Immigration, Strasbourg, and Judicial Overreach

John Finnis and Simon Murray

Foreword by Lord Hoffmann

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Contents

Foreword

Lord Hoffmann
A Lord of Appeal in Ordinary from 1995 to 2009

This paper is about the separation of powers. When Montesquieu was writing on this subject in 1748 and Madison and Hamilton published the *Federalist Papers* in 1787, they were mainly concerned with preventing the executive from interference with decisions of the judges and ensuring that the government was subject to the law. It was part of a system of checks and balances which held tyranny at bay. There was less emphasis upon the possibility that judges might trespass upon the powers of the other two branches of government. The only exception seems to have been the *Parlements* of the French *ancien régime*, aristocratic bodies which exercised judicial functions but also claimed to have a veto power over royal edicts, leading to their abolition in the Revolution and an article in the Code Napoleon, still extant, which provides that "[t]he judges are forbidden to pronounce, by way of general and legislative determination, on the causes submitted to them."

In common law countries, on the other hand, we have no inhibitions about declaring much of our law to be 'judge made'. The law is what the judges declare to be the law. What, then, inhibits judges from declaring that the law is whatever they think it ought to be? In the United Kingdom there is of course the power of Parliament to reverse a judicial decision by legislation. The absence of any entrenchment of constitutional provisions, a disciplined party system and first-past-the-post elections usually means that the government has the necessary majority to reverse any judicial statement of the law. Then there are traditions of self-restraint on the part of the judiciary; an ancient tradition of presenting the law as plausibly derived by continuous development from the remote past and a more modern tradition of respect for democracy, so that courts refrain from developing common law doctrines if that would conflict with policies enacted by statute, or would involve controversial questions or unexpected expenditure of public money.

In the United Kingdom, the doctrine of the sovereignty of Parliament prevents any judicial declaration of law from being beyond the reach of reversal by a democratic process. But what happens when judges declare law by claiming to interpret an instrument which in practice, perhaps by virtue of constitutional entrenchment, cannot be changed? In such a case, the only protection against judicial overreach is the self-restraint to which

I have referred. The extent to which such restraint should be exercised is noisily disputed in the United States, where the bill of rights is in practice beyond amendment. This 230-year-old document has become the terrain for hand-to-hand fighting between members of the US Supreme Court over the creation of rights, some commendable, some highly controversial, but which mostly would have surprised its authors.

The situation in the United Kingdom has been very different. The answers to questions of capital punishment, abortion, sex discrimination, race discrimination, gun control and many others which the US Supreme Court derives from the constitution have been settled in this country by relatively recent democratically enacted legislation. Judges in the UK do not have to express views on any of these matters. A striking symptom of the difference is that judges in the United Kingdom have preserved an enviable anonymity. Hardly anyone knows who they are. With the advent of televised hearings, many people will be able to tell you that the former President of the Supreme Court has a spider brooch but few will know anything else about her or her colleagues. In the United States there is virtually nothing about the lives and opinions of the nine judges of the Supreme Court which is not given the widest publicity.

The European Convention on Human Rights, with which this paper is principally concerned, is likewise for practical purposes unalterable. There is no question of reversing an unfortunate decision by legislation. In the absence of self-restraint by the judiciary which applies it, the only remedy available to a nation state which disagrees is secession. Unfortunately, in several areas that self-restraint has been lacking and this paper charts the consequences in one particular area, namely immigration and the right of the nation state to decide who shall be permitted to enter its territory.

There is only one way to determine the limits of the commitment undertaken by the states which subscribed to European Convention on Human Rights and that is by reading the instrument and construing it against the background which would have been known or assumed by the parties at the time. Indeed, this is the only way to understand the meaning of any utterance whatever. But the European Court of Human Rights have felt free to give the Convention a meaning which could not possibly have been intended by its subscribers on the ground that it is a 'living instrument' which it is entitled – indeed, required – to update in accordance with what it considers to be the spirit of the times.

There is no doubt that some version of the 'living instrument' doctrine has a part to play in the interpretation of a constitutional document such as the Convention. If I may be allowed to quote what I said in a case about a Caribbean constitution:

> *"The framers of the Constitution would have been aware that they were invoking concepts of liberty such as free speech, fair trials and freedom from cruel punishments which went back to the Enlightenment and beyond. And they would have been aware that sometimes the practical expression of these concepts—what limits on free speech are acceptable, what counts as a fair*

