1212]

In my view, the contrivance of deportability and/or removability is adumbrated by the legal production of migrant irregularity exemplified by inconsistent and uncertain laws. In the words of Calavita 'There may be no smoking gun, but there is nonetheless a lot of smoke in the air'.[1213] It could therefore be argued that irregularity-giving rise to deportability and/or removability is a creation of immigration laws because it

[1209] Emmanuela Paoletti citing Alice Edwards (n1071)
[1210] Nicholas P. De Genova, 'Migrant "Illegality" and Deportability in Everyday Life' (2002) 31 *Annual Review of Anthropology* 419, 425
[1211] Michel Foucault, *Discipline and Punish: the Birth of the Prison* (Random House 1979) 280
[1212] De Genova (n1210) 431, 439; see also Jacqueline Maria Hagan, *Deciding to be legal: a Mayan Community in Houston* (Temple University Press 1994) 79 who opined that the U.S immigration laws beginning in 1965 have been instrumental in producing migrant illegality [irregularity] in its contemporary configuration
[1213] Kitty Calavita, 'Immigration, law and marginalization in a global economy: notes from Spain' (1998) 32 (3) *Law & Society Review* 529, 557

constructs, differentiates and ranks various categories of migrants, which entails an active process of inclusion through irregularisation.[1214] The difficulty is that inconsistency and unfairness fuelled by constant changes of the immigration rules and policies during the currency of the migrant's leave to remain creates deportable status. In essence, unfairness, inconsistency and detrimental reliance function to feed the infraction of the doctrine of legitimate expectation, which in totality instigates and contrives deportability and/or removability.

5.7.2 Legitimate Expectation, Article 8 ECHR and 'Belonging'

It might be expected that migrants having established a web of social, personal and family ties with the host State while estranged from their country of nationality, regardless of their conduct such as criminality, would be saved from deportation-as an interference with their right to private and family life. But as it stands, the ECtHR applies no identifiable spectrum in deciding whether deportation will be disproportionate against them despite their length of stay in the host State.[1215] Rather than treat long-term migrants as a special category of aliens whose expulsion would require thorough and weighty reasons, the ECtHR prefers the application of individual circumstances in each case with different outcomes.[1216] As discussed above, Judge Martens in *Boughanemi v France* described this approach as a 'lottery' and 'a source embarrassment' for the ECHR.[1217] Judge Marten opined that the embarrassment arises since it makes it impossible for the court to make comparisons between the merits of cases before it and those already decided.[1218]

In her reconstruction, Dembour opined that such a fluctuating approach does not allow for legal certainty, consistency and precision, which should be a parameter of measuring the rule of law but the court, has adopted different standards thus culminating in different findings since 1991.[1219] Steinorth in her study reported that in the decade between 1991 and 2001, more than 10 cases came before the ECtHR concerning the expulsion of long-term migrants where in some cases violations were found, while in

[1214] De Genova (n1210) 439
[1215] For a full discussion on this, see 'Necessity in a democratic society' section 5.6.3 above
[1216] Charlotte Steinorth, '*Uner v The Netherlands*: Expulsion of Long-term Immigrants and the Right to Respect for Private and Family Life' (2008) 8 *Human Rights Law Review* 185, 186
[1217] (1996) 22 EHRR 228, para 4 (Judge Martens)
[1218] *Boughanemi v France* ibid
[1219] Marie-Benedicte Dembour, 'Human rights law and national sovereignty in collusion: the plight of quasi-nationals at Strasbourg' (2003) 21 *Netherlands Quarterly of Human Rights* 63, 64

others no violations were found.[1220] This inconsistency has led to the argument whether it will not be preferable for the ECtHR to take a clear stand on either the giving of primary consideration to the legitimate expectation of long-term residents or over the legitimate interests of States in securing their supposedly public order.[1221] Narrating this inconsistency, Mole opined that there remains an imprecise boundary between positive and negative obligations but a fair balance must be struck between the interest of the individual and the interest of the community.[1222] After all, the conviction for a criminal offence itself should not necessarily warrant deportation, as this may not adequately address the issue of criminality given that the wrong doing of a foreigner is not greater than that of a citizen.

Nevertheless, the ECtHR in *Uner v the Netherlands*[1223] concluded that regardless of the non-national's strong residence (long term residence) and degree of integration, they cannot be equated with that of a national when it comes to the power of the host State to expel them. Mole observed that despite this position, several ECtHR judges have continued to hold dissenting opinions against the majority in insisting that long term resident migrants residing lawfully in the host State should be accorded the same fair treatment and a legal status as close as possible to that of nationals.[1224]

The above illustrates that the dichotomy between the legitimate expectation of long term residents and nationals remains wide. According to Gibney, the boundary between legitimate expectation and deportation power can be narrowed down to 'who belongs' in the liberal state.[1225] For Gibney, 'the idea of who belongs chimes with recent writing by scholars from several perspectives who stressed the moral claims to citizenship and protection against deportation of long-term non-citizen residents'.[1226] They argue that

[1220] Charlotte Steinorth (n1216) in this, Steinorth reported the following cases where the ECtHR found no violations of Article 8 regarding long term migrants- *Boughanemi v France* (1996) 22 EHRR 228, *C v Belgium* (2001) 32 EHRR 19, *Boulchekia v France* (1998) 25 EHRR 686, *El Boujaidi v France* (2000) 30 EHRR 223, *Boujlifa v France* (2000) 30 EHRR 419, *Dalia v France* (2001) 33 EHRR 26 and *Baghli v France* (2001) 33 EHRR 32. In contrast to the above, the ECtHR found in the following cases a violation of Article 8 by virtue of their long-term residency- *Moustaqium v Belgium* (1991) 13 EHRR 802, *Beldjoudi v France* (1992) 14 EHRR 801, *Nasri v France* (1996) 21 EHRR 458, *Mehemi v France* (2000) 30 EHRR 739 and *Ezzouhdi v France* App no 47160/99 (ECtHR, 13 February 2001)
[1221] Charlotte Steinorth (n1216) 196
[1222] Nuala Mole, *Asylum and the European Convention on Human Rights* (Council of Europe 2007) 99
[1223] App no 46410/99 (ECtHR, 18 October 2006)
[1224] Nuala Mole (n1222) 99
[1225] Gibney, 'Is Deportation a Form of Forced Migration?' (n983) 126
[1226] Matthew Gibney citing J H Carens, "The Case for Amnesty" (2009) 34 Boston Review 5-6; M. Walzer, *Spheres of Justice* (Basic Books 1983); R Baubock, *Stakeholder Citizenship: An idea Whose*

these moral claims grow out of the liberal and democratic ideal of congruence between the contours of State's coercive power and the boundaries of its membership. They reasoned that an expansive conception of membership-guaranteeing membership for long-term resident non-nationals, which protects them from deportation, is also consistent with more communitarian ideas of State.[1227] This expanded concept of belonging is gaining weight with international human rights instruments. By applying Article 12 of the ICCPR, which states that an individual should not be arbitrarily deprived of "the right to enter his own country" the Human Rights Committee found in *Nystrom v Australia*[1228] that States are under obligation not to deport or expel certain categories of long term resident non-nationals.[1229]

As discussed at chapter 3 of this thesis and as Gil-Bazo noted, 'the UN Human Rights Committee had had cause to consider extensively the relationship that exists between individuals and States other than nationality, particularly the legal relevance of such significant attachments other than nationality'[1230] which in my view, has not been given sufficient consideration and nuance by liberal democracies in deportation matters.

5.7.3 *Legitimate Expectation, Deportation, Removal, HSMP Forum*[1231] *and the Pankina*[1232] *String of Cases*

The recurring decimal in the *HSMP Forum* and the *Pankina* string of cases is the issue of legitimate expectation and the exercise of power within the confines of unreasonableness. The underlying argument as highlighted above is whether the State can depart from its published policy [law] relied upon by migrants during the currency of their leave to remain- heightened by the fact that such departure would inadvertently create an unfavourable immigration situation culminating in deportation and/or removal.

Time Has come? (Migration Policy Institute 2008) and A. Shachar, *The Birthright Lottery: Citizenship and Global Inequality* (Harvard University Press 2009)

[1227] Matthew Gibney, ibid

[1228] Communication No CCPR/C/102/D/1557/2007 Meeting of 18 July 2011

[1229] For a full discussion on this case, see above the 'Necessity in a democratic society' section of this chapter

[1230] Maria-Teresa Gil-Bazo, 'Refugee Protection under International Human Rights Law: From Non-Refoulement to Residence and Citizenship' (2015) 34 *Refugee Survey Quarterly* 11, 33-34; see also chapter 3.2 of this thesis.

[1231] [2008] EWHC 664 (Admin)

[1232] *Pankina & Ors v SSHD* [2010] EWCA Civ 719

In the *HSMP Forum Ltd v SSHD*[1233] the UK government introduced a policy allowing individuals to come to the UK under the Highly Skilled Migrant Programme ("HSMP"). The Home Office issued a guidance containing sufficient details for self-assessment enabling prospective applicants to determine their likelihood of success in the application for leave to enter the UK. Some 49,000 migrants entered the UK under this scheme.[1234] The Home Office reserved for itself the power to review the policy (through changes to the Immigration rules)[1235] stating that qualifying criteria might be adjusted from time to time. Three reviews were made in 2003-2006 but in 2007 the Home office tagged the review "new scheme". The new scheme changed the criteria for extensions and settlements made applicable to new entrants as well as migrants already in the UK.[1236]

The HSMP Forum challenged this new scheme by way of a judicial review as being unfair, unlawful and unreasonable and a breach of their right to legitimate expectation. The Parliamentary Joint Committee that conducted an inquiry found that the new rules were retrospective in effect and could not be justified as proportionate given that HSMP individuals have taken a number of steps to establish their home in the UK.[1237] But the Secretary of State argued that the rule was not retrospective in effect stating that the only expectation which the applicants should have is that the rules and policies in force at the time of their applications, will be applied correctly to them. The court however held that the legitimate expectation of migrants at the time of their application was that the criteria of extensions of their leave to remain would not change from what was obtainable and that the revision of the scheme should not affect those already on the scheme.

The court found that conspicuous unfairness was involved when migrants were encouraged to sever links with their home country and the court also found abuse of power in frustrating the path to final settlement in the UK for these migrants. In short, their only legitimate expectation was that their applications would be judged on the basis of the rules and criteria under HSMP in force at the relevant time, which if not applied will make it impossible for some of them to remain. The implication of the

[1233] *HSMP Forum* (n1231)
[1234] Parliamentary Joint Committee on Human Rights, *Highly Skilled Migrants: Changes to the Immigration Rules* (n1208) 10
[1235]Parliamentary Joint Committee, ibid
[1236] *HSMP Forum* (n1231) [5]
[1237] ibid [21]

above is that had the court not given judgment in favour of the HSMP individuals, these 49,000 persons may have been subject to deportation and/or removal (for purported breach of conditions or overstaying their leave) when in actual fact it was the State that lured them into the country and during the currency of their leave decided to change the rules midway.

This approach leads to inconsistency and unfairness in view of these migrants' detrimental reliance on the State policies and laws, a breach of their right to legitimate expectation and consequently a latent contrivance of deportability and/or removability by the state in their initial inclusion and now what appears to be a calculated exclusion from the State. The retrospective effect of immigration laws as in this case, to say the least, is incompatible with international human rights law and cannot be said to meet the criteria of "in accordance with the law" requirement of Article 8 ECHR.[1238] The argument is that had the Home Office made the new HSMP policies for new entrants rather than the existing beneficiaries, the change would have been prospective rather than retrospective and may not have affected the legitimate expectation of the affected migrants. Therefore it is this retrospective approach that has shattered the necessary foreseeability and predictability element considered an inherent requirement of the law.[1239] In essence, the inclusive measures exemplified by the adoption of the HSMP programme and the exclusive measures exemplified by the rule change, which has the consequence of deportability and/or removability shows inconsistency and uncertainty that negates international human rights law.

5.7.4 The Ratio of the Pankina String of Cases

The facts of the *Pankina* case were that in 2008, the Home Office introduced an immigration rule that allowed graduates of approved United Kingdom institutions to remain in the country under the Tier 1 (Post Study work) migrant category.[1240] The rule require that the applicant must meet amongst other requirements, a certain sum of £800 in his/her bank account as explained in the Points Based System Policy Guidance. Migrants relying on the rules applied for leave to remain. The requirements of the rules

[1238] For a full discussion of the "in accordance with the law" element of Article 8 ECHR 1950, see 'The ECtHR, legality, the rule of law and minimum procedural safeguards' section of this chapter above
[1239] Parliamentary Joint Committee (n1208) 39
[1240] The affected rule is paragraph 245v of the Immigration Rules HC 607 laid before Parliament on 9 June 2008 under section 3 (2) of the 1971 Immigration Act.

were in mandatory terms of which failure will result in the refusal of the application and consequent removal. The Immigration Rules provided that the said £800 pounds was to be held by the applicant prior to the application while the Policy Guidance was amended to provide that the money was to be held for three months prior to the application.

The issue then was whether the applicant's application was to be judged under the Immigration rules or under the Policy Guidance interpreting the relevant rules.[1241] The court held that the three month requirement in the Policy Guidance did not form part of the rules and as it was not laid before Parliament. It reasoned that policy is precisely not a rule and is therefore required by law to be applied without rigidity. The court held that if the Home Secretary intends to make the rule black letter law, an established legislative route rather than the confusion it has generated must achieve this, the confusion generated being the unlawful incorporation of a document that had not been laid before Parliament.

However, I contend that aside of the issue of legitimate expectation raised by the above case, transparency, predictability and legal certainty are equally turned on. As been highlighted above, a law may be legal but arbitrary in its intent and application. The affected migrants having relied on the rules were put in a deportable status by virtue of the refusal of their applications, a situation that was saved by the decision in *Pankina*. Prior to this decision, migrants were compelled to leave the UK and some were removed.[1242]

Furthermore, at the heart of the matter is a further underlying issue where information can be amended, removed, or added to policy. This thus reflects the pressure and absolute whirlwind which litigants and judges are made to go through.[1243] The consequences are in themselves ominous as will be discussed further.

The Pankina decision was closely followed by *R (English UK) v SSHD*[1244] where the issue was that one of the requirements for the award of points being that the course must

[1241] See also *R v Secretary of State for Social Security ex parte Sutherland* [1996] EWHC 208 (Admin)
[1242] Home Office UK Border Agency, 'Points-Based System Maintenance (Funds): Policy Document (London 23 July 2013)
[1243] *DP (United States of America) v SSHD* [2012] EWCA Civ 365 [14]
[1244] [2010] EWHC 1726 (Admin)

meet the requirements set out in the UKBA's published sponsor guidance. However, the course level specified in the Guidance was then altered that specified a different level of course required as minimum. In following *Pankina*, the court stated that the ratio is that a provision which allowed a substantive criterion for eligibility of admission or leave to remain must involve Parliamentary scrutiny, therefore the change of approach in the new guidance operated to materially change the substantive criteria for entry of foreign students who wished to study English in this country.[1245]

Similarly in *R (Joint Council for the Welfare of Immigrants) v SSHD*[1246] the court had to consider applications under Tier 1 of the Points Based System vide a statement of proposed changes made to Immigration Rules HC 59.[1247] The changes *inter alia* enabled a limit to be set on the number of grant of entry clearance or leave to enter to a particular route during the relevant allocation period. The Secretary of State promised to publish the interim limit on the website of the UK Border Agency (now UK Visas & Immigration) but failed to do so at the relevant time only to be published at a later date. The court held that the manner in which the limits were imposed was unlawful following the decision in *Pankina* and stated that the limit should have been subject to Parliamentary scrutiny, however minor.

In 2012 in the case of *R (on the application of Alvi) v SSHD*[1248] similar issues came up. Mr. Alvi, a citizen of Pakistan entered the UK as a student on 20 September 2003 with leave valid to 31 January 2005 subsequently renewing his leave as necessary. Prior to a later renewal of leave, the work permit regime has been replaced by the points based system, which came into effect on 27 November 2008. He applied for leave to remain on the points based system, his application was refused stating that he did not satisfy the requirements of the Immigration Rules because his job title as an assistant physiotherapist was not of the level of the skilled occupations required by the rules. He argued *inter alia* that the list of skilled occupations was not part of the Immigration

[1245] *R (English) v SSHD* ibid (Foskett J)
[1246] [2010] EWHC 3524 (Admin); see also *R (Ahmed) v SSHD* [2011] EWHC 2855 (Admin); *R (Purzia) v SSHD* [2011] EWHC 3276 (Admin); *R (New London College Limited) v SSHD* [2012] EWCA Civ 51 on the interaction between what was in the policy guidance and the Immigration Rules.
[1247] Home Office, HC 59-Statement of Changes in Immigration Rules Laid before Parliament on 28 June 2010 under section 3(2) of the Immigration Act 1971 <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/statementsofchanges/2010/hc59.pdf?view=Binary > accessed 19 November 2013
[1248] [2012] UKSC 33; *Munir and Rahman v SSHD* [2012] UKSC 32- these two cases were heard together with common issues at stake relating to parliamentary scrutiny section 3 (2) of the 1971 Immigration Act.

Rules and the document containing the list had not been laid before Parliament under the negative resolution procedure consistent with the Immigration Act 1971, section 3 (2). In short, that the Occupation Codes of Practice contain material which was not just guidance. Mr. Alvi sought a judicial review of the decision and permission was granted him to appeal to the Court of Appeal. The court allowed his appeal stating that the skilled occupation was not part of the Immigration Rules […][1249] The SSHD appealed.

In upholding the case of Mr. Alvi, the court agreed that the information was not set out in the rules themselves and has therefore not passed the minute parliamentary scrutiny. The court pointed out the volume of rules being sent to Parliament under section 3 (2) of the Immigration 1971 Act appear to be voluminous to the extent that it is doubted whether Parliament would have subjected them to effective scrutiny before accepting them.[1250] The court stated that the case illustrates the tension in public law decision-making, between flexibility in the decision-making process and flexibility of its outcome, remarking that even though both are desirable objectives but achieving balance is often difficult.[1251] Lord Walker stated that the pressure under which the present day immigration control operates, makes it appropriate and desirable that outcomes of decision-making should be very predictable; therefore the requirement for detailed consideration of individual cases should be reduced.[1252]

In my view, the above cases have common ratios. The first is the ambulatory nature of the rules which appears to have been contrived to achieve a set standard inconsistent with the idea of Parliamentary scrutiny which is geared towards effective supervision even though no debates are usually held for passing Immigration Rules into law as they are made under the negative resolution procedure highlighted above. Secondly, as highlighted by Ian Dove J, the above cases raised a spectrum that operated to the extent that there lies a difference between the substantive requirements of the rules on the one hand and procedural requirement on the other hand.[1253] The difficulty with this approach is that it does not allow for consistency, predictability and foreseeability, which have the consequence of creating deportability or removability by way of legislative architecture. The corollary is that legal certainty is compromised in that the

[1249] *R (on the application of Alvi) v SSHD* [2011] EWCA Civ 681
[1250] *Alvi v SSHD* ibid [65] (Hope SCJJ)
[1251] ibid [111] (Walker SCJJ)
[1252] ibid [112] (Walker SCJJ)
[1253] *R (Purzia) v SSHD* [2011] EWHC 3276 (Admin) [17] (Dove J)

migrant cannot foretell the consequence of his/her application for leave to remain made in good faith.

In addition, the addition of extraneous materials as in the case of *Alvi* and *Pankina* illustrates abuse of power where a public authority can without the consent of Parliament add or remove at will, anything it considered necessary in order to probably achieve a high rate of refusal of migrants' applications ultimately leading to removal. It is rather not surprising that the Merit Committee of the House Lords made an adverse comment as to why the actual limit of the Tier 1 during the relevant allocation period was not in the statement itself.[1254]

At the rear of the cases discussed above, is the issue of unconstrained power, which is the very essence of arbitrariness. The Parliamentary Joint Committee stated with regrets that if the legal basis for the change in the rules is simply to give unconstrained power to the government to change rules with immediate effect thereby rendering people whom the Government has required to make their main home in the UK ineligible to stay in the UK, such an unconstrained power is the very essence of arbitrariness.[1255] Therefore legitimate expectation, as an aspect of legal certainty has been compromised with constant changes to the laws lacking intelligibility, clarity and predictability. The argument is that irregularity-giving rise to deportability or removability is a creation of immigration laws given that it constructs and differentiates migrants through the process of inclusion and in consequence creates exclusion leading to deportability and/or removability.

5.7.5 'Crimmigration'-Widening the Gates

A primrose path to the contrivance of deportability, which has opened the vistas, widened the gates, and heightened the velocity of deportation, is 'crimmigration'. Crimmigration for our purpose is used to describe the 'intersection of criminal and immigration law where criminal justice norms are imported into deportation or removal proceedings, whereas relaxed procedural norms of immigration proceedings are

[1254] Merits of Statutory Instrument Committee, *Statement of Changes in Immigration Rules* (Fourth Report of Session) (2010-11, HL 17) paras 10-14
[1255] Parliamentary Joint Committee (n1208)

themselves imported into the criminal justice system'.[1256] Crimmigration signposts the growing convergence of two critical regulatory regimes-criminal justice and immigration control where the two systems 'intersect at multiple points notably at points that violations of the immigration laws trigger broader, harsher, and more frequent criminal consequences even leading to refugees being prosecuted for illegal [irregular] entry'.[1257] Crimmigration exposes a common link, rooted in membership theory that has increasingly come to unite these two once discrete fields of law notably criminal law and immigration law.[1258] It is therefore curious that State practice through legislation has steadily expanded the list of non-immigration-related crimes that trigger deportation and other adverse immigration consequences and in addition the plethora of deportations bordering on crime-related grounds have skyrocketed.[1259]

The concomitant effect is that the underlying theories of deportation increasingly resemble those of criminal punishment to the extent that preventive detention and plea-bargaining, known as longstanding staples of the criminal justice system, have infiltrated the deportation process.[1260] Chacon on her part expresses that the State creates too many crimes about immigration that properly stated should not be crimes or if anything, stand as a ground for deportation.[1261] In the opinion of Beale, 'in a system characterized by over-criminalization [crimmigration], law enforcement operates with an undesirable degree of unchecked discretion, in such a manner that procedural protections are undercut leading to the misallocation of scare resources in crime control efforts'.[1262] As a result, concerns generated by crimmigration in the light of its implication vide the extension of the power to deport against the principle of legal certainty are legion. These concerns are amplified by what has been referred to as 'the selective convergence of criminal and immigration law' argued to have contributed

[1256] Jennifer M Chacon, 'Managing Migration Through Crime' (2009) 109 *Columbia Law Review Sidebar* 135, 136; crimmigration or over-criminalisation came into the lexicon of migration law through the contribution of American jurisprudence commentators as Chacon, Stumpf, Legomsky to mention but this few.
[1257] Nora V. Demleitner, 'Immigration Threats and Rewards: Effective Law Enforcement Tools in the "War" on Terrorism' (2002) 51 *EMORY Law Journal* 1059, 1059; Daniel Kanstroom, 'Criminalizing the Undocumented: Ironic Boundaries of the Post-September 11th 'Pale of Law' (2004) 29 *North Carolina Journal of Int'l Law and Commercial Regulation* 639, 640
[1258] Juliet Stumpf, 'The Crimmigration Crisis: Immigrants, Crime, and sovereign Power' (2006) 56 *American University Law Review* 367, 368
[1259] Stephen H. Legomsky, 'The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms' (2007) 64 *Walsh and Lee Law Review* 469, 470
[1260] Legomsky, 'The New Path of Immigration Law' ibid
[1261] Jennifer M. Chacon, 'Overcriminalizing Immigration' (2012) 102 *The Journal of Criminal Law and Criminology* 613, 614
[1262] Sara Sun Beale, 'The Many Faces of Overcriminalization: From Morals and Mattress Tags to Overfederalization' (2005) 54 *American University Law Review* 747, 749

immeasurably to a subtle violation of broader international human rights violations impinging on fairness, equal dignity, discrimination and proportionality to legitimate aim of immigration control.[1263]

The palpable tension generated by crimmigration have led scholars to query the rationale behind the importation of criminal justice norms into the domain of immigration, which according to them was originally conceptualized as civil where inter alia; States applying the citizenship and non-citizenship dichotomy map the exclusionary effects of criminalization of immigration law.[1264] From a symbiotic perspective, it appears that criminal law and immigration law serve the sole function of excluding individuals from the society and for determining when they could join or rejoin society.[1265] Nevertheless, both play different roles: criminal law regulates conduct within a community whereas immigration law governs the entry and exclusion of individuals across borders.[1266] Criminal law 'functions to inflict punishment on those that committed offenses where temporal considerations play a part in the determinations of guilt because it focuses on a single moment in time: the moment of crime as against affiliation such as marriage, family, good moral conduct which may be irrelevant but forms a bulwark of considerations in the immigration context'.[1267]

It is probable that the apparent rationale for using criminal law as a response to migration issues is the myth and stereotype of migrant criminality, which, according to Chacon are sometimes tinged with racism.[1268] In a bid to attempt to address the litany of problems associated with irregular migration, States employ criminal law as a vehicle of exclusion thereby aligning itself with public discourse on migration resonating and dominated by a trope of criminality.[1269] As Frey and Zhao argue, 'the rise in the anti-immigrant rhetoric, trumpeted and hyped by interest groups with a passionately

[1263] Barbara A. Frey and X Kevin Zhao, 'The Criminalization of Immigration and the International Norm of Non-Discrimination: Deportation and Detention in U.S. Immigration Law' (2011) 29 *Law and Inequality* 279
[1264] Stephen H. Legomsky, 'The New Path of Immigration Law' (n1259) 471; Nora Demleitner, 'Preventing Internal Exile: The Need for Restrictions on Collateral Sentences Consequences' (1999) 11 *Stanford Law and Policy Review* 153, 158; Stumpf, 'The Crimmigration Crisis: Immigrants, Crime and Sovereign Power' (n1258) 369
[1265] Nora V. Demleitner, 'Immigration Threats and Rewards' (n1257) 640
[1266] Juliet P. Stumpf, 'Doing Time: Crimmigration Law and the Perils of Haste' (2011) 58 *UCLA Law Review* 1705, 1708
[1267] ibid 1724
[1268] Chacon, 'Overcriminalizing Immigration' (n1261) 629
[1269] Jenifer M. Chacon, 'Unsecured Borders: Immigration Restrictions, Crime Control and National Security (2007) 39 (5) *Connecticut Law Review* 1827, 1832

sympathetic media have all doubled to cement the ideological construction of migrant irregularity with the moral stigma and stereotype accompanying the name'.[1270] The consequence is that a state of self-perpetuating phenomenon is created which subject migrants to an ever-increasing criminal law sanctions and by so doing ironically validates previous unjustified posture concerning migrant criminality.[1271]

In addition, Stumpf argues that crimmigration narrows the decision whether to exclude the migrant out of the State to a single moment in time-the moment of crime, compelling enough, to trigger the potential for deportation or detention for an immigration offense.[1272] Therefore by expanding deportability grounds by way of contrivance especially through the expansion of migration related conduct that constitutes a crime, crimmigration excludes non-citizens by first incarcerating them followed by removal from the State.[1273] In addition, by the creation of an enforcement process that provide fewer substantive and procedural protections for non-citizens than its citizens, the State through crimmigration excludes non-citizens from equal access to the protection of the judicial system.[1274] That probably accounts for Kanstroom's argument that 'the deportation of migrants especially lawful permanent residents should be seen as punishment, and to that extent, substantive constitutional protections should apply to deportation proceedings'.[1275]

In short, by the contrivance of deportability under the spectrum of crimmigration, the traditional boundaries between criminal and immigration sphere becomes blurred, if not, eroded making it easier for States to increase the deportation of migrants convicted of criminal offences. This is heightened and achieved by the increase of the number of immigration-related criminal offences as well as the severity of punishment attached. In addition, the State by way of contrivance expands the number of criminal offences for

[1270] Barbara A. Frey and X Kevin Zhao, 'The Criminalization of Immigration and the International Norm of Non-Discrimination: Deportation and Detention in U.S. Immigration Law' (2011) 29 *Law and Inequality* 279, 280 citing Stephen H. Legomsky, 'The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms' (2007) 64 *Walsh and Lee Law Review* 469, 500
[1271] Chacon, 'Overcriminalizing Immigration' (n1261) 629
[1272] Stumpf, 'Doing Time: Crimmigration Law and the Perils of Haste' (n1266) 1710
[1273] Hiroshi Motomura, 'The Decision That Matters: Federal Immigration Enforcement, State and Local Arrests, and the Civil-Criminal Line' (2011) 58 *UCLA Law Review* 1819, 1837
[1274] Stumpf, 'Doing Time: Crimmigration Law and the Perils of Haste' (n1266) 1710
[1275] Daniel Kanstroom, 'Deportation, Social Control, and Punishment: Some Thoughts about Why Hard Cases Make Bad Laws' (2000) 113 *Harvard Law Review* 1889, 1893

deportation purposes thereby creating targets for deportation, and through the arsenal of State resources, work to achieve it.[1276]

5.7.6 The Factual Matrix of Crimmigration

The phenomenon of crimmigration in the UK came into prominence with the seminal Immigration Act 1971 ("1971 Act") followed by the Immigration and Asylum Act 1999 ("1999 Act") and the Asylum & Immigration (Treatment of Claimants Etc. Act) 2004 ("2004 Act"). The 1971 Act created a whole spectrum of immigration offences with custodial sentences.[1277] The 1999 Act and the 2004 Act on their parts created similar immigration offences in parallel terms with the 1971 Act.[1278] These expansions especially with respect to the 2004 Act drew the ire of the Refugee Council who opined that the UK government decided to insert the section 2 of the 2004 Act to prosecute people who destroyed immigration documents on arrival in the country with the aim of increasing the rate of removal of failed asylum seekers.[1279] But in *R v Soe Thet*[1280] the court ruled that a conviction for the offence of failing to produce a passport at an immigration interview, or on arrival at a port of entry in the UK, under Section 2 of the 2004 Act does not apply if the defendant travelled to the UK with a false passport or without a passport.

The UK Borders Act 2007 ("2007 Act") amplified the issue of crimmigration with its mandatory deportation under section 32 with exceptions under section 33.[1281] Consequentially, a direct link between deportation and the commission of a crime of the appropriate level of severity has been created which ultimately reduces the scope for challenging automatic deportation decisions through the appeals system.[1282] The obvious implication is that Parliament lengthened the list of immigration related offences from the 1971 Act to a major 'catch all' law by the instrumentality of the 2007 Act which rather than rely on immigration related offences alone but now relies on all

[1276] Barbara A. Frey and X Kevin Zhao (n1270) 281
[1277] See Immigration Act 1971, s24.
[1278] See the Immigration Act 1999, s105 and s 35 of the 2004 Act.
[1279] Refugee Council, 'Briefing' <http://www.refugeecouncil.org.uk/assets/0001/5764/section_2_october_2006.pdf accessed 29 November 2013
[1280] [2006] EWHC 2701 (Admin)
[1281] See UK Borders Act 2007, s 32 and 33
[1282]Explanatory Notes to the UK Borders Act 2007 <http://www.legislation.gov.uk/ukpga/2007/30/notes > accessed 29 November 2013

offences carrying a sentence of more than 12 months. The reasoning is that any migrant convicted of any offence at all, is liable to deportation either under the 'not conducive to public good grounds' or by way of automatic deportation under the 2007 Act. By so doing, crimmigration justifiably implores the conduct of the migrant and the length of imprisonment to expand deportation categories.

The section 33 exceptions of the 2007 Act as a counterpoise to deportation has not alleviated the potency of section 32 in automatic deportation cases thereby illustrating the effect of crimmigration as a contrivance of deportability.[1283] It is typical of courts to find following a conviction that deportation was conducive to public good, even where families with children were involved, 'the best interest of the child'[1284] did not save their parent (s) from being deported.[1285] As the court stated in *Rocky Gurung v SSHD*, "The Borders Act by s.32 decides that the nature and seriousness of the offence, as measured by the sentence, do by themselves justify deportation unless an exception recognized by the Act itself applies".[1286] Therefore, without the application of a criminal conviction, deportation may not have been justified under this limb.

Similarly in the United States, the crimmigration debacle has assume exponential dimensions in the light of evidence that over the past two decades, the U.S. Congress has through the accumulation of legislative Acts, steadily expanded the scope of criminal conduct which underlies deportation.[1287] As Stumpf identifies, deportation based on the commission of aggravated felony has expanded from the original three grounds notably murder, drug trafficking and firearms trafficking to what she refers to as 'an alphabet of crimes of lesser gravity'.[1288] Therefore, through the instrumentality of legislation, immigration related conducted have been termed criminal with harsher sanctions for the violation of immigration law imposing incarceration as a ground for

[1283] See UK Borders Act 2007 s 33 (2) Exception 1 is where removal of the foreign criminal in pursuance of the deportation order would breach—(a) a person's Convention rights, or (b) the United Kingdom's obligations under the Refugee Convention. (3) Exception 2 is where the Secretary of State thinks that the foreign criminal was under the age of 18 on the date of conviction

[1284] Section 55 of the Borders, Citizenship and Immigration Act 2009 provides for the duty regarding the welfare of children which mirrors Article 3(1) of UN Convention of the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) UNTS 1577 (CRC)

[1285] *Rocky Gurung v SSHD* [2012] EWCA Civ 62; *SS (Nigeria) v SSHD* [2013] EWCA Civ 550; *AJ (Bangladesh) v SSHD* [2013] EWCA Civ 493; *Richards v SSHD* [2013] EWCA Civ 244

[1286] *Gurung* ibid

[1287] Legomsky, 'The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms' (n1264) 482

[1288] Stumpf, 'Doing Time: Crimmigration Law and the Perils of Haste' (n1266) 1727

deportation.[1289] The USA's Illegal Immigration Reform and Responsibility Act 1996 ("IIRIRA")[1290], allows retroactive punishment, by way of convergence to the UK Borders 2007 Act which in its Explanatory Note permits deportation of those already convicted prior to the coming into force of the law.[1291]

Unlike IIRIRA and the Anti-Terrorism and Effective Death Penalty Act 1996 ("AEDPA") which allow cancellation of deportation under the defense of 'exceptional and extremely unusual hardship' for the migrant's family, the UK's 2007 Act created exception to automatic deportation under its section 33 on grounds of breach of human rights or age of the offender.[1292] But contrary to IIRIRA and AEDPA which specified all offences-aggravated felonies attracting deportation[1293], the UK's 2007 Act by way of divergence excludes all offences less than 12 months but such offences remains deportable offences under the "not conducive to public good" limb enshrined in the 1971 Immigration Act.[1294] The IIRIRA through its section 287 (g) generally referred to as '287 (g) agreements' made provision authorizing state and local police to identify and turn over to the Immigration and Customs Enforcement ("ICE") any suspected criminal immigrant encountered during regular enforcement activities,[1295] with convergent enforcement patterns in the UK.[1296] These deportation enforcement practices in the UK and the U.S. are similar in style and approach to the extent that it could be termed a legal transplant or policy transfer.[1297]

[1289] See the United Kingdom's 1971 Act, the 2009 Act, the 2004 Act and the 2007 Act; Cf. the U.S.'s sections, 101 and 237 of the Immigration and the Nationality Act 2006 and section 108 of the Illegal Immigration Reform and Responsibility Act 1996.

[1290] IIRIRA increased deportations by the expansion of categories of migrants subject to deportation; see J Ryan Moore, 'Reinterpreting the Immigration and Nationality Act's Categorical Bar to Discretionary Relief for "Aggravated Felons" in Light of International Law: Extending Beharry v Reno' (2004) 21 *Arizona Journal of International and Comparative Law* 535, 537; see also Jacqueline Hagan, Brianna Castro & Nestor Rodriguez, ' The Effect of U.S. Deportation Policies on Immigrant Families and Communities: Cross-Border Perspectives' (2009-2010) 88 *North Carolina Law Review* 1799, 1800

[1291] See the Explanatory Note to the UK Borders Act 2007, Part 5

[1292] See UK Borders Act 2007, s 33

[1293] See commentaries by Jacqueline Hagan, Karl Eschbach & Nestor Rodriguez, ' U.S. Deportation Policy, Family Separation and Circular Migration' (2008) 42 *International Migration Review* 64,65; Nancy Morawetz, 'Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms' (2000) 113 *Harvard Law Review* 1936, 1955;

[1294] See Immigration Act 1971, s 3 (5) (a) and the UK Borders Act 2007, s 32 (4)

[1295] Elizabeth C Borja, 'Brief Documentary History of the Department of Homeland Security 2001 – 2008' (Homeland Security-History Office) <http://www.aila.org/content/default.aspx?docid=37572 >accessed 13 December 2013

[1296] See Home Office UK Border Agency, 'Our work in your region' <http://www.ukba.homeoffice.gov.uk/aboutus/your-region/ > accessed 13 December 2013

[1297] Alan Watson, *Legal Transplants: An Approach to Comparative Law* (2nd edn, University of Georgia Press, 1993) 29 (Legal transplant- a movement of a system of law from one country to the other usually a diffused law); David Dolowitz, Stephen Greenwold and David Marsh, 'Policy Transfer: Something Old,

Crimmigration, it is argued, exposes a malaise, which in adjudicative proceedings pays little or no attention to discretion not to deport,[1298] with judges and officials lacking the authority to stay deportation in the face of separation of families that may lead to destruction of such families.[1299] In short, the relationship between criminal law and immigration law has become so inextricably intertwined to the extent they switch roles implying that the decision to deport are indirectly made through criminal justice institution at the point of conviction while the actors, functions and institutions in the criminal justice system have shifted allowing immigration objectives to dictate criminal prosecution.[1300] The point being made by these divergent and convergent practices as exemplified by some sort of policy transfer is that they accomplish enforcement goals accompanied through lack of attention to the rights of migrants,[1301] which I argue is the behaviour and character of liberal democracies. As Markowitz posited, 'migrants have no right to protection against retroactive changes in law and they can be deported for minor criminal and other offences at the pleasing of the State'.[1302]

In Australia, the main legislation for the deportation of migrants is the 1958 Migration Act with its later amendments.[1303] Section 12 of the Act contains broad discretionary powers exercised by the Minister to deport an alien [migrant] convicted of a particular crime or sentenced to imprisonment of one year or more. This provision is in identical terms with the UK Borders Act 2007- the identical decimal being criminal conviction, a product of 'character test' as in Australia.[1304] It is crucial therefore to note that while section 32 of the UK Borders Act 2007 makes provision for automatic deportation of 'foreign criminals' as discussed above, the Australian section 501 of the Migration Act on the other hand is used to deport those under the 'character test' regardless of their

---

Something New, Something Borrowed, But Why Red, White And Blue?' (1999) 52 (4) *Parliamentary Affairs* 719, 720

[1298] Cf. section 33 of the 2007 Act with decisions in *Rocky Gurung v SSHD, SS (Nigeria) v SSHD* and *AJ (Bangladesh) v SSHD* (n1285)

[1299] Nancy Morawetz, 'Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms' (2000) 113 *Harvard Law Review* 1936, 1943

[1300] Stumpf, 'Doing Time: Crimmigration Law and the Perils of Haste' (n1266) 1729; see also comments by Jennifer Chacon, ' A Diversion of Attention? Immigration Courts and the Adjudication of Fourth and Fifth Amendment Rights' (2010) 59 *Duke Law Journal* 1563, 1571

[1301] Jennifer Lee Koh, 'Waiving Due Process (Goodbye): Stipulated Orders of Removal and the Crisis in Immigration Adjudication' (2012-2013) 91 *North Carolina Law Review* 475, 481

[1302] Peter L. Markowitz, 'Deportation is Different' (2010-2011) 13 *University of Pennsylvania Journal of Constitutional Law* 1299, 1302

[1303] Section 12 of the Migration Act 1958 was amended by section 10 of the Migration Amendment Act 1983.

[1304] Michelle Foster, 'An "Alien" By the Barest of the Threads"-The Legality of the Deportation of Long-Term Residents From Australia' (2009) 33 *Melborne University Law Review* 483, 507

length of residence. It is therefore contended that this supposedly synergy of deportation practices in the form of convergence could not have been an accident. Using criminality as a springboard for deportation could better be explained as the exportation of the State's problem elsewhere with no reasonable consideration of their human rights.

In France, the deportation of migrants gained fervor with the 2003 legal reform *centres de retention*, which extended the maximum time of detention of migrants to 32 days thus providing an amphitheatre for large-scale deportation.[1305] This was followed by the imposition of deportation quotas on *prefets*-law enforcement officers from several departments forcing them to increase the number of irregular migrants, charged with deportation and actually removed from the country.[1306] Nonetheless, the French Immigration law prohibits expulsion in these limited circumstances,[1307] and it appears that France has not made criminal conduct a major policy plank in the deportation of migrants by way of divergence but has made the use of quotas and targets as a convergent practice similar to the UK.

The above illustrates that the deportation realities of the United States, Australia and France within the broader context of liberal democracies offer significant similarities with the UK, with specificity to crimmigration in particular and immigration enforcement and control in general, as a vehicle for enhancing and sustaining deportation of migrants which queries the liberal democratic ideals of fairness in particular and compliance to international human rights standards in general.

5.8 Conclusion

Legality of deportation or removal of migrants must find expression in the concept of the rule of law depicted in the preamble of the ECHR and described by the ECtHR as part of the common heritage and fundamental principles of a democratic society [liberal democracy]. The laws on deportation and removal must be fair, precise, sufficiently

[1305] Clemence Richard and Nicolas Fischer,' A legal disgrace? The retention of deported migrants in contemporary France' (2008) 47 *Social Science Information* 581, 590
[1306] Richard and Fischer, ibid
[1307] See Code de l'entrée et du sejour des etrangers et du droit d'asile [Code on the Entry and Stay of Foreigners and on the Right of Asylum] (France) art L521-3 [Nawaar Hassan trans] cited in Michelle Foster, 'An "Alien" By the Barest of the Threads"-The Legality of the Deportation of Long-Term Residents From Australia' (n1304); see also Cimade, 'Centres et locaux de retention administrative, Rapport 2007 (2008) cited in Clemence Richard and Nicolas Fischer, 'A legal disgrace? The retention of deported migrants in contemporary France' (2008) 47 *Social Science Information* 581, 598

clear and proportionate to aims pursued. Even though the grounds for the deportation of migrants may be determined solely by the liberal State but the practice must not be abused against acceptable international human rights norms and the underlining matter is that the very notion of universality of human rights should shape the manner in which entry and exit norms are conceived.