> *trial, what is a cruel punishment—had been different in the past and might again be different in the future. But whether they entertained these thoughts or not, the terms in which these provisions of the Constitution are expressed necessarily co-opts future generations of judges to the enterprise of giving life to the abstract statements of fundamental rights. The judges are the mediators between the high generalities of the constitutional text and the messy detail of their application to concrete problems. And the judges, in giving body and substance to fundamental rights, will naturally be guided by what are thought to be the requirements of a just society in their own time. In so doing, they are not performing a legislative function. They are not doing work of repair by bringing an obsolete text up to date. On the contrary, they are applying the language of these provisions of the Constitution according to their true meaning. The text is a "living instrument" when the terms in which it is expressed, in their constitutional context, invite and require periodic re-examination of its application to contemporary life….*
>
> *All this is trite constitutional doctrine. But equally trite is the proposition that not all parts of a constitution allow themselves to be judicially adapted to changes in attitudes and society in the same way. Some provisions of the Constitution are not expressed in general or abstract terms which invite judicial participation in giving them practical content. They are concrete and specific…. The Constitution does not confer upon the judges a vague and general power to modernise it…. The "living instrument" principle has its reasons, its logic and its limitations. It is not a magic ingredient which can be stirred into a jurisprudential pot together with "international obligations", "generous construction" and other such phrases, sprinkled with a cherished aphorism or two and brewed up into a potion which will make the Constitution mean something which it obviously does not…."*

Put another way, the instrument may employ concepts which it necessarily contemplates may be conceptualised differently by future generations. But a necessary first step is to identify such concepts in the instrument. One must be able to say that, as in the examples of cruel punishments and fair trial, as a matter of construction the instrument was using a concept which must have been intended by its authors to be given a contemporary meaning.

As the authors point out, this lack of restraint has not been confined to the European Court of Human Rights. It can be found also in the highest court in this country. In fact, there is some irony in the fact that certain distinguished judges who showed the most fastidious concern about infringement of the principle of the separation of powers by the office of Lord Chancellor and the presence of the Law Lords in the legislature – mere ceremonial symbols of the ancient origins and continuity of the British constitution – should also have shown the least inhibition about using the 'living instrument' doctrine to legislate from the bench.

All this is not without consequences in the wider community. No doubt many voters could not tell the difference between the Court of Justice in Luxembourg and the Court of Human Rights in Strasbourg, but the

feeling that (especially on immigration) rules and policies which ought to have been decided by the British democratic process were being created from whole cloth by judges – and foreign judges at that – played a part in the hostility to 'Europe' at the polls. What this paper shows is that such attitudes were far from irrational.

Executive Summary

When founding the European Convention on Human Rights 1950 [ECHR] and at the same time the Geneva Convention on the Status of Refugees 1951, the main European states including Britain specified, in many different ways, that signatory states

- have no obligation to let in refugees arriving at their borders *en masse*;
- indeed, have no legal or treaty obligation to accept refugees at all;
- and have no absolute obligation to continue to provide asylum for refugees who are a danger to the community.

Those Conventions were agreed, soon after the Second World War and consequent vast movements of refugees and refugee populations, often displaced in dire circumstances.

But forty years later the European Court of Human Rights [ECtHR, or Strasbourg] set out on a line of judgments by which it has circumvented those fundamental principles and principles of the post-War international and European order.

It has done so along two routes. The first gives to the ECHR's absolute prohibition (art. 3) of torture and inhuman treatment a radically expansive interpretation neither morally nor legally warranted. (During the last fifteen years, this misinterpretation was adopted and enforced by the Court of Justice of the European Union [ECJ or CJEU] and incorporated in some EU legislation still part of UK law.) This expansion's negative side-effects have been increased by the second circumvention: the art. 8 ECHR right to private and family life has been expanded to override immigration controls, something which those who drafted, signed and ratified the Convention would certainly have rejected.

These misinterpretations facilitate unlawful immigration, incentivize it, and hamper European states in justly handling what the UN and its Refugee Agency [UNHCR] call "mixed movements" which, like other "situations of mass influx", involve cross-border flows in which refugees are mixed with often much larger numbers of economic migrants who have chosen not to apply for lawful entry. Elastic, expansive and inauthentic treaty-interpretations such as these are contributing substantially to real risks that, in the medium term, the rule of law in European states will be over-strained and important ECHR rights weakened.

Behind the judicial transformation of refugee and migration law lies the doctrine, judicially invented in 1975, that the ECHR is a "living

instrument". With this strange, opaque metaphor, the Strasbourg court puts itself in a position to hold that what the ECHR means (requires and authorises) *changes*, "evolves" – not only to fit changes in technology and other realities, but also (much more important) to fit *judicially approved changes in (elite) public opinion* about what social arrangements are desirable or valuable or appropriate, and about what legal obligations should be acknowledged or imposed on states to give effect to such arrangements.

The "living instrument" doctrine was adopted for a political purpose: to enable judicially approved elites to reform social arrangements (even very fundamental ones) either without the debate and approval of democratic legislatures, or with a retrospective approval strongly encouraged by the judiciary's assertion that *these are reforms already required by law and by international agreements and obligations* which the country has *long ago accepted* as binding.

In either form, that is an unconstitutional purpose. It is especially unfitting in relation to the ECHR. For that Convention was intended, not to provide an engine for social reform, still less for top-down reforms, but to block *regression* from the level of respect for rights that in 1950 was standard in the founder signatory states, distinguishing them from the defeated fascist states and the communist tyrannies imposed in Europe in the late 1940s.