It has been shown that through its laws and practices, liberal democracies rather than comply with its commitments and obligations appear to wield absolute power against migrants, which provides a lynchpin in the justification of deportation-an exclusionary practice.

Criminalization, over-criminalization (crimmigration) is a recurrent decimal in the lexicon of deportation. Criminality should lie within the province of criminal policy and not by its use in immigration control. This is because punishment, functionally speaking is intended to deter others and for the prevention of re-offending, these should be achievable within criminal law and should not be pushed to immigration control. This chapter found that crimmigration heightened the velocity of deportation consequent upon the intersection of criminal justice and immigration control at multiple points-where violations of immigration laws trigger broader, harsher, and more frequent criminal consequences leading to conviction and thereafter deportation. Therefore by expanding deportability grounds by way of contrivance especially through the expansion of migration related conduct that constitutes a crime, crimmigration excludes non-citizens by first incarcerating them and thereafter creating a suitable avenue for their deportation. The issue is that a direct link between deportation and the commission of a crime of the appropriate level of severity has been created which ultimately reduces the scope for challenging deportation decisions through the appeals system and even if challenged, success is a mirage.

The issue of setting deportation targets raises crucial questions for the legality of deportation as carried out by the United Kingdom as a liberal democracy. When deportation rates become targets coupled by policy transfer that exist between and amongst liberal states, with respect to techniques and exchange of ideas and information, then the issue becomes that of illiberal democracy rather than liberal democracy. This is particular so given that when deportation targets are not met and deportation becomes impossible due to logistics and difficulties resulting from receiving

states, the State creates a precarious situation for migrants by refusing to grant them leave even when circumstances cannot warrant their removal. Curiously, deportation styles, conditions and practice have assumed exponential dimensions of coercion and seeming brutality in an attempt to facilitate deportation. This, as we stated suggests an adamant intention to deport whether or not such practices are incongruence to liberal democratic ideals of which some had resulted to death of deportees.

On deportation gaps, the study found that there is a huge the gap between 'deportables' [potential deportees] and the actual number of deportees. The inability to deport on its own and the lack of refusal to grant leave to remain further puts the migrant in a precarious position which hitherto damages the liberal philosophy of fairness. Inhibitions against deportation in terms of costs and return agreements exist but despite these inhibitions, deportation is still carried out even with strength and vigour.

The chapter argued that the continuous pursuit of deportation of migrants in the face of possible violations of international human rights law coupled with the above practical constraints are anathema to liberalism. The reasoning is that all migrants are subject to an ever increasing and shifting pattern of retroactive deportation laws that violates the basic principles of human rights norms. The salvo is further fired by recent deportation laws across liberal democracies which are either discretionary or couched in rigid terms, referred to as a seemingly "antiseptic uniformity" leaving less chance for compassionate considerations.

Furthermore deportation is constructed in the United Kingdom by a combination of legislative and judicial actions given that legislation associated with deportation are in an unrestrained manner constantly enacted and revised to achieve deportation in contrast to the doctrine of legitimate expectation. In essence, the more complex the laws, the easier it becomes to attract violation thereby creating a deportable or removable status.

Put differently, in order to effect deportation, the deportee must have been put in a deportable state through the instrumentality of the laws of the State. The argument is that deportability and/or removability is State contrivance, which is easily choreographed and articulated through the interplay of policy encumbered by legislative

and judicial architecture regardless of whether or not they comply with international human rights obligations.

It is posited that State contrivance of deportability violates the legitimate expectation of migrants within the purview of legal certainty. As the *HSMP Forum*, *Pankina*, *English* and *Alvi* string of cases have shown, legitimate expectation as an aspect of legal certainty, have been compromised with constant changes to the laws lacking intelligibility, clarity and predictability. The implication is that irregularity-giving rise to deportability is a creation of immigration laws given that it constructs and differentiates migrants through the process of inclusion, and in consequence creates exclusion, leading to deportation through arbitrariness. Therefore if the legal basis for the change of the law is simply to give unconstrained power to the government to change rules with immediate effect thereby rendering migrants deportable or removable, such unconstrained powers are arbitrary. It follows that the inclusive measures exemplified by the adoption of the HSMP programme and the exclusive measures exemplified by arbitrary changes in the laws which encourages and heightens deportability and/or removability, queries the rationality of this new legal framework of State power.

It has equally been argued that liberal states by way of convergent and divergent practices as exemplified by either legal transplant or policy transfer accomplish deportation enforcement goals. The Study found that while section 32 of the UK Borders Act 2007 makes provision for automatic deportation of 'foreign criminals' as discussed above, the United States uses the IIRIRA 1996-aggravated felonies- to expand the vistas of deportability of migrants regardless of their length of residence. The Australian section 501 of the Migration Act on the other hand applies the 'character test' to deport migrants regardless of their length of residence. This leads to the contention that the supposedly synergy of deportation practices by these liberal states in the form of convergence could not have been by accident but suggests either a legal transplant or policy transfer. In essence, through the display of keenness in meeting deportation targets and quotas by the indulgence in arbitrary changes of laws in disregard to its international human rights obligations, the source and rationality of this new legal framework of State power is accordingly queried.

In short, decisions taken by a liberal democracy involving the restriction of a right must be strictly necessary otherwise the State will be in clear violation of its international obligations as well as its status as a liberal democratic state. It could be reasoned that the United Kingdom's deportation regime as a liberal democracy is unlawful because it is shrouded in the cloak of illegitimacy, disproportionate, not necessary in a democratic society, procedurally defective, and adjudged below acceptable standards of international human rights law.

Chapter 6. Research Findings and Conclusions

6.1 Opening Remarks

The notion that every State by reason of its territorial supremacy is competent to exclude non-nationals partly or wholly from its territory is supported by international law. In essence, a fundamental principle of State sovereignty is that States enjoy the discretion over the admission, residence and expulsion of non-nationals from the State-exercising jurisdiction.[1308] Nonetheless, in the exercise of such discretion, States are subject to a cluster of international law/international human rights law (IHRL) and treaty obligations in upholding acceptable principles and standards in the exercise of sovereignty thus inviting a reconciliation of sovereignty with universality of human rights law.

The main question that this thesis sought to examine is whether the UK complies with its substantive and procedural obligations in the deportation and removal of migrants and ancillary to the above is whether the UK complies with its treaty obligations under International Human Rights Law (IHRL) in the detention of migrants for the purpose of deportation and/or removal. Therefore, the standards established by IHRL for the protection of the rights of individuals in the State's territorial jurisdiction with specificity to detention, deportation and/or removal was employed to measure the UK's compliance with its obligations as represented by treaties, conventions, case law and soft law. The emphasis was laid on the safeguards provided by these international legal instruments vis-à-vis the rights of migrants and extending to the right of legitimate expectation.[1309]

In its problem statement, the research engaged the discussion that the growing popularity of exclusionary measures against migrants in liberal states is common.[1310] Therefore, the research examined whether contemporary deportation and/or removal regime in the United Kingdom is the emergence of a new legal framework of State power.[1311]

[1308] See chapter 2.1 of this thesis
[1309] See chapter 2.2-2.4 of this thesis for details on norms and character of IHRL with respect to deportation and chapter 5.7.1 on legitimate expectation.
[1310] An idea first canvassed by Gibney and Hansen, see chapter 1.3 of this thesis
[1311] See chapter 1.2 of this thesis

In order to address this issue and for connected purposes, the thesis is divided into six chapters which developed the following interlinked research questions:

1. Does the United Kingdom comply with its treaty obligations under International human Rights Law (IHRL) in the deportation and removal of migrants?

a. Does the United Kingdom as a liberal democratic state comply with its substantive and procedural obligations in the deportation and removal of migrants?

b. Are immigration laws in the UK constructed in an unconstrained manner, which as a consequence enhances deportation and/or removal?

2. Ancillary to deportation and removal is the power to detain. Does the United Kingdom comply with its treaty obligations under International Human Rights Law in the detention of migrants for the purpose of deportation and/or removal?

a. Are the United Kingdom detention practices at variance with its liberal democratic ideology of fairness?

b. Can necessity of detention be defined devoid of rationality and due diligence?

The following paragraphs will elucidate a sequential analysis of what has been discussed and evaluated and by so doing, the law will be stated and key arguments emphasized.

6.2 Migration within the Context of International Human Rights Law

Conclusion One: The thesis concluded that that where the detention and/or detention pending deportation and/or removal of a non-national will trigger the breach of his/her rights even outside the UK, provided such consequences are attributed to the UK, it follows that the UK will be in breach of its obligations under IHRL. In reaching this conclusion, the thesis examined the role played by the UDHR and other applicable international instruments, emphasizing that the UDHR remains a blue print for human rights development and a primary source of global human rights standards. In situating

the right of migrants within the international arena vide the obligations of States in IHRL, it was noted that obligations of States under IHRL do also apply extraterritorially and the determination of whether such obligations apply to a particular area usually require questions of subject matter of the obligations and the State's connections in meeting the responsibility norms. This, as has been argued, is very relevant in the deportation and/or removal context due to the underlying fact that the deportation and/or removal of migrants have international destination implications.

6.2.1 Liberal Democratic Ideals and the Rule of Law

Conclusion Two: The thesis concluded that liberal democracies emphasize the importance of the rule of law and sees itself as inseparable from international human rights with the aim of applying the rights effectively and properly. In arriving at this conclusion, the thesis at chapter two contextualized liberalism and liberal democracy with a view to reaching the standard required for the categorisation of the United Kingdom as a liberal democracy and by so doing measure its compliance to the demands, salient features and values of a liberal democracy. By way of purposive application, the thesis showed that liberalism retains the fundamental idea that individuals have equal ethical standing and is society's fundamental ethical unit and that liberal democracies exist primarily to discover and establish public values such as human rights, which defines the democratic character of States.[1312]Applying this standard, the United Kingdom was adjudged a liberal democracy.

Conclusion Three: The thesis also concluded that concluded that liberal democratic states operate on the principle of humanitarianism with an implied obligation to assist migrants given the liberal democracy's membership in 'a single human community' philosophy. This philosophy include the respect of international human rights law, the equality of treatment-save for objective differences, the respect for the rule of law that includes legitimate expectation and legal certainty, accountability, transparency and the avoidance of arbitrariness.

The thesis concluded that the rule of law requires that public officials at all levels must exercise the powers conferred on them reasonably and in good faith for the purpose for

[1312] See chapter 2.5 of this thesis for general discussions on liberal democracy

which the law was made without exceeding their authority or the limits of such powers. In contextualizing the rule of law, it was shown that the rule of law is the life-blood of any liberal democratic State and becomes the vehicle for guaranteeing the protection of human rights.[1313] In reaching this conclusion, the thesis examined the rule of law generally and specifically in the migration context and argued that the rule of law requires that the laws of the land should apply equally to all save to the extent that certain objective differences justify such differentiation-the citizen and non-citizen dichotomy.

6.2.2 The Liberal Democratic Paradox

Conclusion Four: The thesis has shown that the tension between the law of inclusion and politics of restriction is best understood as a reflection of a deeper tension between liberal and democratic values in a liberal democracy. The thesis concluded that the relationship between sovereignty and external legal commitments for a liberal democracy should lie in a continuum which demands that the UK's laws and practices especially in the area of immigration control will be measured against its compliance to international human rights obligations with the spectacle and ambiance of the rule of law. In arriving at this conclusion, the thesis expanded the liberal democratic paradox argument, which it explained as the analysis of tension between respects for international human rights on the one hand, and the protection of citizenship on the other hand which places the liberal state in a difficult position to make decisions between the respect of public opinion against the deportation of aliens [migrants] and due process.[1314] Therefore the challenge faced by liberal democratic states is therefore how to reconcile liberal principles and identities that transcend the state with competing principles or sources of authority.

6.2.3 Immigration control in the United Kingdom

Conclusion Five: The research found that measures controlling the movement of aliens [migrants] were often connected with hostilities with other countries; such hostilities led to expulsion of aliens vide the issuance of a proclamation order.[1315] This historical

[1313] See chapter 2.5.1 of this thesis on the rule of law
[1314] See chapter 2.5.2 of this thesis
[1315] See chapter 3.5 of this thesis

proclamation order is a precursor to deportation order, later entrenched in the 1905 Aliens Act that statutorily opened the vistas for deportation. This conclusion was reached by the analysis of the patterns of immigration control from the point of citizenship and interplay of sovereignty to the regime of Parliamentary scrutiny. In analyzing immigration control, this study identified that immigration laws are now passed without much parliamentary scrutiny *inter alia* as evidenced by the Human Rights Act 1998, s 19 ("HRA 1998"), the Nationality, Immigration and Asylum Act 2002 and the Treatment of Claimants Act 2004 Act, which were passed without crucial parliamentary scrutiny for compatibility with human rights. This is in contrast to the Aliens Act 1914 s 27, where parliamentary scrutiny was a key issue that disallowed executive deference in the form of discretion or policies.

6.2.4 Convergence and trends

Conclusion Six: The study enumerated the revolving issues and trends, divergence and convergence of immigration policies in three other selected liberal democratic states such as the United States of America, Australia and France whose immigration reality offers significant similarities with the UK with a view to situating the analysis of immigration issues in the UK within the broader context of other liberal democracies. By way of convergence and trends, the research has shown that while the UK's 1971 Immigration Act later became the cornerstone of all immigration laws in the UK, about the period between 1971-1999, similar immigration patterns were in operation in the US and France that relieves the argument whether such practices were simply co-incidental, a trend amongst liberal democratic states or mere convergence.

This argument was further cemented by the finding that while the UK used 'not conducive to public good' term as a ground for deportation and automatic deportation of 'foreign criminals', the USA facilitated the deportation of criminal aliens by expanding the definition of aggravated felony to include crimes carrying a prison sentence of one year or more rather than time served. At the time, France used the *Pasqua* laws to expand the deportation regime through the grant of special powers to immigration officers to detain and deport aliens and Australia applied the 'character test' as a yardstick for deportation. This is with a further finding that the use of discretion rather than law became prominent in the UK and Australia, which queries their coincidence, transplants or diffusion that raise fundamental questions as to whether the form and

pattern of immigration control in liberal democratic states is a new legal framework of state power.[1316]

6.2.5 The Precarious Migrant

Conclusion Seven: The thesis found that the preamble to the Criminal Justice and Immigration Act (2008 Act) by its wording created a 'legal limbo' or 'precarious status' for migrants. In arriving at this, the 2008 Act was examined alongside the issue of temporary admission that removed all legal rights to remain of persons convicted of criminal offences but who cannot be deported for certain legal reasons, thereby putting them in a legal limbo. The grant of temporary admission, it was found, does not remove this 'limbo' status given that temporary admission does not permit work nor State support in the form of public benefits, thus the limbo status remains indefinitely until reversed or the migrant, deported. Precarious migrants are highly vulnerable to deportation or/removal and have no capacity to regularize their immigration position while residing unlawfully in the State.[1317]

The thesis further expanded the concept of a firewall or bifurcation argument originally canvassed by Carens who stated that States should guarantee that individuals should be able to pursue their human rights without being exposed to apprehension and deportation.[1318] It was then concluded that States should build a firewall or bifurcate between immigration law enforcement on the one hand and the protection of basic human rights on the other hand emphasizing that the mere fact of migrant irregularity should not justify the precarious status-rights protected must be 'practical and effective' rather than 'theoretical and illusory'.[1319]

6.3 The legality of detention-Detention under Common law and Strasbourg Jurisprudence

Conclusion Eight: The study found that common law principles in immigration detention in the UK presupposes that the State must engage the issue of necessity, reasonableness, due diligence and proportionality as in the case of *Hardial Singh* and *ex*

[1316] See chapter 3.14 of this thesis
[1317] See chapter 3.5 of this thesis
[1318] Joseph Carens, 'The Rights of Irregular Migrants' (n637) 166
[1319] *Airey v Ireland* [1979] ECHR 3

parte I string of cases.[1320] At variance with this position is the decision in *Saadi v UK* where the court refused to accept that necessity was required for immigration detention, which has been concluded as excessive executive deference by the ECtHR. The result of the study supports the conclusion that Strasbourg court seems to have thrown proportionality to the winds by its decision in *Saadi v UK* despite the fact that proportionality is in essence a balancing exercise underpinning the ECHR in Art 8-11 ECHR with the 'necessary in a democratic society' test. This is because a restriction cannot be regarded as 'necessary in a democratic society' unless it is proportionate to the legitimate aim pursued. Strasbourg jurisprudence is challenged by its latter decision in *Rusu v Austria* where the court surprisingly abandoned its previous stance in *Saadi v UK* and accepted the necessity adjunct but did nothing to incorporate it into its interpretation of Art 5 (1) (f) on detention. The thesis therefore concluded that the right to liberty might have been compromised regardless of the UK's Home Office policies, which mirror an amalgam of the common law principles requiring necessity in detention, but actual practice with respect to the liberty rights of migrants remains a mirage.

6.3.1 Prolonged or Indefinite Detention

Conclusion Nine: The thesis concluded that prolonged detention-indefinite detention-as practiced by the United Kingdom is at variance with its status as a liberal democracy. In doing so, the thesis situated the legality of detention within the remit of liberal democracies and chapter four sought to highlight the test for the legality of detention in the light of the principles of necessity, due diligence, arbitrariness and proportionality in addition to substantive and procedural requirements. In this connection, the research then examined the recent position of the HRC on the United Kingdom which expressed concern that no fixed time limit on the duration of detention in immigration removal centres has been established and advised that a statutory time limit on the duration of immigration detention be established while ensuring that detention is a last measure of resort and is justified as reasonable, necessary and proportionate. Furthermore, the UNHCR with specificity to asylum seekers in particular and relevant to detention in general which emphasized that the detention of asylum seekers is inherently undesirable and only accepted if it is brief, absolutely necessary and implemented where other

[1320] See chapter 4.3.1 of this thesis

options have been exercised leaving detention as the last resort. But this is not the case with detention practices in the United Kingdom that allows for prolonged detention spanning several years.

To add vent to the conclusion is the underlying fact that there are two limbs with respect to Article 5 ECHR, notably the test for the legality of detention on the one hand and a set of procedural rights for detainees on the other hand. It was contended that detention may be substantively legal but the procedures for safeguarding those rights may be otiose and hence unreachable. The findings of this study supports the conclusion that it is regrettable that wider rights under Article 5 (3) ECHR are afforded to criminal suspects allowing them to apply to the court for the review of the desirability of detention pending trial while same does not apply to immigration detainees that are not charged with criminal matters.

6.3.2 Necessity and Proportionality

Conclusion Ten: The research concluded that there was no rational basis for the rejection of the requirements of necessity and proportionality by the ECtHR in detention while accepting due diligence or reasonable time into its lexicon of arbitrariness. In that connection, it was emphasized that it is inconceivable that the EU threshold of proportionality meets international human rights law standards as depicted by its applicable Directives on detention which confirms that detention should be employed when it proves necessary whereas the standards of Strasbourg are at variance with it.[1321]

Pursuant to that, the study queried the rationale behind detention as a measure taken to facilitate expulsion where evidence has shown that expulsion figures are dropping as against increasing detention. Therefore, it is concluded that the necessity of detention cannot be defined, devoid of rationality and due diligence which leaves the research with the conclusion that detention in the United Kingdom raises questions of legitimacy and is not eloquent of its status as a liberal democracy. In reaching this conclusion, the research showed that detention might be lawful but arbitrary. The reasoning is that an assessment of legality of detention should encompass amongst others a broader test of substantive arbitrariness to include decisions, which are unreasonable, unjust, bad faith,

[1321] See chapter 4.5.2 of this thesis

delayed, and unpredictable. It is therefore submitted that an unreasonable decision, delayed decision or where the State's laws are imprecise and unpredictable is an affront on the rights of migrants as arbitrariness cannot be well defined without the requirement of necessity.

6.3.3 Detention and Bail

Conclusion Eleven: The thesis concluded that the processes and procedures in bail hearings have a multiplier and cumulative effect on its outcome and by extension on the right to liberty. To arrive at this conclusion, chapter four examined procedural barriers and reiterated that there is also a connection between quality representation and successful bail applications. It was found that 50% of the applicants in the bail applications examined were not legally represented and none of the cases without legal representation were successful.[1322] Aside the seemingly inability to access quality legal representation, detainees face an uphill task. A case in point is the introduction of the policy 'hub and spoke' in 2009 by HM Prison designed to increase the speed and efficiency of removals where male foreign prisoners can be removed quickly from the UK which arguably affect their chances to be granted bail.[1323] In the light of the above, it was argued that the United Kingdom's detention practices is incongruent with its status as a liberal democracy on the one hand and at variance with its treaty obligations under IHRL on the other hand with specific reference to procedural legality.

6.4 The Legality of Deportation and Removal

Conclusion Twelve: The study has shown that through their laws and practices, liberal democracies rather than comply with their commitments and obligations appear to wield absolute power against migrants. The research reached this position by examining the historical dimensions of deportation and/or removal, grounds and rationale for deportation and trends and turns in contemporary deportation regimes, noting that the very notion of universality of human rights should shape the manner in which entry and exit norms are conceived. In its discussion at chapter five, the study considered the role of the Memorandum of Understanding (MoU) in deportation and then concluded that

[1322] Bail for Immigration Detainees and the Refugee Council, Immigration bail hearings by video link: a monitoring exercise (March 2008) 6
[1323] See chapter 4.5.2 of this thesis

liberal States as in the instant case, the United Kingdom, using the MoU instrument, continue to deport migrants to such countries irrespective of whether those states will eventually violate them.[1324]

In their determination to deport and/or remove, liberal States set deportation and/or removal targets. The research has shown that the issue of setting deportation and/or removal targets raise crucial questions for the legality of deportation and removal as carried out by the United Kingdom. This is embedded in the fact that when deportation and/or removal rates become targets coupled by policy transfer that exist between and amongst liberal states, with respect to techniques and exchange of ideas and information, then the issue becomes that of illiberal democracy rather than liberal democracy. It has therefore been concluded that when deportation and/or removal targets are not met and actual removal becomes impossible due to logistics and difficulties resulting from receiving states, the State creates a precarious situation for migrants by refusing to grant them leave even when circumstances cannot warrant their removal.

And closely connected to the above are deportation and/or removal gaps. On deportation gaps, the study found that there remains a huge gap between 'deportables' [potential deportees] and the actual number of deportees. The quarterly statistics produced by the Home Office on deportation only indicates the number of enforced removals as against the number of deportation orders or removal directions issued.[1325] It is submitted that the inability to deport or remove on its own and the lack of refusal to grant leave to remain further puts the migrant in a precarious position which hitherto damages the liberal philosophy of fairness.

Conclusion Thirteen: On inhibitions against deportation and/or removal, the research has shown that the inhibitions against deportation or removal in the context of *non-refoulement* obligations with specific reference to medical cases under the ECtHR is problematic and unclear and has not provided the necessary panacea against deportation. It concluded that in reshaping *non-refoulement* obligations in the medical cases, the ECtHR is undermining the absolute nature of Art 3 ECHR with the

[1324] See chapter 5.5.1 of this thesis
[1325] ibid

unfortunate creation of uncertainty due to the Court's inconsistency leaving deportees helpless, without knowing on what side the pendulum will swing.

6.5 The Contrivance of Deportability and Removability

Conclusion Fourteen: The study concluded that deportation and/or removal is constructed in the United Kingdom by a combination of legislative and judicial actions given that legislation associated with deportation and removal are constantly enacted and revised to achieve deportation and/or removal in contrast to the doctrine of legitimate expectation. The discussion on the contrivance of deportability and removability raised the query as to whether legislation associated with deportation and removal are in an unconstrained manner, constantly enacted, revised and re-enacted to achieve deportation and/or removal in contrast to the doctrine of legitimate expectation encapsulated under the principle of legal certainty.

Legitimate expectation was also discussed within the remit of Article 8 ECHR. The study therefore found that the earlier Immigration Acts have been amended by a vast accretion of other Acts, with some provisions re-enacted, enlarged and some, consolidated which as a consequence enhances deportation and removal. This means that the more complex the laws, the easier it becomes to attract violation, therefore a deportable and removable status has been created vide the instrumentality of the laws of the State.

The research further concluded that State contrivance of deportability and removability violates the legitimate expectation of migrants within the purview of legal certainty. Relying on the *HSMP Forum*, *Pankina*, *English* and *Alvi* string of cases, it showed that legitimate expectation as an aspect of legal certainty, have been compromised with constant changes to the laws lacking intelligibility, clarity and predictability. It reiterated that irregularity-giving rise to deportability or removability is a creation of immigration laws given that it constructs and differentiates migrants through the process of inclusion and in consequence creates exclusion leading to deportation through arbitrariness. The research concluded that if the legal basis for the change of the law is simply to give unconstrained power to the government to change rules with immediate effect thereby rendering migrants deportable, such unconstrained powers are arbitrary. It therefore argued that the inclusive measures exemplified by the adoption of

the HSMP programme, its corollaries and the exclusive measures exemplified by arbitrary changes in the laws which encourages and heightens deportability and/or removability, queries the emergence and rationality of this new legal framework of State power.

With respect to legitimate expectation and Article 8 ECHR (right to private and family life) it has been submitted that the ECtHR applies no identifiable spectrum in deciding whether deportation or removal will be disproportionate against migrants regardless of their length of stay in the host State. Rather than treat long-term migrants as a special category of aliens whose expulsion would require thorough and weighty reasons, the ECtHR prefers the application of individual circumstances in each case with differing outcomes. This approach has been described as a 'lottery'. Therefore the boundary between legitimate expectation and deportation and/or removal power can be narrowed down to 'who belongs' in the liberal state. The study has thus revealed that the concept of 'who belongs' has been expanded and that this expanded concept of belonging is gaining weight with international human rights instruments.[1326] The issue then is that when decisions are taken by a liberal democracy that involves the restriction of a right, that restriction must be strictly necessary; otherwise the State will be in clear violation of international obligations as well as its status as a democratic state. The test is a rigorous test that requires the assessment of a 'pressing social need' as against the disproportionate restriction of the individual's right even as the ECtHR had affirmed that proportionality is the most crucial element of the necessity test that requires the application of a fair balance between competing interests i.e. between the requirements of the general interest of the community versus the requirement for the protection of human rights.[1327]

6.5.1 Contrivance of Deportability and Crimmigration

Conclusion Fifteen: The research identified that criminalization is a recurrent decimal in the lexicon of deportation but submits that criminality should lie within the province of criminal policy and not by its use in immigration control. Using crimmigration as the springboard for construction of deportability, the study reached the conclusion that crimmigration heightened the velocity of deportation consequent upon the intersection

[1326] See chapter 5.7.2
[1327] See chapter 5.6.2

of criminal justice and immigration control at multiple points- where violations of immigration laws trigger broader, harsher, and more frequent criminal consequences leading to conviction and thereafter deportation. It espoused that by expanding deportability grounds by way of contrivance especially through the expansion of migration related conduct that constitutes a crime, crimmigration excludes non-citizens by first incarcerating them and thereafter creating a suitable avenue for their deportation. The consequence of the above, as has been submitted is that, a direct link between deportation and the commission of a crime of the appropriate level of severity has been created which ultimately reduces the scope for challenging deportation decisions through the appeals system and even if challenged, success is a mirage. Deportation on criminality grounds, it is submitted, an extension of the policy of exclusion, which is against liberal ideals and anathema to the necessity in a democratic society nexus. The research therefore concluded that the contrivance of deportability vide crimmigration is not eloquent of the United Kingdom's liberal democratic status.

In the light of the above conclusions, the thesis has been able to prove its hypothesis-problem statement, that the growing popularity of exclusionary measures against non-citizens in United Kingdom is common. This is reflected in the State practice regarding deportation and/or removal as found by this study, negating as it did, its liberal democratic principles of fairness and contrary to acceptable standards established under international human rights law.

The questions as to whether the United Kingdom's detention practices pending deportation or removal is at variance with its liberal democratic ideology of fairness has been answered even as it has been shown, following the results of the study, that necessity of detention cannot be defined devoid of rationality and due diligence. This is particularly important as expulsion figures are dropping as against increasing detention, thereby raising questions of legitimacy.

In addition, the question as to whether the United Kingdom as a liberal democratic state complies with its substantive and procedural obligations in the deportation and removal of migrants has been answered in the negative following the conclusions reached by this study and the further question as to whether immigration laws in the United Kingdom are constructed in an unconstrained manner, which as a consequence enhances deportation and/or removal has been answered in the positive. State practice regarding

deportation and/or removal encumbered by the interplay of unmet deportation and/or removal targets resulting in the creation of precariousness or limbo status of non-citizens has been shown. This practice, lying in continuum with the contrivance of deportability, exemplified by crimmigration in part, is anathema to liberal philosophies.

The summary is that through its laws and practices, the United Kingdom, rather than comply with their commitments and obligations as a liberal democracy and under acceptable international human rights standards, appear to wield unrestrained power against migrants. Therefore, the source and rationality of this new legal framework of State power is accordingly queried.

6.5.2 Summary of Conclusions and Proposals for Change of Law

In the light of the above conclusions, the thesis has proved that the growing popularity of exclusionary measures against non-citizens in United Kingdom is common. This is reflected in the State practice regarding deportation and/or removal as found by this study, negating as it did, its liberal democratic principles of fairness and contrary to acceptable standards established under international human rights law.

The questions as to whether the United Kingdom's detention practices pending deportation or removal is at variance with its liberal democratic ideology of fairness has been answered even as it has been shown, following the results of the study, that necessity of detention cannot be defined devoid of rationality and due diligence. This is particularly important as expulsion figures are dropping as against increasing detention, thereby raising questions of legitimacy. Since no power is unfettered and every power is fettered, it is proposed that the United Kingdom should set up a maximum time in detention by way of legislation given that the right to liberty is a fundamental right. As has been found by this study, under common law, there is a presumption of liberty owing its origin to the Magna Carta 1215 and there exist similar obligations under international human rights law as captured in relevant in international instruments dealing with detention. The concept of necessity, proportionality, due diligence and the use of alternatives to detention has been raging issues. It is therefore proposed that detention should be subjected to the test of necessity and proportionality culminating to a fair use of detention spaces. There is no justification for detaining a person for 6 years and others for longer period ranging from 1-3 years as found by this thesis.

It is further proposed that detention in the United Kingdom should return to the standards laid down under common law as captured in the *Hardial Singh* principles which amongst others enunciated that the powers to detain must be exercised in accordance with the purpose-for the purposes of removal and/or deportation, reasonably necessary. Therefore, when it becomes clear that the purpose of detaining the individual cannot be achieved, release should be automatic. To do otherwise is to continuously erode or distort the character of a liberal democracy that emphasis the respect of the rule of law against all forms of arbitrariness. If the thread that runs through a liberal democracy is the respect of international human rights law, the equality of treatment save for objective differences, the respect of the rule of law in the form of transparency, legitimate expectation, legal certainty and avoidance of arbitrariness, including providing a mechanism to challenge unfair decisions within the remit of equality of arms, it is proposed that this should be reflected in the corpus of laws of the United Kingdom regarding the detention pending deportation of migrants. This is important because this study has shown that detention can be legally permitted but arbitrary or both arbitrary and unlawful.

The question as to whether the United Kingdom as a liberal democratic state complies with its substantive and procedural obligations in the deportation and removal of migrants has been answered in the negative following the conclusions reached by this study. It is proposed that all deportation cases should have suspensive effect in order to allow migrants the effective use of the right to effective remedy because 'rights should be practical and effective and not theoretical and illusory'.

State practice regarding deportation and/or removal encumbered by the interplay of unmet deportation and/or removal targets resulting in the creation of precariousness or limbo status of non-citizens in an unconstrained manner, which as a consequence enhances deportation and/or removal, has been shown. This practice, lying in continuum with the contrivance of deportability, exemplified by crimmigration in part, is anathema to liberal philosophies. It is therefore proposed that the United Kingdom should refrain from creating deportation targets and to moderate its import of crimmigration as a cornerstone of its immigration law. The use of deportation targets and crimmigration ridicules its liberal democracy's principles of transparency and fairness.

Bibliography

Books

Aleinikoff T A, Marin D and Motomura H, *Immigration Process and Policy* (3rd edn, West Group 1995)

Appadorai A, *The Substance of Politics* (OUP 1968)

Arendt H, *The Origins of Totalitarianism* (Harcourt Brace Jovanovich 1973)

Balibar E, 'Racism and Crisis' in Etienne Balibar & Immanuel Wallerstein (eds) *Race, Nation, Class: Ambiguous Identities* (Verso 1991)

Balibar E, *We, the People of Europe? Reflections on transnational citizenship* (Princeton University Press 2004)

Baubock R, *Stakeholder Citizenship: An idea Whose Time Has come?* (Migration Policy Institute 2008)

Benhabib S, *The rights of others: Aliens, residents and citizens* (CUP 2004)

Berlin I, *Four Essays on Liberty* (OUP 1969)

Bigo D, 'Liaison Officers in Europe: New Officers in the European Security Field' in J Sheptycki (ed) *Issues in Transnational Policing* (Routledge 2000)

Bingham T, *The Rule of Law* (Penguin 2010)

Bishop W, International Law: Cases and Materials (3rd edn, Little Brown & Co Law & Business Publishing 1971)

Blake N and Husain R, *Immigration, Asylum and Human Rights* (OUP 2003)

Bloomfield A, Tsourdi E and Petin J, *Alternatives to Immigration And Asylum Detention in the EU* (Philippe De Bruycker ed Odysseus Network 2015)

Borchard E, *The Diplomatic Protection of Citizens Abroad* (New York 1914)

Bosniak L, The Undocumented Immigrant: Contending Policy Approaches' in Carol M Swain (ed) *Debating Immigration* (CUP 2007)

Bradley A W and Ewing K D, *Constitutional and Administrative Law* (14th edn, Pearson 2007)

Brownlie I, *Principles of Public international Law* (7th edn, OUP 2008)

Brownlie I and Goodwin-Gill G S (eds) *Brownlie's Document on Human Rights* (6th edn, OUP 2010)

Castecker F, 'The Changing modalities of regulation in international migration within Continental Europe 1870-1940' in A, Bocker and Others (eds) *Regulation of Migration: International Experiences* (Het Spinhus 1998)

Carens J, 'Citizenship and Civil Society' in Randall Hansen and Patrick Weil (eds) *Dual Citizenship, Social Rights and the Federal Citizenship in the U.S and Europe: The Reinvention of Citizenship* (OUP 2002)

Ceaser J W, *Liberal Democracy & Political Science* (John Hopkins University Press 1990)

Clarke S, 'The Neoliberal Theory of Society' in Alfredo Saad-Filho and Deborah Johnston (eds) *Neoliberalism: A Critical Reader* (Pluto Press 2005)

Clayton G, *Textbook on Immigration and Asylum Law* (4thedn, OUP 2010) 16

Chomsky N, *Profit Over People: Neoliberalism and Global Order* (Robert W McChesney Intr, Seven Stories Press 1999)

Chu W H, 'Qualitative Legal Research' in Mike McConville and Wing Hong Chui (eds), *Research Methods for Law* (Edinburgh University Press 2010)

Chynoweth P, 'Legal Research' in Andrew Knight and Les Ruddock (eds) *Advanced research methods in the built environment* (Blackwell Publishing 2008)

Cole D, *Enemy Aliens: Double Standards and Constitutional Freedoms in the War on Terror* (New Press 2003)

Cohen R, *Frontiers of Identity: The British and Others* (Longman 1994)

Cornelisse G, *Immigration detention and Human rights – Rethinking territorial sovereignty* (Martinus Nijhoff Publishers 2010)

--- --- 'Immigration detention and the territoriality of universal rights' in N De Genova and N Peutz (eds) *The Deportation regime: sovereignty, space and freedom of movement* (Duke University Press 2010)

--- --- 'A New Articulation of Human Rights, or Why the European Court of Human of Human Rights Should Think Beyond Westphalian Sovereignty' in M.B Dembour and T Kelly (eds), *Are Human Rights for Migrants?: Critical Reflections on the Status of Irregular Migrants in Europe and the United States* (Routledge 2011)

Coyle A, Campbell A and Neufeld R (eds) *Capitalist Punishment: Prison Privatisation and Human Rights* (Zed Books 2003)

Craig P, *Administrative Law* (5th edn, Sweet & Maxwell 2003)

Cryer R and others, *Research Methodologies in EU and International Law* (Hart Publishing, 2011)

Dahl R, *Polyarchy: Participation and Opposition* (University of Chicago Press 1971)

--- --- *Dilemmas of Pluralist Democracy: Autonomy Versus Control* (Yale University Press 1982)

De Genova and Peutz N, *The Deportation regime: sovereignty, space and the freedom of movement* (Duke University Press 2010)

De Giorgi A, *Rethinking the Political Economy of Punishment: Perspectives on Post Fordism and Penal Politics* (Ashgate Publishing 2006)

Dembour M B, 'What It Takes To Have a Case: the Backstage Story of Muskhadzhiyeva v Belgium (illegality of children's immigration detention)' in E.L Abdelgawad (ed), *Preventing and Sanctioning Hindrances to the Right of Individual Petition before the European Court of Human Rights* (Intersentia 2011)

Diamond L, *Developing Democracy: Toward Consolidation* (Johns Hopkins University Press 1999)

Dicey A V, *An Introduction to the study of the Law of the Constitution* (6th edn, Macmillan 1902)

Dijk P and others (eds), *Theory and Practice of the European Convention on Human Rights* (4th edn, Intersentia 2006)

Dummet A and Nicol A, *Subjects, Citizens, Aliens and Others: Nationality and Immigration Law* (Weidenfield and Nicolson 1990)

Dunstan R, *Cell Culture* (Amnesty International 1996)

Fawcett J E C, *The Application of the European Convention on Human Rights* (2nd edn, OUP Oxford 1987)

Feinberg J, *Harm to Others: The Moral Limits of Criminal Law* (OUP 1984)

Finnis J, *Natural Law and Natural Rights* (OUP 1980)

Fordham M, *Judicial Review Handbook* (Hart Publishing 2008)

Foucault M, *Discipline and Punish: the Birth of the Prison* (Random House 1979)

Frost A, *Botany Bay: the real story* (Black Inc 2011)

Gainer B, *The Alien Invasion: The Origins of the Aliens Act of 1905* (Heinemann Education 1972)

Garland D, *The Culture of Control: Crime and Social Order in Contemporary Society* (OUP 2001)

Garrard J, *The English and Immigration 1880-1910* (OUP 1971)

Gibney M, *The Ethics and Politics of Asylum: Liberal Democracy and the Response to Refugees* (CUP 2004)

Grahl-Madsen A, *The Status of Refugees in International Law* (Sijthoff Leiden 1972)

Grant S, 'The Legal Protection of Stranded Migrants' in Ryszard Cholewinski, Richard Perruchold and Euan MacDonald (eds) International Migration Law: *Developing Paradigms and Key Challenges* (Asser Press 2007)

Green T H, *Lectures on the Principles of Political Obligations and Other Writings* (CUP 1986)

Goodwin-Gill G S, *International law and the movement of persons between states* (Clarendon Press, 1978)

Groenendijk K, Guild E and Dogan H, *Security of Residence of Long-term Migrants: A comparative study of law and practice in European Countries* (Council of Europe 1998)

Guild E, 'Who is An Irregular Migrant?' in Barbara Bogusz and Others (eds), *Irregular Migration and Human Rights: Theoritical, European and International Perspectives* (Martinus Nijhoff Publishers 2004)

Guiraudon V, 'Citizenship Rights for Non-Citizens: France, Germany and the Netherlands,' in Christian Joppke (ed) *Challenge to the Nation-State* (OUP 1998)

Hagan J M, *Deciding to be legal: a Mayan Community in Houston* (Temple University Press 1994)

Hansen R, *Citizenship and Immigration in Post-war Britain* (OUP 2000)

Harris D, *Cases and Materials on International Law* (5th edn, Sweet and Maxwell 1998)

--- --- and others, *Law of the European Convention on Human Rights* (2nd edn, OUP 2009)

Hart H.L.A, *The Concept of the Law* (Clarendon Press 1961)

Hathaway J, *The Rights of Refugees under International Law* (CUP 2005)

Harvey D, *A Brief History of Neoliberalism* (OUP 2005)

Hayter T, *Open Borders: The Case Against Immigration Controls* (Pluto Press 2000)

Henckaerts J, *Mass Expulsion in Modern International Law and Practice* (Martinus Nijhoff 1995)

Henkin L, The Age of Rights (Columbia University Press 1990)

Henn M, Weinstein M and Foard N, *A Short Introduction to Social Research* (Sage 2006)

Hobson J, *The Social Problem* (Nisbet 1902)

Holmes C, *A Tolerant Country: Immigrants, Refugees and Minorities in Britain* (Faber and Faber 1991)

Holt J C, Magna Carta 461 (2nd edn 1972)

Humphrey J, 'The Universal Declaration of Human Rights: Its History, Impact and Judicial Character' in B G Ramcharan (ed) *Human Rights, Thirty years after the Universal Declaration* (Martinus Nijhoff 1979)

Hutchinson T C, *Researching and Writing in Law* (2nd edn, Thomson Lawbook Co 2006)

Jackson D and others, *Immigration Law and Practice* (4th edn, Tottel Publishing 2008)

Jacobs E, *Tribunal Practice and Procedure: Tribunals under the Tribunals, Courts and Enforcement Act 2007* (2nd edn, Legal Action Group 2011)

Jacobson D, *Rights Across Borders: Immigration and the Decline of Citizenship* (John Hopkins University Press 1996)

James A and others, *Privatising Prisons: Rhetoric and Reality* (Sage 1997)

Janda K, Jeffrey M. Berry and Jerry Goldman, *The Challenge of Democracy* (Houghton Mifflin Company 1999)

Jennings R and Arthur W (eds), *Oppenheim's International Law* (9th edn, Longman 1992)

Jopke C, 'Asylum and State Sovereignty: A comparison of the US, Germany and Britain' in Joppke C (ed) *Challenge to the Nation State: Immigration in Western Europe and the US* (OUP 1998)

--- --- *Immigration and the Nation-State: The United States, Germany and Great Britain* (OUP 1999)

Joseph S, 'Scope of Application' in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds) *International Human Rights Law* (OUP 2010)