The present paper traces the history of several judicially demanded or created obstacles to preventing unlawful entry or removing illegal migrants. The decisions to create these obstacles, it argues, were well-motivated but unauthorised and even unprincipled.

This is a story in which European courts and our own courts all have a part. In the lead was the ECtHR. Our courts have sometimes criticized and slowed the advance, sometimes got ahead, but for the most part have simply been loyal to Strasbourg – "strikingly loyal", the UK Supreme Court recently said – more loyal than our law required of them.

The standards spelled out in the ECHR, as it was drafted and agreed, are sound. They correspond to, and did not challenge, the state of British common law and statute law as it stood in 1950, though they *permit* countless subsequent developments. Britain properly recognizes these ECHR standards. Correctly understood, however, they did not – and do not – *require* the many subsequent developments of our law.

How has the Strasbourg court assumed the role of a legislature? By interpreting these ECHR standards, not as merely permitting, but instead as requiring developments which those judges would support in a referendum or legislative debate, The ECtHR asserts, wrongly, that a national legislature's or government's non-compliance with the *new* judicial answers to old questions is a violation of standards settled and agreed to in the ECHR. In truth, the settling and agreeing of the Convention confronted those same questions – which makes them "old" – and gave, presupposed, or deliberately permitted a different set of answers, answers now reversed by that Court.

In the field of immigration, the main ECHR provisions judicially deployed to transform the law have been art. 3 and art. 8 ECHR. As now

interpreted, art. 3 undercuts or circumvents the Refugee Convention, and relegates some of its main features to history. And art. 8, after half a century of irrelevance to migration law, now blocks many attempts to regulate unlawful entry or stay by legislation or by enforcement of reasonable rules.

Art. 3 states a precious, fundamental truth: governments and their agents, like everyone else, must *never* intend – set out or try, or intend anyone else to set out or try – to inflict on someone (anyone) the pains of torture or the miseries or indignities of inhuman or degrading treatment.

The judges, however, have inflated this true central meaning of art. 3 so that it becomes a moral untruth: that governments must *never* do anything which, despite their intentions, results in a "real risk" that someone will undergo sufferings (or indignities) *which if deliberately imposed*– within the ECHR's territorial jurisdiction – *by or with the connivance of public authority*, would entail a violation of art. 3.

This inflation is intellectually and legally out of order. It also has many damaging consequences. It incoherently privileges preventing risks to non-citizens over preventing risks to citizens. It has rendered the protection elements of the Refugee Convention redundant. It outlaws or effectively neutralises maritime interdiction operations, so making maritime borders practically open and maritime rescue an immigration ferry. It outlaws any removal/deportation which would result in a significantly shortened lifespan because the country of return lacks European/UK levels (and availability to all) of medical care.

Similarly, the art. 8 ECHR right to family/private life has been inflated, transformed by "living" interpretation, into a vehicle for remaking immigration law, by –

- deploying a person's legal right to stay, or even someone's illegal *de facto* residence, to create new legal rights to immigrate;
- requiring admission for family members (reunion/reunification);
- severely inhibiting workable measures to prevent forced marriage and marriages of convenience;
- exaggerating the significance of the UK or other EU citizenship of children born to fraudulent illegal immigrants well aware of their own "precarious" (that is, illegal) immigration status, immigrants who may thus acquire a parental right to stay (a theory then echoed in the CJEU's extravagant thesis that sending the illegally-present parent home prevents the child "enjoying" his or her EU citizenship even though the child retains that citizenship throughout and will have it, unimpaired, as an adult);
- making time spent here as an unlawful entrant, with contacts, activities and relationships here, confer an entitlement to stay for a discretionary period that may lead to permanent residence and even citizenship.

The difficulty of maintaining fair but strict immigration controls while enmeshed by these mistaken judicial doctrines is deepened by another recent, weakly justified judicial doctrine: that no clear rules ("bright lines" or "blanket rules") can fit or embody the "true" contours of these expanded rights. Most immigration claimants are therefore entitled to an intense *judicial* focus on their claims, with opportunities for one or two appeals, at least the first involving a rehearing of all the arguments. Thus the application of immigration law tends to be slowed to a crawl, at great expense. The sound judicial role of *reviewing* administrative systems and decisions for their legality has been inflated into one for which court proceedings and judicial methods are not so well suited.

If the just public order of the UK and other European states is not to be corroded and distorted by extensive unlawful migration, states and their legislatures and citizens need an accurate view of their lawful options. They are options limited and obscured by the judicial doctrines outlined in this paper. These doctrines impose on legislatures and electorates limits that were rejected – quite reasonably – by those who founded the ECHR and the Refugee Convention.

This paper does not propose solutions or even approaches to the migration problem. Its focus is on a constitutional problem. Our legislators, ministers, and citizens are entitled to know how far the laws said to constrain their migration-control options have in fact been *created* by judges. For judicial proceedings are not apt instruments of legislation. The continuing attachment of courts, European and national, to "living instrument" doctrines puts in doubt our constitutional form of government, our rule of law.