Juss S, *Immigration, Nationality and Citizenship* (Mansell 1993)

Kalmthout, F. Meulen H and Dunkel F, 'Comparative Overview, Conclusions and Recommendations' in A. Van Kalmthout, F. Hofstee-Van Der Meulen and F Dunkel (eds) *Foreigners in European Prisons* (Wolf Legal Publishers 2007)

Kanstroom D, *Deportation nation: outsiders in American history* (Harvard University Press, 2007)

Kelsen, H, *The Pure Theory of Law* (M Knight tr, University of California Press 1967)

--- --- *Principles of International Law* (The LawBook Exchange Ltd 2003)

Kymlicka W, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Clarendon Press 1995)

Lambert H, *The Position of Aliens in Relation to the European Convention on Human Rights* (Council of Europe Publishing 2007)

Layton-Henry Z, 'Britain: From Immigration Control to Migration Management' in Wayne A Cornelius (ed) *Controlling Immigration: A Global Perspective* (Stanford University Press 2004)

Levy J, *Strengthening Parliament's Powers of Scrutiny: An assessment of the introduction of Public Bills Committee* (UCL 2009)

Lillich R B *The Current Status of the Law of State Responsibility for Injuries to Aliens* (University Press of Virginia 1983)

--- --- *The human rights of aliens in contemporary international law* (Manchester University Press 1984)

Linz J and Stepan A, *Problems of Democratic Transition and Consolidation* (Johns Hopkins University Press 1996)

Locke J, *Of Civil Government: Two Treaties* (Introduction by William S Carpenter, J M Brent 1924)

London H I, *Non-white immigration and the "White Australia" policy* (New York University Press, 1970)

London L, *Whitehall and the Jews, 1933-1948: British Immigration Policy, Jewish Refugees and the Holocaust* (CUP 2001)

Macdonald I and Toal R, *Macdonald's Immigration Law & Practice* (1st Supp, 7th edn, LexisNexis 2009)

Macpherson C B, *The Life and Times of Liberal Democracy* (OUP 1977)

McAdam J, *Complementary Protection in International Refugee Law* (OUP 2007)

McBride J, 'Proportionality and the European Convention on Human Rights' in E Ellis (ed) *The Principle of Proportionality in the Laws of Europe* (OUP 1999)

McGoldrick D, 'Exraterritorial Application of the International Covenant on Civil and Political Rights' in Fon Coomans and Menno T. Kamminga (eds) *Extraterritorial Application of Human Rights Treaties* (Intersentia 2004)

Mill J S, *On Liberty and Other Essays* (OUP 1991)

Miller T, 'The Impact of mass incarceration on immigration policy' in M. Mauer and M. Chesney-Lind (eds) *Invisible Punishment: The Collateral Consequences of Mass Imprisonment* (New Press 2002)

Mole N, *Asylum and the European Convention on Human Rights* (Council of Europe Publishing 2007)

Morsink J, *The Universal Declaration of Human Rights: Origin, Drafting, and Intent* (Philadelphia 1999)

Nicholls G, Deported: *A history of Forced Departures from Australia* (University of New South Wales Press 2007)

Nicol A, *Illegal Entrants* (JCWI and Runnymede Trust 1981)

Nowak M, *UN Convention on Civil Political Rights: CCPR Commentary* (NP Engel 1993) 173

Oppenheim L, *International Law* (8th edn, Longmans, Green & Co 1955)

Paine T, *The rights of Man* (Watts & Co 1937)

Park A and others, (eds) *British Social Attitudes* (2012 edn, 29th Report, NatCen Social Research 2012)

Posner R, *How Judges Think* (Harvard University Press 2008)

Quentin S, *Liberty before Liberalism* (CUP 1998)

Ramcharan B, *The Fundamentals of International Human Rights Treaty Law* (Martinus Nijhoff 2011)

Raz J, *The Morality of Freedom* (Clarendon Press 1986)

--- --- *The Authority of Law: Essays on Law and Morality* (2nd edn, OUP 2009)

Robertson A H and Merrils J G, *Human Rights in the World* (3rd edn, Manchester University Press 1989)

Robinson N, *The Universal Declaration of Human Rights: Its Origin, Significance, Application and Interpretation* (World Jewish Council 1958)

Roche T*, The Key in the Lock: A History of Immigration Control in England from 1066 to the Present Day* (1st edn, John Murray Publishers Ltd 1969)

Shachar A, *The Birthright Lottery: Citizenship and Global Inequality* (Harvard University Press 2009)

Shaikh A, 'The Economic Mythology of Neoliberalism' in Alfredo Saad-Filho and Deborah Johnston (eds) *Neoliberalism: A Critical Reader* (Pluto Press 2005)

Scheinin M, 'Extraterritorial Effect of the International Covenant on Civil and Political Rights' in Fon Coomans and Menno T. Kamminga (eds) *Extraterritorial Application of Human Rights Treaties* (Intersentia 2004)

Schuster L and Solomos J, The politics of refugee and asylum policies in Britain: Historical patterns and contemporary realities' in Alice Bloch and C Levy (eds) *Refugees, Citizenship and Social Policy in Europe* (Macmillan 1999)

Seddon D, *Immigration, nationality and Refugee Law* (JCW1 2006)

Smith M P, 'Transnationalism and Citizenship' in Brenda Yeoh and others, *Approaching Transnationalism* (Kluwer 2003)

Smith R 'Constitutional Democracy, Coercions and Obligations to Include' in Jeffrey Tulis and Stephen Macedo (eds), *The Limits of Constitutional Democracy* (Princeton University Press 2010)

Solomos J, *Race and Racism in Britain* (3rd edn, Palgrave 2003)

Soysal Y, *The Limits of Citizenship: Migrants and Postnational Membership in Europe* (University of Chicago Press 1994)

--- --- 'Changing Citizenship in Europe: Remarks on Post-National Membership and the National State' in Cesarani, D and Fulbrook, M (eds) *Citizenship, Nationality and Migration in Europe* (Routledge Press 1996)

Spencer I, *British Immigration Policy since 1945: The Making of Multi-Racial Britain* (Routledge 1997)

Steel Z and others, 'The Politics of asylum and immigration detention: advocacy, ethics, and the professional role of the therapist' in J P Wilson and B Drozdek (eds) *Broken spirits: the treatment of traumatized asylum seekers, refugees, war and torture victims* (Brunner-Routledge 2004)

Steger M B & Roy R, *Neoliberalism: A Very Short Introduction* (OUP 2010)

Storey H, 'International Law and Human Rights Obligations' in S Spencer (ed) *Strangers and Citizens: A Positive Approach to Migrants and Refugees* (Oram Press 1994)

Tambakaki P, *Human Rights or Citizenship?* (Birbeck Law Press 2010)

Tiburcio C, *The Human Rights of Aliens under International and Comparative Law* (Martinus Nijhoff Publishers 2001)

Tonry M, *Punishing Race* (OUP 2011)

Triandafyllidou A (ed), *Irregular Migration in Europe: Myths and Realities* (Ashgate 2010)

Tuitt P, *False Images: The Laws Construction of the Refugee* (Pluto Press 1996)

Vattel E, *Law of Nations* (Bela Kapossy and Richard Whatmore eds, first published in 1758, Liberty Fund Inc 2008)

Vohra S, 'The Detention of Irregular Migrants and Asylum Seekers' in Ryszard Cholewinski, Richard Perruchold and Euan MacDonald (eds) *International Migration Law: Developing Paradigms and Key Challenges* (Asser Press 2007)

Wadham J and others, *Blackstone's Guide to the Human Rights Act 1998* (OUP 1999)

Walzer M, *Spheres of Justice* (Basic Books 1983)

--- --- *Thick and Thin: The Moral Argument at Home and Abroad* (University of Notre Dame Press, 1994)

Watson A, *Legal Transplants: An Approach to Comparative Law* (2nd edn, University of Georgia Press, 1993)

Wilsher D, 'Detention of asylum seekers and refugees and international human rights law' in P Shah (ed) *The Challenge of Asylum to Legal Systems* (Cavendish 2005)

Winder R, *Bloody Foreigners: The Story of Immigration to Britain* (Little Brown 2004)

Journals

Akakpo C and Lenard P, 'New challenges in immigration theory: an overview' (2014) 17 (5) *Critical Review of International Social and Political Philosophy* 493

Alice E, 'Human Rights, Refugees and The Right 'To Enjoy' Asylum' (2005) 17 IJRL 293

Allain J, 'The Jus Cogens Nature of Non-Refoulement' (2001) 13 (4) *International Journal of Refugee Law* 533

Allan J, 'Do The Right Thing Judging? The High Court of Australia in Al- Kateb' (2005) 24 *Queensland Law Journal* 1

Anderson B 'Migrants and Work-related Rights' (2008) 22 *Ethics and International Affairs* 199

--- ---, Gibney M and Paoletti E, 'Citizenship, deportation and the boundaries of belonging' (2011) 15 *Citizenship Studies* 547

Askola H, 'Illegal Migrants', Gender and Vulnerability: The Case of the EU's Returns Directive' (2010) 18 *Fem Leg Studies* 159

Baldacini A, 'The EU Directive on Return: Principles and Protests' (2010) 28 *Refugee Quarterly Review* 115

Bashford A and McAdam J, 'The Right to Asylum: Britain's 1905 Aliens Act and the Evolution of Refugee Law' (2014) 32 (2) *Law and History Review* 218

Battjes H, 'The Soering reshold: Why Only Fundamental Values Prohibit *Refoulement* in ECHR Case Law' (2009) 11 (3) *European Journal of Migration and Law* 205

Beale S, 'The Many Faces of Overcriminalization: From Morals and Mattress Tags to Overfederalization' (2005) 54 *American University Law Review* 747

Benhabib S, 'Citizens, residents and aliens in a changing world: political membership in the global era' (1999) 66 (3) *Social Research* 709

--- --- 'Borders, Boundaries and Citizenship' (2005) 38 (4) *Political Science and Politics* 673, 675

Bernstorff J V, 'The Changing Fortunes of the Universal Declaration of Human Rights: Genesis and Symbolic Dimensions of the Turn to Rights in International Law' (2008) 19 *The European Journal of International Law* 903

Bettinson V, 'European Court Of Human Rights: Deportation of Migrant Following Criminal Conviction; European Convention on Human Rights, Article 8; Omojudi v United Kingdom' (2010) 74 *Journal of Criminal Law* 113

Bhagwati J, 'Illegals in our Midst: Getting Policy Exactly Wrong' (1998) Oct-Nov *Boston Review* 3

Bingham T, 'There is a World Elsewhere: The Changing Perspectives of English Law' (1992) 41 ICLQ 513

--- --- 'Personal Freedom and the Dilemma of Democracies' (2003) 52 *International and Comparative Law Quarterly* 841

Bloch A & Schuster L, ‘At the extremes of exclusion: Deportation, Detention and Dispersal’ (2005) 28 *Ethnic and Racial Studies* 491

--- --- and Sigona N and Zetter R, ‘Migration Routes and Strategies of young undocumented Migrants in England: a qualitative perspective’ (2011) 34 *Ethnic and Racial Studies* 1287

Borelli S, ‘Casting Light on the Legal Black Hole: International Law and Detentions Abroad in the “War on Terror” (2005) 87 INT’L REV. RED CROSS 39

Bosniak L, ‘Exclusion and Membership: The Dual Identity of the Undocumented Worker under the United States Law’ (1988) 6 *Winconsin Law Review* 955

Bosworth M, ‘Governing Through Migration Control: Security and Citizenship in Britain’ (2008) 48 (6) *British Journal of Criminology* 703

--- --- ‘Deportation, ‘Detention and foreign-national prisoners in England and Wales’ (2011) 15 *Citizenship Studies* 583

--- --- ‘Subjectivity and identity in detention: Punishment and society in a global age’ (2012) 16 (2) *Theoretical Criminology* 123

Breitenmoser S and Wilms G, 'Human Rights v. Extradition: The Soering Case' (1989/90) 11 Mich. J. Int'L L 843

Broeders D, ‘Return to sender? Administrative detention of irregular migrants in Germany and the Netherlands’ (2010) 12 *Punishment and Society* 169

Bryan I and Langford P, ‘Impediments to the Expulsion of Non-Nationals: Substance and Coherence in Procedural Protection under the European Convention on Human Rights’ (2010) 79 *Nordic Journal of International Law* 457

--- --- ‘The Lawful Detention of Unauthorised Aliens under the European System for the Protection of Human Rights’ (2011) 80 *Nordic Journal of International Law* 193

Buergenthal B, 'The Normative and Institutional Evolution of International Human Rights' (1997) 19 *Human Rights Quarterly* 703

Calavita K, 'Immigration, law and marginalization in a global economy: notes from Spain' (1998) 32 (3) *Law & Society Review* 529

Caloz-Tschopp M, 'On the Detention of Aliens: The Impact on Democratic Rights' (1997) 10 *Journal of Refugee Studies* 165

Carens J, 'Aliens and Citizens: The Case for Open Borders' (1987) 49 (2) *Review of Politics* 251

--- --- 'The Rights of Irregular Migrants' (2008) *Ethnic and International Affairs* 163

--- --- "The Case for Amnesty" (2009) 34 *Boston Review* 5-6

Cartwright J, 'Protecting Legitimate Expectation and Estoppel in English Law' (2006) 10 (3) *Electronic Journal of Comparative Law* 1

Cassidy J, 'Emergence of the Individual as an International Juristic Entity: Enforcement of International Human Rights' (2004) 9 (2) *Deakin Law Review* 534

Chacon J M, 'Unsecured Borders: Immigration Restrictions, Crime Control and National Security (2007) 39 (5) *Connecticut Law Review* 1827

--- --- 'Managing Migration Through Crime' (2009) 109 *Columbia Law Review Sidebar 135*

--- --- 'A Diversion of Attention? Immigration Courts and the Adjudication of Fourth and Fifth Amendment Rights' (2010) 59 *Duke Law Journal* 1563

--- --- 'Overcriminalizing Immigration' (2012) 102 *The Journal of Criminal Law and Criminology* 613

Chan W, ‘Crime, Deportation and the Regulation of Immigrants in Canada’ (2005) 44 *Law and Social Change* 153

Charlesworth H, ‘The Mid-Life Crisis of the Universal Declaration of Human Rights’ (1998) 55 WASH & LEE L. REV 781

Chimenti M, ‘Mobilization of Irregular Migrants in Europe: a comparative analysis’ (2011) 34 *Ethnic and Racial Studies* 1338

Cholewinski R and Taran P, ‘Migration, Governance and Human Rights, Contemporary Dilemmas in the era of Globalization’ (2010) 22 *Refugee Survey Quarterly* 1

Choudhury T, ‘Intrepreting the Right to Equality Under Article 26 of the International Covenant on Civil and Political Rights’ (2003) 24 *European Human Rights Law Review* 31

Clayton G, ‘Transparent and Trusted: The Immigration Rules in 2009?’ (2008) 14 *Immigration Law Digest* 2

Clayton R, ‘Legitimate Expectation, Policy and the Principle of Consistency’ (2003) 62 (1) *Cambridge Law Journal* 93

Cole P, ‘Towards a symmetrical world: migration and international law’ (2006) 4 *Ethics and Economics* 1

Coleman D and Rowthorn R, ‘The Economic Effects of Immigration into the United Kingdom’ (2004) 30 (4) *Population and Development Review* 579

Coppedge M and others, ‘Conceptualizing and Measuring Democracy: A New Approach’ (2011) 9 (2) *Perspectives on Politics* 247

Cornelisse G, ‘Human Rights for Immigration Detainees in Strasbourg: Limited Sovereignty or a Limited Discourse?’ (2004) 6 *European Journal of Migration and Law* 93

Costello C, ‘Human Rights and the Elusive Universal Subject: Immigration Detention Under International Human Rights Law’ (2012) 19 *Indiana Journal of Global Legal Studies* 257

Couper K, ‘An Elusive Concept: The Changing Definition of Illegal Immigration in the Practice of Immigration Control in the United Kingdom (1984) 18 (3) *International Migration Review* 437

Dauvergne C, ‘Sovereignty, Migration and the Rule of Law in Global Times’ (2004) 67 *Modern Law Review* 588

De Baets A, ‘The Impact of the Universal Declaration of Human Rights on the Study of History (2009) 48 *History and Theory* 20

De Genova N, ‘Migrant “Illegality” and Deportability in Everyday Life’ (2002) 31 *Annual Review of Anthropology* 419

--- --- ‘The production of culprits: from deportability to detainability in the aftermath of ‘Homeland Security’ (2007) 11 *Citizenship Studies* 421

--- --- ‘Inclusion Through Explosion: Explosion or Implosion’ (2008-2009) 1 *Amsterdam Law Forum* 43

Dell’ Olio F, ‘The Redefinition of the Concept of Nationality in the UK: Between Historical Responsibility and Normative Challenges’ (2002) 22 *Politics* 9, 10

Dembour M, ‘Human Rights law and the national sovereignty in collusion: the plight of quasi-nationals at Strasbourg’ (2003) 21 *Netherlands Quarterly of Human Rights* 63

Demleitner N V, ‘Preventing Internal Exile: The Need for Restrictions on Collateral Sentences Consequences’ (1999) 11 *Stanford Law and Policy Review* 153

--- --- ‘Immigration Threats and Rewards: Effective Law Enforcement Tools in the "War" on Terrorism’ (2002) 51 *EMORY Law Journal* 1059

Dennis M J, 'Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation' (2005) 99 (1) *The American Journal of International Law* 119

De Zayas A, 'Human rights and indefinite detention' (2005) 87 *International Review of the Red Cross* 15

Dizerega G, 'Spontaneous Order and Liberalism's Complex Relation to Democracy' (2011) 16 (2) *The Independent Review* 173

Dolowitz D, Greenwold S and Marsh D, 'Policy Transfer: Something Old, Something New, Something Borrowed, But Why Red, White And Blue?' (1999) 52 (4) *Parliamentary Affairs* 719

Dotan Y, 'Why Administrators should be Bound by their Policies' (1997) 17 (1) *Oxford Journal of Legal Studies* 23

Doucleff J K, 'Denmore v Kim: Upholding the Unnecessary Department of Legal Permanent Residents, Supreme Court Review' (2003) 94 *Journal of Criminal Law and Criminology* 625

Duncan N.J and Hutchinson T, 'Defining and describing what we do: Doctrinal legal research' (2012) 17 (1) *Deakin Law Review* 83

Edwards R A, 'Reading down legislation under the Human Rights Act' (2006) 20 *Legal Studies* 353

Ellermann A, 'The Limits of Unilateral Migration Control: Deportation and Interstate Cooperation' (2008) 43 (2) *Government and Opposition* 168

Enarsen T, 'The European Convention on Human Rights and die Notion of an Implied Right to de facto Asylum', (1990) 2 *International Journal of Refugee Law* 361

Fekete L, 'The Deportation machine: Europe, Asylum and human rights' (2005) 47 Race class 64

Feldman P, 'The Developing Scope of Article 8 of the European Convention on Human Rights' (1997) EHRLR 265

Finch T and Cherti M, 'No Easy Options: Irregular Immigration in the UK' (2011) *Institute for Public Policy Research* 18

Fiss O, 'The Immigrant as Pariah' (1998) 23 (5) *Boston Review* 1

Flynn M, 'Who Must Be Detained? Proportionality as a Tool for Critiquing Immigration Detention Policy' (2012) 31 *Refugee Survey Quarterly* 40

Fornale E, 'The European Returns Policy and the Reshaping of the National Reflections on the Role Of Domestic courts' (2012) 31 *Refugee Survey Quarterly* 134

Forsyth C, 'Wednesbury protection of legitimate expectation' (1997) *Public Law* 375

Foster M, 'An "Alien" By the Barest of the Threads"-The Legality of the Deportation of Long-Term Residents From Australia' (2009) 33 *Melborne University Law Review* 483

Foweraker J and Krznaric R, 'Measuring Liberal Democratic Performance: an Empirical and Conceptual Critique' (2000) 48 *Political Studies* 759

Frey B and Zhao X K, 'The Criminalization of Immigration and the International Norm of Non-Discrimination: Deportation and Detention in U.S. Immigration Law' (2011) 29 *Law and Inequality* 279

Frontman-Cain S, ' Boultif v Switzerland: The ECHR Fails to Provide Precise Criteria for Resolving Article 8 Deportation Cases' (2003) 25 *Loyola of Los Angeles International and Comparative Law Review* 323

Fukuyama F, 'Identity, Immigration and Liberal Democracy' (2006) 17 *Journal of Democracy* 5

Gerards J, ‘How to improve the necessity test of the European Court of Human Rights’ (2013) 11 (2) *International Journal of Constitutional Law* 466

Gibney M ‘Asylum and expansion of deportation in the United Kingdom’ (2008) 43 (2) *Government and Opposition* 146

--- --- ‘Is Deportation a form of Forced Migration’ (2013) 32 *Refugee Survey Quarterly* 116

Gil-Bazo M T, ‘Refugee Protection under International Human Rights Law: From Non-Refoulement to Residence and Citizenship’ (2015) 34 *Refugee Survey Quarterly* 11

Glen Johnson M, ‘The Contribution of Eleanor and Franklin Roosevelt to the Development of International Protection of Human Rights’ (1987) 9 *Human Rights Quarterly* 19