There are some ways forward, however, which the paper concludes by identifying. Remedial measures are available, in principle, that could enable us to get free from the "living instrument" doctrines and restore the form of democratic-constitutional government under which our political community lived before those doctrines took hold in Strasbourg in the 1980s and were then brought in into our law, wholesale, by and under the Human Rights Act 1998.

Introduction

During the past 35 years the European judiciary, with diminishing resistance, if not active assistance, from Britain's own courts, have gradually ensured that no country under their jurisdiction can exercise — as efficaciously as needed — the most basic element of national self-determination: authority to determine who, among Earth's nearly eight billion inhabitants, will be *admitted within the country's borders* to the entitlements and benefits, and the reciprocal obligations and burdens, of residence (and thence, in due course, of citizenship).

ECtHR decisions of 2011-12 facilitated an episode if not a period of "mass migration" – "massive influx", "large mixed (refugee/non-refugee) flows" – into Europe. First these made Europe's co-ordinated asylum system incoherent by ruling that Greece, then the main arrival-point for asylum-claimants, had become unfit to receive or process them, as the system presupposes the first receiving state will. This decision created a real incentive to enter unlawfully with a view to making unmeritorious asylum claims in a country selected by claimants and their advisers for its "softness" – its readiness, unlike Greece, to certify refugee status or allow humanitarian protection or indefinite stay on some other basis.

Then, still more radically, the ECtHR condemned all practicable methods of interdicting sea-borne inflows, and particularly Italy's efforts to intercept and prevent people-smuggling by boat from Libya. And finally the ECJ declared Italy to be just a rung below Greece: presumptively unfit for asylum seekers.

These decisions created preconditions, essential but not well known, for the dramatic inflows of 2015-16. So, of course, did decisions by other constitutional organs, including EU legislation adopted some years before 2011. But the judicial decisions, presenting themselves as *applications of the law* of treaties and general international law, have certainly constrained and deflected political thinking about whether and how to limit such inflows (or even their acceleration), and about whether and how to revise legislation adopted without real regard to the risks and side-effects created by inflows of such scale and kind.

This paper -- focusing on the UK's position, but always with an eye to the whole European situation -- outlines first the internationally agreed structure regulating migration, asylum and refugee status, and then some of the main European court decisions tending to circumvent, override, dismantle and bury that structure. It then examines the supposed legal bases for that dismantling process. It concludes with reflections on one or two salient elements of the so-called crisis of mass migration that, most

evidently in 2015-16, showed how far Western European states, including even Britain, are exposed to stresses capable of imperiling prospects of integration, stresses perhaps accentuated wherever they are taken to result not from democratic national legislation but from judicial fiat.

European states have acquiesced in the judicial transformation of the ECHR, (and indeed of the European Community/Union Treaties). National and EC/EU legislation has often consolidated and built upon the judges' rulings. All this provides some explanation of, and some justification for, the judges' persistence on the path of continuous "evolution" they have initiated and managed. But even when that justification has been given full weight (and proper allowance has been made for differences of opinion in interpreting the *original* intentions and public meaning of these treaties), three things remain clear. (i) The work of judicially directed transformation lacked and lacks proper foundations.[1] (ii) Much of it, for all its earnest good intentions, has been done inadequately, with a degree of incoherence immediately obvious to legal scholars (and publicly noted by some). (iii) All of it has had elements of make-believe, that is, has been done under the erroneous description that the decisions were *required by law and*[2] *by the ECHR*, rather than by the moral-political judgments of these judges.

Prosperous nations such as ours have serious moral obligations, and should have even higher aspirations, to extend assistance in many forms, and at real, palpable cost to the well-off amongst us, to those outside our nation who are in serious danger or need. Nothing in this paper denies or questions that. Everything in the paper centres on the constitutional question, "Who has the responsibility of deciding how we are going to discharge those obligations and identify and pursue those aspirations?" Related to that question are associated legal, moral and factual issues: How far have we already committed ourselves by laws which we must now either live up to, or honestly and openly change? Is sound debate about these obligations, aspirations and responsibilities being impeded by any widely-held assumptions about how our own courts have in fact been responding to them?

1. This paper leaves aside a number of decisions at the highest level that may reasonably be considered to have been legally unsound and that, sound or unsound, have contributed substantially to the difficulty of regulating migration – for example, the (mis)interpretation of "persecution for reasons of . . . membership of a particular social group" (Refugee Convention art. 1A(2)), in *R v Immigration Appeal Tribunal ex parte Shah* [= *Islam v Home Secretary*] [1999] 2 Appeal Cases 629 (see the dissenting judgment of Lord Millett).

2. On the validity and the legal and constitutional importance of the suddenly widely denied distinction between our law and the international-law obligations contracted by the Crown's adherence to a treaty with foreign countries (such as the ECHR), see John Finnis and John Larkin, "Introducing the Internal Market Bill isn't Unconstitutional", *Spectator* 11 September 2020 https://www.spectator.co.uk/article/whatever-its-political-wisdom-introducing-the-internal-markets-bill-is-not-unconstitutional; Finnis, "Ministers, International Law and the Rule of Law" 2 November 2015 (Policy Exchange) https://judicialpowerproject.org.uk/ministers-international-law-and-the-rule-of-law/.

I. The law internationally agreed in the 1950s

A. The Framework Presupposed

The treaty law outlined in this section came into being on the basis of some stable and foundational presuppositions. Sovereign states have supreme authority to admit, exclude and in due manner expel non-citizens (non-nationals).[3] Nationality (state-citizenship) counts. Statelessness is not to be imposed on anyone. A state must always allow its own nationals to enter, re-enter and stay. It must put up with, and deal at home with, all the risks posed to its wellbeing by its own nationals. A state does not need to tolerate similar risks posed by the entry or continued presence of non-nationals. Resident, even transient, non-nationals it must treat as equal bearers of civil rights, though it need not (but may) extend these to include rights to vote, or rights to stay if staying imposes serious risks to citizens and resident non-citizens. Refusal, cancellation or non-renewal of a non-citizen's leave to enter, and duly requiring him to leave the country, is one measure amongst others to alleviate dangers (immediate or indirect and long-term) to the common good – dangers which, when created by our own nationals, we must handle *without deportation or refusal of re-entry*.

Immigration in general, and refugees and asylum in particular, were matters deliberately excluded from the European Convention on Human Rights [ECHR] by the states that drafted the Convention. The decision to exclude them was taken with full knowledge that several principles relevant to those matters had been given morally authoritative (though legally non-binding) expression in the Universal Declaration of Human Rights (UDHR) proclaimed by the United Nations General Assembly, in Paris, on 10 December 1948. According to the UDHR, everyone has the right to a nationality (art. 15), everyone has the right to *leave* any country, including his own, and to return to *his* country (art. 13(2)), and everyone has the right to *seek* and to *enjoy* in other countries asylum from persecution (art. 14(1)). The European countries engaged in drafting the ECHR chose to leave all such matters to the Refugee Convention which, at that time, was in process of formation and adoption by an overlapping but somewhat wider group of states. Those states decided (as we shall see) that some of the most important issues should be left to the judgment and moral conscience of individual states – that is, should not be made the

3. The position is authoritatively and fairly stated with an eye both to international and national law, by Lord Bingham in *R (European Roma Rights Centre) v Immigration Officer at Prague Airport* [2004] UKHL 55, at para. 11.

subject of international legal obligations and rights. When the ECHR was amended by Protocol 4 in 1963, a number of the UDHR rights were incorporated, but even then the art. 14(1) UDHR right to seek asylum was left aside. (The UK has never ratified Protocol 4 ECHR even as it stands.)

B. No Right to Asylum

As stable political communities, our moral obligation to receive and shelter genuine refugees is real, and strong. Generosity in fulfilling and exceeding it has rightly been long esteemed among us. It certainly was held in high esteem by those – states and persons – who drafted the great post-War human rights declarations and agreements. But these same states and persons were alert to the dangers and inequities which in this domain can follow from excess. They also knew how difficult it is to distinguish propositionally, let alone legally, between the generous, the just balance or just mean (the fair), and perilous excess.

Their decision that much of that domain of justice, with its corresponding moral ("human") rights, should be left to the legally free judgment of states was not meant in 1950/51, and is not meant now, to deny a fundamental moral truth: that states, like property-owners of every kind, have a moral obligation in relation to the part of the world's resources which they hold as theirs. The obligation is to hold it as a kind of property indeed, but property subject to a trust for the benefit also of those who have no holding, or holdings too little for them to cope. The decision to leave this to the good will and good sense of states was based on a judgment: that, just as communist systems of governance fail both the poor and the rich by their coerciveness, their over-ambitious misjudgments and their consequent misallocation of resources, such a trust in favour of refugees cannot reasonably and justly be subjected to judicially enforceable rules binding in all circumstances.

That was the judgment and the decision. And, at the urging of Britain (among other nations), even the non-enforceable UDHR abstained in its art. 14 from saying that a persecuted person has a human *right to be granted* asylum. All that is affirmed is the right to apply for asylum and then, *if it is granted*, the right not to be disturbed by, for example, the persecuting state's threats of reprisals unless the grant is revoked. And even the right to *apply* is conditional and forfeitable: it is unavailable "in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations" (art. 14(2)).[4]

Equally deliberately, the proclaimed UDHR rights to emigrate (art. 13(2)) and to change one's nationality (art. 15(2)) have no counterpart or matching right to be admitted into or enter a country whether as tourist, visitor or immigrant, or to be granted its nationality.[5] No such right was

4. According to the Immigration, Asylum and Nationality Act 2006, s. 54, such acts are to be taken to include all kinds of involvement in terrorism as defined in the Terrorism Act 2000, s. 1.