Glendon M A, ‘The Rule of Law in the Universal Declaration of Human Rights’ (2004) 2 *Northwestern Journal of International Human Rights* 1

Goodwin-Gil G, ‘The Limits of the Power of Expulsion in Public International Law’ (1975) 47 *British Yearbook of International Law* 55

--- --- ‘International Law and the Detention of Refugees and Asylum Seekers’ (1986) 20 *International Migration Review* 193

Grano J D, 'Delimiting the Concept of Judicial Activism: Flag Desecration and Abortion' (1989) 6 *Cooley Law Review* 439

Grant S, ‘Immigration Detention: Some Issues of Inequality’ (2011) 7 *The Equal Rights Review* 69

Gray B, ‘From Exile of Citizens to Deportation of non-citizens: ancient Greece as a mirror to illuminate a modern transition’ (2011) 15 *Citizenship Studies* 565

Greenman K, ‘A Caste Built on Sand? Article 3 ECHR and the Source of Risk in Non-Refoulement Obligations in International Law’ (2015) 00 (00) *International Journal of Refugee Law* 1

Greenstone D, ‘Dilemmas of Pluralist Democracy: Autonomy Versus Control by Robert A Dahl’ (1983) 11 (1) *Political Theory* 146

Griffiths M, ‘Anonymous aliens? Questions of identification in the detention and deportation of failed asylum seekers’ (2012) 18 (6) *Population, Space and Place* 715

Grillo R, ‘”Saltdean can’t cope” protests against asylum seekers in an English seaside surb’ (2005) 28 (2) *Ethnic and Racial Studies* 235

Gurd R, ‘Redefining the Borders: The Call for Indefinite Detention Reform in the United Kingdom’ (2011) 9 *Journal of Migration and Refugee Studies* 304

Hagan J, Eschbach K & Rodriguez N, ‘ U.S. Deportation Policy, Family Separation and Circular Migration’ (2008) 42 *International Migration Review* 64

--- ---, Castro B & Rodriguez N, ‘The Effect of U.S. Deportation Policies on Immigrant Families and Communities: Cross-Border Perspectives’ (2009-2010) 88 *North Carolina Law Review* 1799

Hailbronner K, ‘Detention of Asylum Seekers’ (2007) 9 *European Journal of Migration and Law* 159

Hammond J, ‘Immigration Control as a (False) Security Measure’ (2011) 37 *Critical Sociology* 739

Hannum H, ‘The UDHR in National and International Law’ (1998) 3 (2) *Health and Human Rights* 144

Hansen R and King D, ‘Illiberalism and the New Politics of Asylum: Liberalism’s Dark side’ (2000) *The Political Quarterly* 396

Harvey A, ‘The Cap on Immigration’ (2011) 25 *Journal of Immigration Asylum and Nationality Law* 7

--- --- ‘Expulsion and Exclusion’ (2007) 21 (3) *Journal of Immigration, Asylum and Nationality Law*, 208

Harvey C, ‘Time for Reform? Refugees, Asylum-Seekers, and Protection Under International Human Rights Law’ (2015) 34 *Refugee Survey Quarterly* 43

Hazell R, ‘The Continuing Dynamism of Constitutional Reform’ (2007) 60 *Parliamentary Affairs* 3

Hefferman L, ‘A Comparative View of Individual Petition Procedures under the European Convention on Human Rights and the International Covenant on Civil and Political Rights’ (1997) 19 *Human Rights Quarterly* 78

Heydon D, 'Judicial Activism and the Death of the Rule of Law' (2003) 47 1 (2) *Quadrant Magazine* 3

Hing B O, ‘Detention to Deportation-Rethinking the Removal of Cambodian Refugees’ (2005) 38 *University of California Davis Law Review* 891

Hobson C, ‘Liberal Democracy and Beyond: extending the sequencing debate’ (2012) 33 (4) *International Political Science Review* 441

Hollifield J, ‘Migration and International Relations’ (1992) *International Migration Review* 26 (2) 570

--- ---, Hunt V F and Tichenor D J, ‘The Liberal Paradox: Immigrants, Markets and Rights in the United States’ (2008) 61 (1) SMU Law Review 67

Huysman J and Buonfino A, ‘Politics of exception and unease: Immigration, asylum and terrorism in parliamentary debates in the UK’ (2008) 56 (4) *Political Studies* 766

Johnson C, ‘Indefinite Immigration detention: can it be justified?’ (2009) 23 J.I.A.L 351

Johnston C, ‘Indefinite Detention: Can it be justified’ (2009) 23 *Journal of Immigration, Asylum and Nationality Law* 351

Jones T and Newburn T, ‘Comparative Criminal Justice Policy Making in the United States and the United Kingdom: The Case of Private Prisons’ (2005) 45 *British Journal of Criminology* 58

Joppke C, ‘Why Liberal States Accept Unwanted Immigration’ (1998) 50 (2) *World Politics* 266

Kanstroom D, ‘Deportation, Social Control, and Punishment: Some Thoughts about Why Hard Cases Make Bad Laws’ (2000) 113 *Harvard Law Review* 1889

--- --- ‘Criminalizing the Undocumented: Ironic Boundaries of the Post-September 11th ‘Pale of Law’ (2004) 29 *North Carolina Journal of Int'l Law and Commercial Regulation* 639

Kazmierski V, ‘How Much “Law” in Legal Studies? Approaches to Teaching Legal Research and Doctrinal Analysis in a Legal Studies Program’ (2014) 29 *Canadian Journal of Law and Society* 297

Kedar B, ‘Expulsion as an issue of world history’ (1996) 7 (2) *Journal of World History* 165

Kelsen H ‘The pure theory of law: Part II’ (1935) 51 *Law Quarterly Review* 517

--- --- ‘The pure theory of law: its method and functional concepts’ (1934) 50 *Law Quarterly Review* 474

King A, ‘Modes of Executive-Legislative Relations: Great Britain, France, and the West Germany’ (1976) 1 (1) *Legislative Studies Quarterly* 11

King H, ‘The Extraterritorial Human Rights Obligations of States’ (2009) 9 (4) *Human Rights Law Review* 522

Klein A & Williams L ‘Immigration detention in the community: research on the experiences of migrants released from detention centres in the UK’ (2012) 18 (6) *Population, Space and Place* 741

Kmiec K, 'The Origin and Current Meanings of "Judicial Activism"' (2004) 92 *California Law Review* 1441

Kofman E, Rogoz M and Lévy F, ‘Family Migration Policies in France’ (2010) *International Centre for Migration Policy Development* 1

Koh J L, ‘Waiving Due Process (Goodbye): Stipulated Orders of Removal and the Crisis in Immigration Adjudication’ (2012-2013) 91 *North Carolina Law Review* 475

Kuijer M, ‘Effective Remedies on a domestic level for excessively lengthy proceedings’ (2013) 13 (4) *Human Rights Law Review* 774

Lambert H, ‘The European Convention on Human Rights and the Protection of Refugees: Limits and Opportunities’ (2005) 24 *Refugee Survey Quarterly* 40

Leerkes A and Broeders D, ‘A case of mixed motives? Formal and informal functions of administrative immigration detention’ (2010) 50 (5) *British Journal of Criminology* 830

Lehman J, ‘Rights at the Frontier: Border Control and Human Rights Protection of Irregular International Migrants’ (2011) 3 *Goettingen Journal of International Law* 733

Legomsky S H, ‘The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms’ (2007) 64 *Walsh and Lee Law Review* 469

Legrand P, ‘European Legal Systems Are Not Converging’ (1996) 45 (1) *The International and Comparative Law Quarterly* 52

Lehman J M, ‘Rights at the Frontier: Border Control and Human Rights Protection of Irregular International Migrants’ (2011) 3 (2) *Goettingen Journal of International Law* 733

Leiden W R and Neal D, ‘Highlights of the U.S. Immigration Act of 1990’ (1990) 14 (1) *Fordham International Law Journal* 328

Lillich R B, ‘The Soering Case' (1991) 85 AM. J. INT’L L 128

MacGrady B, ‘Resort to International Human Rights in challenging conditions in U.S. immigration detention centres (1997) 23 *Brooklyn Journal of International Law* 271

MacIntyre H, ‘Report exposes “indefinite immigration detention”’ (2009) 23 (2) *Journal of Immigration Asylum and Nationality Law* 117

Marcoux L, ‘Protection from Arbitrary Arrest and Detention Under International Law’ (1982) 5 (2) *Boston College International and Comparative Law Review* 345

Markowitz P L, ‘Deportation is Different’ (2010-2011) 13 *University of Pennsylvania Journal of Constitutional Law* 1299

Marrington D, ‘Commitment and contradiction in immigration law’ (1986) 6 *Legal Studies* 272

McDougal M S and Bebr G, ‘Human Rights in the United Nations’ (1964) 58 *The American Journal of International Law* 603

--- --- and Chen L and Lasswell H, ‘Protection of Aliens from Discrimination and World Public Order: Responsibility of States Conjoined with Human Rights’ (1976) 70 *American Journal of International Law* 432

McHarg A, ‘Reconciling Human Rights and the Public Interest’ (1999) 62 (5) *The Modern Law Review* 671

Mckee R 'The Immigration, Asylum and Nationality Act 2006 and other developments' (2006) 20 *Journal of Immigration, Asylum, and Nationality Law* 2

McLaren L and Johnson M, 'Resources, Group Conflict and Symbols: Explaining Anti Immigration Hostility in Britain' (2007) 55 *Political Studies* 709

McNevin A, 'Contesting Citizenship: Irregular Migrants and Strategic Possibilities for Political Belonging' (2008) 31 *New Political Science* 163

Meron T, 'Extraterritoriality of Human Rights' (1995) 89 *American Journal of International Law* 78, 79;

Miko S, 'Al-Skeini v United Kingdom and Extraterritorial Jurisdiction under the European Convention for Human Rights' (2013) 35 *Boston College International and Comparative Law Review* 6

Milanovic M, 'Al-Skeini and Al-Jedda in Strasbourg' (2012) 23 (1) *European Journal of International Law* 121

Miltner B, 'Revisiting Extraterritoriality After Al-Skeini: The ECHR and Its Lessons' (2012) 33 *Michigan Journal Of International Law* 693

Moan M, 'Immigration Policy and the Immanent Critique' (2008) 22 *Ethics and International Affairs* 205

Moeckli D, The Selective "War on Terror": Executive Detention of Foreign Nationals and the Principle of Non-Discrimination (2005-2006) 31 Brook J. Int'l L 495

Moore R, 'Reinterpreting the Immigration and Nationality Act's Categorical Bar to Discretionary Relief for "Aggravated Felons" in Light of International Law: Extending Beharry v Reno' (2004) 21 *Arizona Journal of International and Comparative Law* 535

Morawetz N, 'Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms' (2000) 113 *Harvard Law Review* 1936

Moreno-Lax V, 'Beyond Saadi v UK: Why the 'Unnecessary' Detention of Asylum Seekers is Inadmissible under EU Law' (2011) 2 *Human Rights and International Legal Discourse* 166

Morsink J, 'The Philosophy of the Universal Declaration' (1984) 6 *Human Rights Quarterly* 309

Motomura H, 'The Decision That Matters: Federal Immigration Enforcement, State and Local Arrests, and the Civil-Criminal Line' (2011) 58 *UCLA Law Review* 1819

Mowbray A, 'Duties of Investigation Under the European Convention on Human Rights' (2002) 51 *International and Comparative Law Quarterly* 437

Mulvey G, 'When Policy Creates Politics: the Problematizing of Immigration and the Consequences for Refugee Integration in the UK' (2010) 23 *Journal of Refugee Studies* 437

Murkens J, 'The Quest for Constitutionalism in UK Public Law Discourse' (2009) 29(3) *Oxford Journal of Legal Studies* 427

Murphy W.T and Roberts S, 'Introduction to the Special Issue on Legal Issue on Legal Scholarship' (1987) 50 (6) *Modern Law Review* 677

Neuman G L, 'Extraterritorial Violations of Human Rights by the United States' (1994) 9 (4) *American University International Law Review* 213

Newburn T, 'Atlantic Crossings: "Policy transfer" and crime control in the United States and Britain' (2002) 4 (2) *Punishment and Society* 165

Noll G, 'From "protective passports" to protected entry procedures? The legacy of Raoul Wallenberg in the contemporary asylum debate' (2003) *New Issues in Refugee Research* 99

Nyers P, 'Abject Cosmopolitanism: the politics of protection in the anti-deportation movement' (2003) 24 *Third World Quarterly* 1069

O'Nions H, 'Exposing the flaws in the Detention of Asylum Seekers: A critique of Saadi' (2008) 17 *Nottingham Law Journal* 34

--- --- 'No Right to Liberty: The Detention of Asylum Seekers for Administrative Convenience' (2008) 10 *European Journal of Migration and Law* 149

Ozdowski S, *'The Law, Immigration and Human Rights: Changing the Australian Immigration Control System'* (1985) 19 *International Migration Review* 535

Pederson P, ' Territorial Jurisdiction in Article 1 of the European Convention on Human Rights' (2004) 73 *Nordic Journal of International Law* 279

Peers S, 'Free Movement, Immigration Control and Constitutional Conflict' (2009) 5 *European Constitutional Law Review* 173

Pellew J, 'The Home Office and the Aliens Act of 1905' (1989) 32 *Historical Journal* 369

Pennock J R, 'The Life and times of Liberal Democracy by C.B. Macpherson' (1978) 6 (4) *Political Theory* 555

Plattner M, 'Liberalism and Democracy' (1998) 77 (2) *Foreign Affairs* 171

--- --- 'Populism, Pluralism and Liberal Democracy' (2010) 21 *Journal of Democracy* 82

Piotrowicz R, 'Victims of Trafficking and de Facto Statelessness' (2002) 21 *Refugee Survey Quarterly* 50

Posner R A, 'The State of Legal Scholarship Today: A Comment on Schlag' (2009) 97 The *Georgetown Law Journal* 845

Ramcharan B G, 'The Legal Status of International Bill of Human Rights' (1986) 55 *Nordic Journal of International Law* 366

Rhoden T, 'The liberal in liberal democracy' (2013) *Democratization* 1

Richard C and Fischer N, 'A legal disgrace? The retention of deported migrants in contemporary France (2008) 47 *Social Science Information* 581

Rigaux F, 'Hans Kelsen on international Law' (1998) 9 *European Journal of International Law* 325

Roberts M, 'The Exercise of Administrative Discretion Under the Immigration Laws' (1975-76) 13 *San Diego Law Review* 144

Rodenhauser T, 'Another Brick in the Wall: Carrier Sanctions and the Privatisation of Immigration Control' (2014) 26 (2) *International Journal of Refugee Law* 233

Ronen Y, 'The ties that bind: family and private life as bars to the deportation of immigrants' (2012) 8 *International Journal of Law in Context* 283

Ryan B, 'The Evolving Legal Regime on Unauthorised Work by Migrants in Britain' (2005) 27 *Comparative Labour and Policy Journal* 27

Sales P and Steyn K, 'Legitimate Expectations in English Public Law: An Analysis' (2004) *Public Law* 564

Sales R, 'Welfare for asylum seekers in Britain' (2002) 22 *Critical Social Policy* 456

Salter M, 'Governmentalities of an Airport: heterotopia and confession' (2007) 1 *International Political Sociology* 49

--- --- 'When the exception becomes the rule: Borders, Sovereignty, and Citizenship' (2008) 12 *Citizenship Studies* 365

Sampson R and Mitchell G, 'Global trends in immigration detention and alternatives to detention: practical, political and symbolic rationales' (2013) 1(3) *Journal on Migration and Human Security* 97

Sawyer C and Turpin P, 'Neither Here nor There: Temporary Admission to the UK' (2005) 17 *International Journal of Refugee Law* 688
Schabas W, 'International Law and the Abolition of the Death Penalty' (1998) 55 WASH. & LEE L. REV. 797

Schreuer C, 'The Waning of the Sovereign State: Towards a New Paradigm for International Law?' (1993) 4 *European Journal of International Law* 447

Schuster L, 'Turning Refugees into illegal migrants: Afghan Asylum seekers in Europe' (2011) 34 Ethnic *and Racial Studies* 1392

Schwelb E, 'The Influence of the Universal Declaration of Human Rights on International and National Law' (1959) Am. soc. Int'l L 217

Sen A, 'Democracy as a universal Value' (1999) 10 *Journal of Democracy* 3

Sherlock A, 'Deportation of Aliens and Article 8 ECHR' (1998) 23 EUR.L.REV.H.R 62

Silverman S, 'Immigration Detention in America: A History of its Expansion and a Study of its Significance' (2010) *Centre on Migration, Policy and Society Working Paper* 80

--- --- and Massa E, 'Why Immigration Detention is Unique' (2012) 18 *Population, Space and Place* 677

Smitter P and Karl T, 'What Democracy Is' (1991) 25 *Journal of Democracy* 114

Sohn L B, 'The New International Law: Protection of the Rights of Individuals Rather Than States' (1982-1983) 32 *American University Law Review* 1

Steinforth C, 'Uner v The Netherlands: Expulsion of Long-term Immigrants and the Right to Respect for Private and Family Life' (2008) 8 *Human Rights Law Review* 185

Stevens D, 'The Asylum and Immigration Act 1999: A Missed Opportunity?' (2001) 64 (3) *Modern Law Review* 413

Steyn K, 'Consistency-a Principle of Public Law' (1997) 2 (1) *Judicial Review* 22

Steyn L 'Incorporation and Devolution: A Few Reflections on the Changing Scene' (I998) 1 EHLRR 151

Stumpf J P, 'The Crimmigration Crisis: Immigrants, Crime, and the Sovereign Power' (2006) 56 *American University law Review* 367

--- --- 'Fitting Punishment' (2009) 66 *Washington & Lee Law Review* 1683

--- --- 'Doing Time: Crimmigration Law and the Perils of Haste' (2011) 58 *UCLA Law Review* 1705

Sucharitkul S, 'State Responsibility and International Liability under International Law' (1996) 18 *Loyola of Los Angeles International and Comparative Law Review* 821

Taylor S, 'From Border Control to Migration Management: The Case for a Paradigm Change in the Western Response to Transborder Population Movement' (2005) 39 (6) *Social Policy and Administration 563*

--- --- 'Sovereign power at the border' (2005) *Public Law Review* 16

Thienel T, 'The ECHR in Iraq: The Judgment of the House of Lords in R (Al Skeini) v Secretary of State for Defence' (2008) 6 *Journal of International Criminal Justice* 115

Thomas R, 'Tribunalising Immigration and Asylum Judicial Reviews' (2009) 15 (4) *Immigration Law Digest* 2

Vincenzi C, 'Aliens and the judicial review of Immigration Law' (1985) *Public Law* 93

Waites N, 'Immigration and Asylum Law under the Human Rights Act: A three branch analysis' (2008) 4 *Journal of Migration and Refugee Issues* 25

Walters W, ‘Deportation, Expulsion and the International Police of Aliens’ (2010) 6 *Citizenship Studies* 265

Waltz S E, ‘Universalizing Human Rights: The Role of Small States in the Construction of the Universal Declaration of Human Rights’ (2001) 23 *Human Rights Quarterly* 44

Waltz S, ‘Reclaiming and rebuilding the history of the Universal Declaration of Human Rights’ (2002) 23 *Third World Quarterly* 437

Warbrick C, 'Coherence and the European Court of Human Rights' (1989/90) 11 Mich. J. Int'L L 1073

--- --- ‘The structure of Article 8’ (1998) *European Human Rights Law Review* 32

Werner W G and De Wilde J H, ‘The Endurance of sovereignty’ (2001) 7 (3) *European Journal of International Relations* 283

Whittle D, ‘Nystrom v Australia, UN Doc CCPR/C/102/D/1557/2007’ (2012) 19 *Australian International Law Journal* 235

Wilde R, ‘Legal “Black Hole”? Extraterritorial State Action and International Treaty Law on Civil and Political Rights’ (2005) 26 *Michigan Journal of International Law* 740

Wilde R, ‘Triggering State Obligation Extraterritorially: The Spatial Test in Certain Human Rights Treaties (2007) 40 (2) ISR L Rev 503

Wilsher D, ‘The Administrative Detention of Non-Nationals Pursuant to Immigration Control: International and Constitutional Law Perspectives’ (2004) 53 ICLQ 897

Wolton S, ‘Barbed Wire Europe: Conference against Immigration Detention’ (2000) 13 *Journal of Refugee Studies* 415

Wray H, ‘The Aliens Act 1905 and the Immigration Dilemma’ (2006) 33 *Journal of Law and Society* 302

Wyngaert C, 'Applying the European Convention on Human Rights to Extradition: Opening Pandora's Box?' (1990) 39 ICLQ 757

Zakaria F, ‘The Rise of Illiberal Democracy’ (1997) 76 (6) *Foreign Affairs* 22

Zayas A, ‘Human Rights and Indefinite Detention’ (2005) 87 *International Review of the Red Cross* 15

Zilli A S, ‘Approaching the Extraterritoriality Debate: The Human Rights Committee, the U.S. and the ICCPR’ (2011) 9 (2) *Santa Clara Journal of Law* 399

Zorn J, ‘The right to stay: challenging the policy of detention and deportation’ (2009) 12 *European Journal of Social Work* 247