5. A.W. Brian Simpson, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention* (Oxford: Oxford University Press, 2004), 672, 688, 690, 811; at 451-2 he shows that, at the urging of the UK, art. 14(1) of the Universal Declaration of Human Rights was worded so as not to state a right to be *granted* asylum and/or a right of *admission* to a country.

stated, admitted or in any way implied.[6]

C. Each People has the Right of Self-Determination

It is insufficient to say that these definitions of the limits of human rights were an assertion or protection of the sovereignty of states. They were that. But more importantly and truly they were a recognition of the moral reality and importance of *countries*, and of each country's (nation's) *people*. This reality and (not uncomplicated) moral truth was restated at the beginning of each of the three great conventions drafted (mostly during the 1950s) with a view to giving legal effect to the UDHR. These were adopted by the United Nations, and were adhered to as treaties by all the world's leading states, in 1965-66. The International Covenant on the Elimination of All Forms of Racial Discrimination (1965) begins by stating that it does not apply to "distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens" (art. 1.2), and that it does "not affect in any way the legal provisions of States Parties concerning nationality, citizenship, or naturalization, provided that such provisions do not discriminate against any particular nationality" (art. 1.3). The International Covenant on Civil and Political Rights (1966) [ICCPR] and its twin the International

6. Lord Bingham, speaking certainly for three, probably for all four other Law Lords after hearing full argument for the United Nations High Commissioner for Refugees [UNHCR] (intervening), in *R (European Roma Rights) v Immigration Officer at Prague Airport* [2005] 2 AC 1, [2004] UKHL 55 at para. 12, accurately stated:

> It has been the humane practice of this and other states to admit aliens (or some of them) seeking refuge from persecution and oppression in their own countries. … But even those fleeing from foreign persecution have had no right to be admitted and no right of asylum.

The Court of Appeal in the same case (*European Roma Rights Centre v Immigration Officer at Prague Airport* [2003] EWCA Civ 666) stated at para. 37:

> The legal position is correctly stated in Oppenheim's *International Law*, Volume 1, 9th Edition at paragraph 402 as follows:
>
> > The so-called right of asylum is not a right possessed by the alien to demand that the state into whose territory he has entered should grant protection and asylum. For such state need not grant such demands. The constitutions of a number of countries expressly grant the right of asylum to persons persecuted for political reasons, but it cannot be said that such a right has become a 'general principle of law' recognised by civilised states and as such forming part of international law. Neither is any such right conferred by Art 14 of the Universal Declaration of Human Rights … The Declaration, which in any case is not a legally binding instrument, does not confer a right to receive asylum …

The Court of Appeal also approved Lord Mustill's *dicta* in *T v Home Secretary* [1996] AC 742 at 745:

> 39. Lord Mustill in put it thus:
>
> > [A]lthough it is easy to assume that the appellant invokes a 'right of asylum', no such right exists. Neither under international nor English municipal law does a fugitive have any direct right to insist on being received by a country of refuge. (754B)
> >
> > The [domestic] legislation must be viewed against the background of a *complete absence of any common law right, either national or international, for a refugee to insist on being admitted to a foreign country*. (758H) (emphasis added)

Each of these three quotations is of importance in considering s. 5(5) of the European Union (Withdrawal) Act 2018:

> 5.(4) The Charter of Fundamental Rights is not part of domestic law on or after exit day.
>
> (5) Subsection (4) does not affect the retention in domestic law on or after exit day in accordance with this Act of any fundamental *rights or principles which exist irrespective of the Charter* (and references to the Charter in any case law are, so far as necessary for this purpose, to be read as if they were references to any corresponding retained fundamental rights or principles).

Each quotation also shows the legislative significance of the EU Charter of Fundamental Rights, art. 18: "*Right to Asylum. The right to asylum shall be guaranteed* with due respect to the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty establishing the European Community." (emphasis added).

Covenant on Economic, Social and Cultural Rights (1966) each begin: "All *peoples* have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue *their* economic, social and cultural development" (art. 1.1).[7] [emphasis added]

Turning then to the bordered territory without which a nation cannot long exist as a polity, exercise its people's rights, and identify and act upon its responsibilities, the Covenants each declare: "All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based on the principle of mutual benefit, and international law. …" (art. 1.2). Fifty years later the stature of these fundamental Covenants is undiminished.

D. No ECHR Right to Refugee Status

Correspondingly, the European Convention on Human Rights – drafted with important British input in 1949-50, opened for signature on 4 November 1950 and in force as from September 1953 – deliberately excluded any assertion that there is a right to asylum or to refugee status,[8] or of entry across a country's borders. Those who drafted it knew well that these were subjects on which the leading European states were at that very time engaged, in leading roles, in the drafting (mainly in August 1950 and July 1951) and adoption at Geneva (in July 1951) of the Convention on the Status of Refugees.[9]

E. Refugee Convention 1951 and 1967: No Right of Admission as a Refugee

In the scheme and meaning of the Refugee Convention[10] it is fundamental that it too neither creates nor acknowledges a right of asylum or refuge – a right to be admitted across a country's borders as a refugee.

The Convention deals with the legal status and entitlements (and obligations) of any refugees that a signatory country has admitted (or finds within its borders). It takes for granted that, in the exercise of their self-determination, civilized states will in fact freely and generously grant refuge and admission to genuine refugees in the sense defined in art. 1: persons who both (a) are outside their own country "owing to well-

7. Though adopted by the United Nations in 1966, these Covenants were drafted and negotiated largely much earlier, at the same time as the ECHR and the Refugee Convention. ICCPR art. 7 provides, like ECHR art. 3, that "no one shall be subjected to torture or cruel, inhuman or degrading treatment or punishment". The United Nations subsequently sponsored the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984), which by its art. 3 provides that "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."

   Note that this prohibition on removals/return (thus *added to* the prohibition in art. 7 ICCPR) does not extend to removals/return to inhuman or degrading treatment short of torture: see art. 16 Torture Convention and paras. 14 and 41 of the Report of the Working Party on the Draft [Torture] Convention: http://www.un.org/ga/search/view_doc.asp?symbol=E/CN.4/1984/72. This is another sign of the radicalism of the decisions discussed in part IV.A & B of this paper.

8. See e.g. Simpson, *Human Rights and the End of Empire*, 672, 688, 690, 811.

9. The Refugee Convention was limited to events before 1951, and envisaged mainly the great post-World War II movements of peoples inside Europe. But 1967 it was made applicable without temporal or geographical limits, and thereafter it was acceded to by very many states.

10. http://www.unhcr.org/protect/PROTECTION/3b66c2aa10.pdf

founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion" and (b) are not persons with respect to whom there are serious reasons for considering that they have committed any crime against peace, humanity or United Nations principles, or a serious non-political crime (outside the country of refuge and prior to admission) (art. 1.A(2) and F).

It bears repeating: the Refugee Convention affirms no right to be admitted to a country as a refugee, even if one is certainly a refugee within the meaning of the Convention. Its purpose is to guarantee that *refugees* (as defined by the Convention) who are actually *in a country* (whether or not they entered lawfully) are treated fairly and on a basis of substantial equality with citizens in relation to property, access to courts, freedom of association, employment and self-employment, and housing, public education and "public relief and assistance" (today's "welfare" or "social security").

F. Conditionality and Forfeiture of Rights: No Immunity from Expulsion if a Security Risk

Though it creates no right of entry, the Refugee Convention does establish conditions qualifying any grant of entry, and authorizing expulsion of refugees who forfeit their right to stay from a country of refuge. If you have entered the country illegally you are not to be punished or penalized for doing so, provided you came directly from a territory where your life or freedom was threatened by art. 1 persecution and provided also that you present yourself without delay to the authorities and show good cause for your illegal entry or presence: art. 31(1).[11] If you are a refugee lawfully in the country you are not to be expelled save on grounds of national security or public order (and after due process of law, and reasonable opportunity to seek admission to another country): art. 32. And even if you unlawfully entered the country – but are a refugee (as defined) – you are not to be expelled or returned (*refoulé*) to territories where your life or freedom "would be threatened on account of … race, religion, nationality, membership of a particular social group or political opinion", *unless there are reasonable grounds for the authorities in your country of refuge to regard you as a danger to the country's security*, or you have been convicted of a particularly serious crime and are a danger to the community in that country: art. 33(1) and (2).

Sub-part I.H below gives some details of the discussions which yielded these clauses, details which confirm the true meaning of the much misused term (non-) *refoulement*. The very widely used phrase "principle of

11. This long neglected provision's drafting and proper meaning were compellingly expounded by Lords Rodger and Mance, dissenting, in *Asfaw v R* [2008] UKHL 31, demonstrating the error of the "living instrument" interpretation advanced by the majority in that case and by the Divisional Court in *R v Uxbridge Magistrates Court, ex p. Adimi* [2001] QB 667. That erroneous but reigning interpretation is predicated on the notion (plainly rejected by the draftsmen of art. 31) that refugees passing through safe country A en route to safe country B and/or C and/or D and/or E **should have** (and have been granted by the Refugee Convention) **the option** to choose to seek asylum in B or C or D or E and, pursuant to that choice, to commit offences in A to facilitate their departure from A and arrival in B, and offences in B to facilitate departure for and arrival in C… and so on.

non-*refoulement*" by its more or less deliberate vagueness reveals that some of those who deploy it are aware that they are drawing a veil over the expansion of meaning and departure from the meaning originally intended by those who adopted the Refugee Convention. If the "principle" were authentic (rather than a rhetorical screen), its content would be stated straightforwardly in a set of rule-like propositions using ordinary English (German, Spanish, etc.) terms.