Working Papers

Anderson B, “Illegal Immigrant”: Victim or Villain? (2008) *ESRC Centre on Migration, Policy and Society Working Paper* 64/2008

Bacon C, ‘The Evolution of Immigration Detention in the UK: The Involvement of Private Prison Companies’ (2005) *Refugees Studies Centre RSC Working Paper* 27/2005

Field O and Edwards A, ‘Alternatives to Detention of Asylum Seekers and Refugees’ (2006) UNHCR Legal and Protection Policy Research Series POLAS/2006

Gibney M, ‘Outside the Protection of the Law: The Situation of Irregular Migrants in Europe’ (2000) *Refugee Studies Centre Working Paper* 6

--- --- ‘The State of Asylum: Democratization, Judicialization and Evolution of Refugee Policy in Europe’ (2001) *UNHCR Working Paper* 50

--- --- 'Precarious Residents: Migration Control, Membersip and the Rights of Non-citizens' (2009) *UNDP Human Development Reports Research Paper* 10

--- --- and Hansen R, 'Deportation and the liberal state:the forcible return of asylum seekers and unlawful migrants in Canada, Germany and the United Kingdom' (2003) *New Issues in Refugee Research Working Pape*r No.77

Gigauri G, 'Resolving the Liberal Paradox: Citizen Rights and the Alien Rights in the United Kingdom' (2006) *RSC Working Paper* 31

Larsaeus N, 'The Use of Diplomatic Assurances in the Prevention of Prohibited Treatment' (2006) *RSC Working Paper* No. 32

O'cinneide C, 'The Human Rights Act and the Slow Transformation of the UK's 'Political Constitution' *Institute for Human Rights Working Paper Series* 1

Paoletti E, 'Deportation, non-deportability and ideas of membership' (2010) *RSC Working Paper Series* 65/2010

Rohl K, 'Fleeing violence and poverty: non-refoulement obligations under the European Convention of Human Rights' (2005) *UNHCR Working Paper* no 111

Schuster L, 'The Exclusion of Asylum Seekers in Europe' (2004) *Centre on Migration, Policy and Society Working Paper* No. 1

International Legal Instruments

Treaties, Conventions and Protocols

American Convention on Human Rights 1969

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 (CAT)

Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) 1950 ETS 5

Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) UNTS 1577 (CRC)

Convention Relating to the Status of Refugees 2545 189 UNTS 150 (entered into force 22 April 1954)

International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195 (ICERD)

International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR)

International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR)

Optional Protocol to the International Covenant on Civil and Political Rights (entered into force 23 March 1976) 999 UNTS 171

Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime (the Smuggling Protocol)

Treaty on European Union (Consolidated Version), Treaty of Maastricht 2002 OJ C 325/5

Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community 2007 OJ C 306/01

Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A (III) (UDHR)

United Nations ‘Charter of the United Nations’ (adopted 24 October 1945) 1 UNTS XVI

United Nations Resolutions

UNGA, ‘Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment 1988 (76th plenary meeting 9 December 1988) UN Doc No A/RES/43/173

UNGA, ‘Vienna Declaration and Programme of Action, World Conference on Human Rights’ (25 June 1993)

UNGA Res 2200A (XXI) (23 March 1976) UN Doc A/6316

UNGA Res 61/165 (19 December 2006) UN Doc A/Res/61/165

United Nations High Commissioner for Refugees Documents

UNHCR, Ex Com Conclusion 44 (XXXVII) (1986) UN Doc A/AC.96/688

UNHCR ‘Executive Committee of the High Commissioner’s programme Standing Committee on Detention of asylum-seekers and refugees: The framework, the problem and recommended practice (4 June 1999) UN Doc EC/49/SC/CRP.13

UNHCR ‘Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers’ 1999

UNHCR ‘Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention’ (Geneva 2012)

UNHCR, Report of the Working Group on Arbitrary Detention, (18 December 1999) UN Doc E/CN.4/1999/63

UNHCR ‘Report of the Working Group on Arbitrary Detention (10 January 2008) UN Doc A/HRC/7/4

UNSC Presidential Statement ‘Justice and the Rule of Law: the United Nations Role’ (24 September 2003) UN Doc S/PRST/2003/15

UN, Standard Minimum Rules for the Treatment of Prisoners, adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders 1955

International Human Rights Monitoring Bodies & Reports

CAT, *‘Consideration of Reports Submitted By State Parties Under Article 19 of the Convention: Comments by the Government of the United Kingdom of Great Britain and Northern Ireland to the Conclusions and recommendations of the Committee against Torture’* CAT/C/GBR/CO/4/Add.1 (8 June 2006)

HRC ‘General Comment No 8, Right to Liberty and Security of Persons, (Art 9)’ CCPR (30 June 1982)

HRC, ‘CCPR General Comment No 15: The Position of Aliens Under the Covenant’ (11 April 1986)

HRC, *CCPR General Comment No 24* CCPR/C/21/ Rev.1/Add.6 (2 Nov 1994)

HRC ‘CCPR General comment no. 31: The nature of the general legal obligation imposed on States Parties to the Covenant’ UN Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004)

HRC ‘CCPR General Comment No 35, Article 9: Liberty and security of person (Advance Unedited Version) CCPR/C/GC/35 (28 October 2014)

HRC, CCPR Considerations on Reports Submitted by States Parties Under Article 40 of the Covenant: Concluding observations of the Human Rights Committee-United Kingdom and Northern Ireland UN Doc CCPR/C/GBR/CO/6 (30 July 2008)

HRC, ‘Concluding Observations of the Human Rights Committee: Israel’ CCPR/CO/78/ISR (21 August 2003)

HRC, ‘Concluding Observations: US’ CCPR/C/USA/CO/3 (15 September 2006)

HRC ‘On the right to be free from arbitrary arrest, detention and exile’ UN Doc. E/CN.4/826/Rev.1

Report of the Working Group on Arbitrary Detention (24 October, 2002) UN Doc. E/CN.4/2003/8/Add.2

U.N. Commission on Human Rights Working Group on Arbitrary Detention, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment regarding the situation of immigrants and asylum seekers, U.N. Doc. E/CN.4/2000/4/Annex 2 (1999)

Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post Conflict Societies, UN Doc S/2004/616 (2004)

European Union Documents

Commission ‘Commission Communication to the Council and Parliament’ (Communication) COM (98) 146

Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers, OJ 2003 L 31/18

Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing Refugee Status [2005] OJ L 326 and Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers OJ L 31

Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals [2008] OJ L 348

Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast), OJ 2013 L 180/96

Council of Europe Recommendations and Reports

CPT, The CPT Standards, Council of Europe (2009)

Council of Europe Parliamentary Assembly, 'Recommendations 1327 on the Protection and Reinforcement of Human Rights of Refugees and Asylum Seekers in Europe 1997'(Council of Europe Parliamentary Assembly, Arrival of Asylum Seekers and European Airports) Doc (2000) 8761

Council of Europe 'Recommendation 5 of the Committee of Ministers to member states on measures of detention of asylum seekers' (Adopted by the Committee of Ministers on 16 April 2003 at the 837th meeting of the Ministers' Deputies) REC (2003) 5

Parliamentary Assembly, 'Expulsion procedures in conformity with human rights and enforced with respect for safety and dignity' (Report Committee on Migration, Refugees and Demography) Doc. 9196

Hansard Reports

HC Deb 16 June 1971, vol 819, cols 482-483

HC Deb 29 April 2004, vol 420, col 1300

HC Deb 5 July 2005, vol 436, col 191

HC Deb 29 October 2008, vol 481, col 1083w

HC Deb 10 February 2009, vol 487, col 1828W

HL Deb 20 June 1898, vol 59, col 729

HL Deb 5 July 1898, vol 60 col 1098

HL Deb 6 July 2004, vol 663 col 722

Command Papers

Home Office, 'Secure Borders, Safe Haven, Integration with Diversity in Modern Britain' (2002 Cm 5387)

Home Office, '*Controlling our Borders: Making Migration Work for Britain-Five Year Strategy for asylum and immigration'* (2005 Cm 6472)

Conferences and Reports

Beyens K and Snacken S, 'Prison Privatisation: An International Overview and the Debate'. (Prison 2000 Conference, University of Leicester 8-10 April 2000)

Bail for Immigration Detainees and the Refugee Council, Immigration bail hearings by video link: a monitoring exercise (March 2008)

BID, Out of sight, out of mind: experiences of immigration detention in the UK (July 2009)

BID, 'A nice judge on a good day: immigration bail and the right to liberty (July 2010)

BID, 'The Liberty Deficit: the long-term detention and bail decision-making; a study of immigration bail hearings in the First Tier Tribunal' (November 2012)

Byrne L, Minister of State for Immigration, Citizenship and Nationality, giving evidence to the Joint Committee on Human Rights inquiry into the treatment of asylum seekers (London 21 February 2007)

Carnwath L, 'Judicial review in a changing society-From Rationality to Proportionality in the Modern Law (UCL-HKU conference, Hong Kong University, 14 April 2014)

David Cameroun 'PM's Speech at the Munich Security Conference' (Munich Security Conference, 5 February 2011) < http://www.number10.gov.uk/news/pms-speech-at-munich-security-conference/> accessed 13 October 2011

French R, 'The Role of the Courts in Migration Law' (Migration Review Tribunal and Refugee Review Tribunal Annual Members' Conference 25 March 2011)

HM Chief Inspector of Prisons, Report of Unannounced follow-up inspection of Yarl's Wood Immigration Removal Centre 9-13 November (HMIP 2009)

Home Office UK Border Agency, 'Points-Based System Maintenance (Funds): Policy Document (London 23 July 2013)

Immigration Law Practitioners' Association (ILPA), *Points-Based System: Tier 4 Review ILPA Comments* (ILPA 2009)

Joint Committee on Human Rights, 'The Treatment of Asylum Seekers: Tenth Report from Session 2006-07' (22 March 2007 HL 81 HC 60)

Merits of Statutory Instrument Committee, *Statement of Changes in Immigration Rules* (Fourth Report of Session) (2010-11, HL 17)

Parliamentary Joint Committee on Human Rights, *Highly Skilled Migrants: Changes to the Immigration Rules* (Twentieth Report)(2006-07, HL 173, HC 993)

Sales P, 'Legitimate Expectations' (Lecture for ALBA, Legitimate Expectation, London, 7 March 2006)

Sumption J, 'Judicial and Political Decision-making: The Uncertainty Boundary' (F.A.Mann Lecture 8 November 2011)

Talvi S J A ‘It Takes a Nation of Detention Centres to Hold Us Back’ Interview with Michael Welch, Associate Professor of Criminal Justice at Rutgers University Lip Magazine (21 January 2003)

Vine J, Independent Chief Inspector of the UK Border Agency ‘A thematic inspection of how the UK Border Agency manages foreign national prisoners’ (February – May 2011)

Domestic Legislation-United Kingdom

Aliens Act 1905

Aliens Restriction Act 1914

Aliens Restrictions (Amendment) Act 1919

Aliens Order Act 1920

The Commonwealth Immigration Act 1962

Immigration Act 1971

British Nationality Act 1981

British Nationality Act 1984

The Police and Criminal Evidence Act 1984

The Asylum and Appeals Act 1993

The Asylum and Immigration Act 1996

The Special Immigration and Appeals Commission Act 1997

The Human Rights Act 1998

Immigration and Asylum Act 1999

Nationality, Immigration and Asylum Act 2002

Immigration (Treatment of Claimants, etc.) Act 2004

Immigration, Asylum and Nationality Act 2006

UK Borders Act 2007

Criminal Justice and Immigration Act 2008

Borders, Citizenship and Immigration Act 2009

Immigration Act 2014

Statutory Instruments and Directions

Immigration Rules

The Nationality, Immigration and Asylum Act 2002 (Consequential and Incidental Provisions) Order 2003 SI 2003/1016

Consolidated Asylum and Immigration (Procedure) Rules 2005 (SI No. 230)

The Tribunal Procedure (Upper Tribunal) Rules 2008

Practice Directions of the Immigration and Asylum Chambers of the First Tier Tribunal and the Upper Tribunal (10 February 2010)

AIT, 'Bail Guidance Notes for Adjudicators from the Chief Adjudicators' (May 2003);

Bail Guidance For Judges Presiding Over Immigration and Asylum Hearings' (11 June 2012)

Legislation from other Jurisdictions

Australia

Chinese Immigrants Regulation and Restriction Act 1861

Immigration Restriction Act 1901

The Australian Migration Act 1958

The Migration Amendment Act of 1983

USA

Immigration and Nationality Act 1952

Immigration Reform and Control Act 1986

The Legal Immigration and the Immigration Act of 1990

Anti Terrorism and Effective Death Penalty Act 1996

The Illegal Immigration Reform and Immigrant Responsibility Act 1996

Table of Cases-Domestic-United Kingdom

A and Others v SSHD [2004] UKHL 56

A and Others v SSHD [2005] UKHL 71

AA (Afghanistan) v SSHD [2007] EWCA Civ 12

Abdi and Nadarajah v SSHD [2005] EWCA Civ 1363

Abdi v SSHD [1996] Imm AR 148 CA

Adamally and Jaferi (section 47 removal decisions: Tribunal Procedures) [2012] UKUT 00414 (IAC)

A (FC) and Others v SSHD [2004] UKHL 56

AG (Eritrea) v SSHD [2007] EWCA Civ 801

AG for the Dominion of Canada v Cain [1906] AC 542

A-G of Hong Kong v Ng Yuen Shiu [1983] 2 All ER 346

AG and Others (Policies: executive discretions; Tribunal's powers) Kosovo [2007] UKAIT 00082

Alexander v The Immigration Appeal Tribunal [1982] 2 All ER 766

AJ (Bangladesh) v SSHD [2013] EWCA Civ 493

Associated Provincial Pictures Houses Ltd v Wednesbury Corporation [1984] 1 KB 223

Bosadi (paragraph 276ADE;suitability; ties) [2015] UKUT 00042 (IAC)

CA v SSHD [2004] EWCA Civ 1165

Carltona Ltd v Commissioner of Works [1943] 2 All ER 560 CA

CCSU v Minister for the Civil Service [1985] AC 374

Detention Action v SSHD [2014] EWCA Civ 1270

Dube (ss.117A-117D) [2015] UKUT 00090 (IAC)

EB Kosovo (FC) v SSHD [2008] UKHL 41

EO (Turkey) [2007] UKAIT 00062

Fothergill v Monarch Airlines Ltd [1981] AC 251

Gyeabour v SSHD [1989] Imm AR 94

Huang and Kashmiri v SSHD [2007] UKHL 11

Hersi v SSHD [1996] Imm AR 569

HSMP Forum Ltd v SSHD [2008] EWHC 664 (Admin)

JL (Domestic violence: evidence and procedure) India [2006] UKAIT 00058

Khan v SSHD [1995] Imm AR 348

Kwawaja v SSHD (1983) 2 WLR 321

Matadeen v Pointu [1999] 1 AC 98

MO (Nigeria) [2007] UKAIT 00057

Odelola v SSHD [2008] EWCA Civ 308

Pankina & Ors v SSHD [2010] EWCA Civ 719

Padfield v Minister of Agriculture [1968] AC 997

Pearson v IAT [1978] Imm AR 212

Porter v Freudenberg [1915] 1 KB 857

PP (India) [2005] UKAIT 00141

Raymond v Honey [1983] 1 AC

Razgar v SSHD [2004] UKHL 27

Re Findlay [1985] AC 318

Richards v SSHD [2013] EWCA Civ 244

Rocky Gurung v SSHD [2012] EWCA Civ 62

R (Abbasi) v SSHD [2002] EWCA Civ 1598

R (Alvi) v SSHD [2012] UKSC 33

R (BA) v SSHD [2011] EWHC 2748 (Admin)

R (Bibi) v Newham London Borough Council [2002] 1 WLR 237

R v Bow Street Metropolitan Stipendiary Magistrate ex p Pinochet Ugarte (No 3) [1999] 2 WLR 827

R (Daly) v SSHD [2001] UKHL 26

DP (United States of America) v SSHD [2012] EWCA Civ 365

R (English UK) v SSHD [2010] EWHC 1726 (Admin)

R v Environmental Secretary ex parte Spath Holme Limited [2001] 2 AC

R v Governor of Durham Prisons ex p Hardial Singh [1984] 1 WLR 704

R v IAT ex p Begum (Manshoora) [1986] Imm AR 385

R v Immigration Tribunal ex parte Shaikh [1981] 3 AER 29

R v Inland Revenue Commissioners ex p Preston [1985] AC 835

R v North and East Devon HA ex p Coughlan 2001] QB 213

R v Secretary of State for Education and Employment, ex p Begbie [2000] 1 WLR 1115

R v SSHD ex p Urmaza The Times 11 July 1996 (QBD)

R (Joint Council for the Welfare of Immigrants) v SSHD [2010] EWHC 3524 (Admin)

R (Konan) v SSHD [2004] EWCA 22

R (Lumba) v SSHD [2011] UKSC 12, [2012] 1 AC 245

R (M) v Inner London Crown Court [2003] 1 FLR 994

R (MS, AR, FW) v SSHD [2009] ECWA Civ 1310

R (Munir) v SSHD [2012] UKSC 32

R (Rashid) v SSHD [2005] EWCA Civ 744

R (on the application of A) v SSHD [2007] EWCA Civ 804

R (on the application of Alvi) v SSHD [2011] EWCA Civ 681

R (on the application of Alvi) v SSHD [2012] UKSC 33

R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2) [2008] UKHL 61

R (on the application of Chikwamba) v SSHD [2008] UKHL 40

R (on the application of Daly) v SSHD [2001] UKHL 26

R (on the application of I) v SSHD [2002] EWCA Civ 888

R (On the application of RA (and by his litigation friend) and another) v SSHD IJR [2015] UKUT 00242 (IAC)

R (on the application of RA) v SSHD IJR [2015] UKUT 00292 (IAC)

R (on the application of Rashid) v SSHD [2005] EWCA Civ 744

R (Purzia) v SSHD [2011] EWHC 3276 (Admin)

R (Saadi et ors) v SSHD [2001] EWHC Admin 670

R (S) v SSHD [2011] EWHC 2120 (Admin)

R v SSHD ex p Khadir [2005] UKHL 39

R v SSHD ex p Khan [1985] 1 All ER 40

R v SSHD ex p Khan [1981] 1 WLR 1337

R v SSHD ex p Kaur [1987] Imm AR 278

R v SSHD ex p Khawaja [1984] AC 74

R v SSHD ex p Hargreaves [1997] 1 WLR 906

R v SSHD ex p Popata and Chew [2000] EWHC 556 QB

R v SSHD ex p Sheikh [1999] EWCA Civ 1320

R v SSHD ex p Simms [1999] 3 WLR 328

R v Secretary of State for Social Security ex p JCWI [1997] 1 WLR 275

R (Thangarasa) v SSHD [2002] UKHL 36

R (von Brandenburg) v E. London & City NHS Trust [2003] UKHL 58

Re *Wasfi Suleiman Mahmood* [1995] Imm AR 311

SA Pakistan [2007] UKAIT 00083

Schmidt v SSHD [1969] 1 All ER

Szoma v SSHD [2005] UKHL 64

SS (Nigeria) v SSHD [2013] EWCA Civ 550

Tan Te Lam v Superintendent of Tai A Chau Detention Centre [1997] AC 97

The Queen on the application of Detention Action v SSHD [2014] EWCA Civ 1634

Ukus (discretion: when reviewable) [2012] UKUT 307

US (Nepal) v SSHD [2008] EWCA Civ 1057

Table of Cases-ECtHR

A and Others v UK (2009) 49 EHRR 29

A .A v Greece App no 12186/08 (ECtHR 22 July 2010)

A v Netherlands App no 4900/06 (ECtHR, 20 July 2010)

Abdulaziz, Cabales and Balkandani v UK (1985) 7 EHRR 471

Airey v Ireland [1979] ECHR 3

Al-Jedda v UK App no 27021/08 (ECtHR, 07 July 2011)

Al-Skeini and Others v Secretary of State for Defence [2007] UKHL 26

Al-Skeini v UK App no 55721/07 (ECtHR, 07 July 2011)

Amur v France (1996) 22 EHRR 533

Artico v Italy (1981) 3 EHRR 1

Ashingdane v United Kingdom, App no 8225/78 (Commission Decision, 28 March 1985)

Assanidze v Georgia, App no 71503/01 (ECtHR, 08 April 2004)

Assenov and Ors v Bulgaria App no 90/1997/874/1086 (ECtHR 28 October 1998)

Beljoudi v France (1992) 14 EHRR 801

Bensaid v UK (2001) 33 EHRR 10

Berrehab v Netherlands (1988) 11 EHRR 322

Bezicheri v Italy (1989) 12 EHRR 210

Bonzano v France (1986) 9 EHRR 292

Brogan and Others v UK (1988) 11 EHRR 117

Bouamar v Belgium, App no 9106/80 (Commission Decision, 16 October 1986)

Bouchelkia v France (1997) 25 EHRR 686

Boughanemi v France (1996) 22 EHRR 228

Boujlifa v France (2000) 30 EHRR 419

Boultif v Switzerland (2001) 33 EHRR 50

Boyle and Rice v UK App no 9659/82 (ECtHR, 27 April 1988)

Campbell and Cosans v UK (1982) 4 EHRR 293

Chahal v UK (1997) 23 EHRR 413

Conka v Belgium App no 51564/99 (ECtHR 5 February 2002)

Cruz Varas v Sweden App no 15576/89 (ECtHR 20 March 1991)

D v UK [1997] ECHR 25; (1997) 24 EHRR 423

Da Silva and Hoogkamer v Netherlands [2007] 44 EHRR 34

Dougoz v Greece App no 40907/98 (ECtHR 06 March 2001)

Dudgeon v UK (1981) 4 EHRR 149

Engels v Netherlands (1976) EHRR 647

Farmakopolous v Belgium (1993) 16 EHRR 187

Garcia v Germany App no 23541/94 (ECtHR, 13 February 2001)

Gaygusuz v Austria (1996) 23 EHRR 364

Grant v UK App no 10606/07 (ECtHR 8 January 2009)

Gul v Switzerland (1996) 22 EHRR 93

Guzzard v Italy (1980) 3 EHRR 333

Handyside v UK (1976) 1 EHRR 737

Hirsi Jamaa and Others v Italy App no 27765/09 (23 February 2012)

Hurtado v Switzerland App no 1754/90 (ECtHR, 28 January 1994)

Iorgov v Bulgaria App no 40653/98(ECtHR 11 March 2004)

Ireland v United Kingdom (1978) 2 EHRR 25

K v UK (1986) 50 DR 199

Kanagaratnam v Belgium App no 15297/09 (ECtHR, 13 December 2011)

Kaufman v. Belgium (1986) DR 50 (Commission Decision)

Klass and Others v Germany App no 5029/71 (ECtHR, 6 September 1978)

Kolompar v Belgium (1992) 16 EHRR 197

Konstatinov v Netherlands [2007] 2 FCR 194

Koua Poirrez v France 40 EHHR 2

Lamy v Belgium (1989) 11 EHRR 529

Iatridis v Greece, App no 31107/96 (ECtHR, 25 March 1999)

Lithgow v UK App no 900680 (1986) 8 EHRR 329

Lokpo and Toure v Hungary App no 10816/10 (ECtHR, 20 Sept 2011)

Loizidou v Turkey (Preliminary Objections) (1995) 20 EHRR 90

Lynas v Switzerland (1976) 6 DR 141 (Commission Decision, 6 October 1976)

Mahmut Kaya v Turkey (1999) 28 EHRR 1

Marckx v Belgium (1979) 2 EHRR 330

Maslov v Austria App no 1638/03 (ECtHR, 23 June 2008)

Matznetter v Austria (1969) 1 EHRR 198

Megveri v Germany (1992) 15 EHRR 584

Mehemi v France (2000) 30 EHRR 739

M.S.S v Belgium and Greece App no 30696/09 (ECtHR 21 January 2011)

Moustaquim v Belgium (1991) 13 EHRR 802

Mubilanzila Mayeka and Kaniki Mitunga v Belgium App no 13178/03 (ECtHR, 12 October 2006)

Muskhadzhiyeva and Others v Belgium App no 41442/07 (ECtHR 19 January 2010)

N v Sweden App no 23505/09 (ECtHR, 20 July 2010)

N v UK (2008) 47 EHRR 885

Nasri v France (1995) 21 EHRR 458

Niemietz v Germany (1992) 16 EHRR 97

*Neumesiter v Austria (*1968) 1 EHRR 91

Onur v UK (2009) 49 EHRR 38

Popov v France App no 39472/07 (ECtHR 19 January 2012)

Rahimi v Greece App no 8687/08 (ECtHR 05 April 2011)

Riad and Idiab v Belgium App no 2978/03 and 29810/03 (ECtHR 24 January 2008*)*

Ribitsch v Australia (1995) 21 EHRR 573

Rusu v Austria App No 34082/02 (ECtHR 2 October 2008)

Saadi v Italy App no 37201/06 (ECtHR, 28 February 2008)

Saadi v UK (2008) 47 EHRR 17

S.D v Greece App no 53541/07 (ECtHR 11 June 2009)

Sanchez-Reisse v Switzerland (1986) 9 EHRR 71

Selcuk and Asker v Turkey, App no 12/1997/796/998-999 (ECtHR, 24 April 1998)

Selmouni v France (1999) 29 EHRR 403

Shamayev v. Georgia and Russia App no 36378/02 (ECtHR, 12 April 2005)

Shamsa v Poland App no 45355/99 (ECtHR, 27 November 2003)

Shchukin and Others v Cyprus App no 14030/03 (ECtHR, 29 July 2010)

Silver v UK App no 5947/72 (ECtHR 25 March 1983)

Soering v UK (1989) 11 EHRR 439

Sunday Times v United Kingdom (1979) 2 EHRR 245

Suso Musa v Malta App no 22414/93 (ECtHR, 23 July 2013)

Thampibillai and Venkadajalasarma v Netherlands App no 61350/00 (ECtHR 17 February 2004)

Toth v Austria (1991) 14 EHRR 551

Tyrer v UK (1978) 2 EHRR 1

Uner v Netherlands [2006] ECHR 873; (2007) 45 EHRR 14

Vilvarajah v UK (1991) 14 EHRR 248

Witold Litwa v Poland App No 26629/95 (ECtHR4 April 2000)

Winterwerp v Netherlands (1979) 2 EHRR 387

Woukan Noudefo v France (1988) 13 EHRR 549

Yankov v Bulgaria App No. 39084/97 (ECtHR 11 December 2003)

Zamir v UK (1983) 5 EHRR 242

CJEU Cases

Case C-562/13 *Abdida* [2014] (18 December 2014)

Case C-97/91 *Borelli v Commission* [1992] ECR 1-6313

Case 222/84 *Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651
Case C-61/11 PPU *El Dridi* [2011] (First Chamber, 28 April 2011)

Case 222/86 *Union Nationale des Entraineurs et Cadres Techniques Professionnels du Football (UNECTEF) v Heylens and Others* [1987] ECR 4097

Case C-38/14 Zaizoune [2015] (Fourth Chamber 23 April 2015)

Deutsche Milchkontor GmbH and others v Federal Republic of Germany Joined Cases 205-215/82

ICCPR Cases

A v Australia Communication No 456/1991 UN Doc CCPR/C/51/D/456/1991

A v Australia, Communication No. 560/1993, U.N. Doc. CCPR/C/59/D/560/1993 (1997)

A.R.J v Australia Communication No 692/1996 UN Doc CCPR/C/60/D/692/1996

C v Australia, Communication No. 900/1999, U.N. Doc. CCPR/C/76/D/900/1999 (2002)

Celepli v Sweden, Communication No 456/1991 UN Doc CCPR/C/51/D/456/1991

Fongum Gorji-Dinka v Cameroon, Communication No 1134/2002, CCPR/C/83/D/1134/2002

Hugo *van Alphen v Netherlands* Communication No 305/1988 UN Doc CCPR/C/39/D/305/1988

Lilian Celiberti de Casariego v Uruguay Communication No 13/56 CCPR/C/13/D/56/1979

Nystrom v Australia (2011) Communication No 1557/2007

Sergio Euben Burgos v Uruguay Communication No 12/52 UN Doc CCPR/C/13/D/52/1979 (29 July 1981)

Stewart v Canada (1996) Communication No. 538/1993

Torres v Finland CCPR/C/38/D/291/1988 (5 April 1990)

Van Alpen v Netherlands (1990) No 305/1988 UN Doc CCPR/C/39/D/305/1988

PCIJ & ICJ Cases

Case Concerning Certain German Interests in Polish Upper Silesia (Merits) [1926] PCIJ Series A No 7

Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) (Notwithstanding Security Council Resolution 276) (Advisory Opinion) 1971 ICJ Rep 16

Mavrommatis Palestine Concessions case [1924] PCIJ Series A No 2

Nottebohm case (Liechtensen v Guatemala) [1955] ICJ Rep

Cases from other jurisdictions

Australia

Al-Kateb v Godwin [2004] HCA 37

Mahran Behrooz v MIMIA, Attorney-General of the Commonwealth of Australia, Australasian Correctional Management Pty Ltd and Australasian Correctional Security Pty Ltd, 6 August 2004

Musgrove v Chun Teeong Toy, Privy Council (Australia) 18 March 1891

Plaintiff S157/2000 v Commonwealth of Australia [2003] HCA 2, 4 Feb 2003

Kwong Hai Chew v Colding 344 U.S. 590 (USA)

Woolley &Anor; Ex parte Applicants M276/2003 by their next friend GS (M276/2003) [2004] HCA 29, 7 October 2004 (Australia)

USA

Denmore v Kim 538 US 510 (2003)

Railway Express Agency Inc. v New York 336 US 106 (1949)

Shaughnessy v US ex relMezei 345 US 206 (1953)

The Chinese Exclusion Case 130 US 581 (1889)

YickWo v Hopkins 118 U.S. 356, 369 (1886)

Zadvydas v Davis 533 U.S. 678, 693 (2001)

Websites & Newspapers

AIDA, 'National Report for UK' (last up-date April 2014) 66 <http://www.asylumineurope.org/sites/default/files/report-download/aida_-_uk_second_update_final_uploaded.pdf> accessed 03 March 2015

Amnesty UK, 'UK: The road to destitution for rejected asylum seekers' <http://www.amnesty.org.uk/actions_details.asp?actionid=226>accessed 29/02/2012

Amnesty International 'Diplomatic assurances' – No protection Against Torture or Ill-Treatment, (2005) <http://www.amnesty.org/en/library/info/ACT40/021/2005> accessed 08 November 2013

Australian Human Rights Commission, 'Human rights and asylum seekers and refugees'<http://www.humanrights.gov.au/letstalkaboutrights/downloads/HRA_asylum.pdf> accessed 24 September 2012

Bail for Immigration Detainees, 'Submissions to the UN Working group on arbitrary detention: Executive Summary' (2002)<http://www.biduk.org/154/consultation-responses-and-submissions/bid-consultation-responses-and-submissions.html> accessed 28 August 2012

BBC News-Politics 'Capita gets contract to find 174,000 illegal immigrants' *BBC News* (London, 18 September 2012) <http://www.bbc.co.uk/news/uk-politics-19637409> accessed 13 August 2013

Briefing by the Vulnerable People Working Group of the Detention Forum (VPWG) 'The Detention of Vulnerable People: Human Rights Breaches in the UK (10 December 2012) <http://detentionforum.wordpress.com/2012/12/10/briefing-paper-the-detention-of-vulnerable-people-human-rights-breaches-in-the-uk/> accessed 12 December 2012

COE, Treaty Office ETS No 46 <http://conventions.coe.int/treaty/en/Treaties/Html/046.htm> accessed 24 January 2013

Cohen R, 'Fuzzy Frontiers of Identity: The British Case' (1995) 1 *Social Identities* 35 <http://www2.warwick.ac.uk/fac/soc/sociology/staff/emeritus/cohenr/research/papers/fuzzy.pdf> accessed 04 April 2012

Costello C and Kaytaz E, UNHCR, 'Building Empirical Research into Alternatives to Detention: Perception of Asylum seekers and Refugees in Toronto and Geneva' (June 2013) <http://www.refworld.org/pdfid/51a6fec84.pdf >accessed 02 March 2015

Department of Homeland Security, 'Immigration enforcement actions 2008' <

http://www.dhs.gov/xlibrary/assets/statistics/publications/enforcement_ar_08.pdf> accessed 11 July 2013

Editorial, 'Illegal immigrants win compensation over 'unlawful' detention' *Mail Online* (London 13 December 2006) <http://www.dailymail.co.uk/news/article-422429/illegal-immigrants-win-compensation-unlawful-detention-html> accessed 14 December 2012

Federation For American Immigration Reform, 'History of U.S. Immigration Laws: Historical Immigrant Admission Data; 1821-2006' <http://www.fairus.org/site/PageNavigator/legislation.html>accessed 24 February 2012

Fekete L, 'Analysis: Deaths during Forced Deportation' (2003) Institute of Race Relations <http://www.irr.org.uk/news/analysis-deaths-during-forced-deportation/ > accessed 30 June 2013

Field O and Edwards A, 'Alternatives to Detention of Asylum Seekers and Refugees' (2006) UNHCR Legal and Protection Policy Research Series POLAS/2006, Appendix I <http://www.unhcr.org/refworld/pdfid/4472e8b84.pdf> accessed 29 August 2012

Finch T, 'Immigration under Labour' (Prospect Institute for Public Policy Research 2010) 9 www.prospect-magazine.co.uk accessed 07 April 2012

Focus Migration, 'France' (No 2 March 2007) <http://focus migration.hwwi.de/typo3_upload/groups/3/focus> accessed 25 February 2012

Goodwin-Gill G S, ''Temporary Exclusion Orders' and their Implications for the United Kingdom's International Legal Obligations' <http://www.parliament.uk/documents/joint-committees/human-rights/GSGG-Counter_Terrorism_JCHRFinal.pdf >accessed 25 March 2015

Gower M, 'Deprivation of British Citizenship and the withdrawal of passport facilities' (House of Commons Library 2014) 1-2 <www.parliament.**uk**/briefing-papers/sn06820.pdf> accessed 25 November 2015

Guiraudon V, 'Immigration Policy in France' Brookings <http://www.brookings.edu/articles/2002/0101france_guiraudon.aspx > accessed 06 May 2012

HM Inspectorate of Prisons, 'Report on an unannounced full follow-up inspection of Brook House Immigration Removal Centre' (12 – 23 September 2011) <(http://www.justice.gov.uk/downloads/publications/inspectorate-reports/hmipris/immigration-removal-centre-inspections/brook-house/brook-house-2011.pdf> accessed 03 September 2012

Home Office, HC 59-Statement of Changes in Immigration Rules Laid before Parliament on 28 June 2010 under section 3(2) of the Immigration Act 1971 <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/statementsofchanges/2010/hc59.pdf?view=Binary > accessed 19 November 2013

Home Office, 'Fairer, Faster and Firmer -A Modern Approach to Immigration and Asylum' <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/264150/4018.pdf> accessed 05 May 2014

Home Office UK Border Agency, 'Immigration Removal Centres'<http://www.ukba.homeoffice.gov.uk/aboutus/organisation/immigrationremovalcentres/> accessed 11 September 2012

Home Office, 'Immigration statistics, July to September 2013' (2013) <https://www.gov.uk/government/publications/immigration-statistics-july-to-september-2013/immigration-statistics-july-to-september-2013#detention-1 > 03 March 2015

Home Office, Immigration Rules Part 7 (Consolidated version of the current Immigration Rules) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/393497/20150108_Immigration_Rules_-_Part_7_-_final.pdf > accessed 25 March 2015

House of Common Select Committee, 'Home Office still failing to get to grips with backlogs' <http://www.parliament.uk/business/committees/committees-a-z/commons-select/home-affairs-committee/news/ukba-q1-pubn/ > accessed 08 November 2013

Karpf A, 'We have been here before' The Guardian (London 08 June 2002) <http://www.guardian.co.uk/uk/2002/jun/08/immigration.immigrationandpublicservices > accessed 05 September 2012

Kuijer M, 'Effective Remedies as a Fundamental Right' (Seminar on human rights and access to justice in the EU, Barcelona, 28-29 April 2014)

Locke J, Two Treaties of Government (1680-1690) Book II Chapter 9 <http://www.lonang.com/exlibris/locke/loc-209.htm> accessed 27 August 2014

London Detainee Support Group, 'Detained lives' (January 2009) <http://www.detainedlives.org/wp-content/uploads/detainedlives.pdf> accessed 03 September 2012

Lord Mance, 'Should the law be certain?' (The Oxford Shrieval lecture University Church of St Mary The Virgin, Oxford 11October 2011) <http://supremecourt.uk/docs/speech_111011.pdf >accessed 12 August 2014

Lord Bingham, 'The Rule of Law' (Centre for Public Law Lecture Series, 16 November 2006)< http://www.cpl.law.cam.ac.uk/past_activities/the_rt_hon_lord_bingham_the_rule_of_law.php> accessed 05 April 2012

McNeil R, 'Deportations, Removals and Voluntary Departures from the UK' (The Migration Observatory, 19 December 2012) <http://www.migrationobservatory.ox.ac.uk/briefings/deportations-removals-and-voluntary-departures-uk> accessed 13 August 2013

Migrants' Rights Network, 'Marking 50 years of Commonwealth immigration controls: The legacy of Commonwealth Immigrants Act 1962'

<http://www.migrantsrights.org.uk/blog/2012/01/marking-50-years-commonwealth-immigration-controls >accessed 27 November 2014

Migration Watch UK,‘ A summary history of immigration to Britain’ <http://www.migrationwatchuk.com/Briefingpaper/document/48> accessed 20 November 2014

Migreurope, Foreigners’ camps in Europe and in Mediterranean countries (2005) <http://www.migreurop.org/IMG/pdf/carte-en.pdf> accessed 20 August 2012

Miller P, ‘Dalrymple verdict: NEGLECT contributed to death of American tourist in UK immigration jail’ *Our Kingdom* (London 27 June 2014)

Office for Judicial Complaints, ‘The Judicial Complaints (Tribunals)(No 2) Rules 2008 <http://judicialcomplaints.judiciary.gov.uk/docs/Judicial_Complaints_(Tribunals)_(No2)_Rules_2008pdf> accessed 13 January 2013

Open University, ‘Making Britain: 1919 Aliens Restriction Act’ (23 December 1919) <http://www.open.ac.uk/researchprojects/makingbritain/content/1919-aliens-restriction-act > accessed 22 November 2014

Petition of Right 1628 ‘The Great Charter of the Liberties of England’ <http://www.constitution.org/eng/petright.htm> accessed 01 August 2014

Parliamentary Assembly, Recommendation 1504 (2001) <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta01/EREC1504.htm > accessed 26 October 2013

Proclamations of Accession of English and British Sovereigns (1547-1952) < http://www.heraldica.org/topics/britain/brit-proclamations.htm> accessed 04 April 2012

Refugee Council Briefing, ‘Asylum and Immigration Act 2004: An update’ (London, March 2005) <www.refugeecouncil.org.uk/publications > accessed 30 November 2014

Shackle S, ‘Jimmy Mubenga's death: no prosecution, no surprise’ *The Guardian* (London, 17 July2012) <http://www.theguardian.com/commentisfree/2012/jul/17/jimmy-mubenga-death-no-prosecution> accessed 19 October 2013

Silverman S J and Hajela R, The Migration Observatory, ‘Briefing: Immigration Detention in the UK’ (2012) <http://www.migrationobservatory.ox.ac.uk/sites/files/migobs/Immigration%20Detention%20Briefing.pdf > accessed 03 March 2015

Sparrow A, 'Go home' campaign against illegal immigrants could go nationwide’ *The Guardian* (London 29 July 2013) <http://www.theguardian.com/uk-news/2013/jul/29/go-home-campaign-illegal-immigrants> accessed 20 October 2013

Sutherland J, ‘Deporting illegals is not always easy’ *The Morning Call* (Pennsylvania, 22 January 2010) <http://articles.mcall.com/keyword/deportation/recent/2 accessed 13 August 2013>

The Immigration Directorate Instructions <https://www.gov.uk/immigration-operational-guidance/immigration-directorate-instructions > accessed 06 December 2014

The National Archives-The Cabinet Papers 1915-1984, ‘Commonwealth Immigration control and legislation’ <http://www.nationalarchives.gov.uk/cabinetpapers/themes/commonwealth-immigration-control-legislation.htm> accessed 27 November 2014

UK Visas and Immigration, Chapters 46 to 62: detention and removals ‘Enforcement Instructions and Guidance: Detention and Removals, Detention and Temporary Release’ <https://www.gov.uk/government/publications/chapters-46-to-62-detention-and-removals> accessed 09 January 2015

UK Visas and Immigration Operational Guidance-collection, 'Chapter 31: detention and detention policy in port cases' (immigration directorate instructions) IDI <https://www.gov.uk/government/collections/chapter-31-detention-and-detention-policy-in-port cases-immigration-directorate-instructions > accessed 09 January 2015

UNHCR, '*Saadi v United Kingdom*: Written Submissions on Behalf of the United Nations High Commissioner for Refugees' (30 March 2007) <http://www.refworld.org/docid/47c520722.html >accessed 12 December 2014

UNHCR, 'UNHCR Statement on the right to an effective remedy in relation to accelerated asylum procedures': Issued in the context of the preliminary ruling reference to the Court of justice of the European Union from the Luxembourg Administrative Tribunal regarding the interpretation of Art 39, Asylum Procedures Directive (APD); and Article 6 and 13 ECHR' <http://www.refworld.org/pdfid/4bf67fa12.pdf > accessed 13 August 2014

Webster P, 'I'll Deport 4000 Foreign Criminals by the End of Year, Brown Promises' *The Times* (London, 25 July 2007) <http://www.thetimes.co.uk/tto/news/politics/article2023656.ece > accessed 15 July 2013

Whitehead T, 'Asylum Seeker family wins £150,000 compensation' *Telegraph* (13 February 2009) <http://www.telegraph.co.uk/news/uknews/law-and-order/4606367/Asylum-seeker-family-wins-150000-compensation.html >accessed 14 December 2012

Wintour P, Booth R and Al Soud H, 'As Abu Qatada leaves, Theresa May vows to change human rights law' *The Guardian* (London, 7 July 2013) http://www.guardian.co.uk/world/2013/jul/07/abu-qatada-human-rights accessed 11 July 2013