G. Right of Peoples to Avert "Mass Influx of Persons"

Even with all these precautions and built-in restrictions, the states that freely accepted the Refugee Convention obligations to refugees – and indeed accepted also their further non-legal obligations of justice or generosity to admit refugees -- remained alert to the potentiality for injustice to their own citizens, especially (though not only) from mass migration. In 1967, when the Convention's temporal and geographical limits were removed (leaving its meaning intact), the General Assembly of the United Nations adopted a Declaration on Territorial Asylum. This affirmed, first, that refugees (in the sense of art. 14 of the Universal Declaration) are not to be rejected at the frontier, or expelled or compulsorily returned to a state where they may be subjected to persecution; and secondly, that "exception may be made" to this principle "for overriding reasons of national security or in order to safeguard the population, as in the case of *a mass influx of persons*": art. 3 (1) and (2).[12] (Hopes that this non-binding declaration might be given legal effect by a revision of the Convention came to nothing.)[13] As to the Refugee Convention itself, any state may withdraw from it at any time on one year's notice to the United Nations: art. 9.

The parties who drew up, acceded to and ratified the Refugee Convention in the early to mid 1950s were -- besides Australia and Israel -- the dozen core members of the Council of Europe that during the same years was arranging for states to become parties, one by one, to the ECHR after its finalization in November 1950 and then its entry into force in 1953.

H. What the Refugee Convention means by (Non-) refoulement

The intentions of the states that founded both the ECHR and, almost simultaneously, the Refugee Convention, and the plain public meaning of their words and acts, have been outlined above. Looking now at the historical record in more detail, we can see how far those involved in

12. For the vital link between this Declaration's reference to mass influx and the *travaux préparatoires* for the 1951 Convention, see n. 14 below. This whole provision for exceptions makes the 1967 Declaration more restrictive (from the point of view of refugees) than the 1951 Convention, though it is wider because the 1948 Universal Declaration treats persons fleeing for fear of persecution as refugees even before they have left their own (persecuting) state's territory.

13. In *Roma Rights*, n. 6 above, at para. 30 Lord Bingham said:

> In 1967 the United Nations adopted a Declaration on Territorial Asylum which provided, in article 3, that no person entitled to invoke article 14 of the Universal Declaration of Human Rights should be subjected to measures such as rejection at the frontier, but a conference held in 1977 to embody this and other provisions in a revised convention ended in failure.

those decisions foresaw the real possibility of events such as those which unfolded in Europe 60 years later, in the second decade of the 21st century. With such foresight and good sense, the principal states completely and in the end, it seems, without dissent rejected the absolutist view and proposal which the Refugee Convention's Drafting Committee was strongly urging upon them.[14] That rejected absolutist view is precisely the one judicially adopted and imposed upon those states, half a century later, with neither authorisation nor sufficient reason, in the cases outlined in IV.B below: notably, *Chahal*, *Saadi* and *Hirsi Jamaa*.

After the definitive rejection of the absolutist view by 19 votes to nil (with three abstentions) on 11 July, the chairman of the meeting of the

14. Paul Weis, *The Refugee Convention 1951: The Travaux Préparatoires Analyzed with a Commentary by Dr Paul Weis* (Refugee Studies Programme, University of Oxford, and Cambridge Research Centre for International Law, International Documents Series (undated, circa 1994) www.unhcr.org/4ca34be29.pdf ext at fnn 647-650. See ibid pp 239-40 for Weis's summary of the decisive debate (Geneva 25 July 1951, the day the whole Convention text was agreed) about Art. 33, Refugee Convention:

> The Netherlands representative recalled that at the first reading [11 July] the Swiss representative had expressed the opinion that the word 'expulsion' related to a refugee already admitted into a country, whereas **the word 'return' ('refoulement') related to a refugee already within the territory but not yet resident there.** According to that interpretation, **Article 28** [which had subsequently become art. 33] **would not have involved any obligation in the possible case of mass migration across frontiers or of attempted mass migration.** He wished to revert to that point, because the Netherlands Government attached very great importance to the scope of the provision now contained in Article 33. The Netherlands could **not accept any legal obligation in respect of large groups of refugees seeking access to its territory.**
>
> At the first reading, the representatives of Belgium, the Federal Republic of Germany, Italy, Netherlands, and Sweden had supported the Swiss interpretation. From conversations he had had since with other representatives, he had gathered that the **general consensus of opinion was in favour of the Swiss interpretation.** In order to dispel any possible ambiguity and to reassure his Government, he wished to have it placed on record that the Conference was in agreement with the interpretation, that **the possibility of mass migration across frontiers or of attempted mass migrations was not covered by Article 33.**
>
> There being no objection, the President ruled that the interpretation given by the Netherlands representative should be placed on record.
>
> **The UK representative remarked that the Style Committee had considered that the word 'return' was the nearest equivalent in English to the French term 'refoulement'. He assumed that the word 'return' as used in the English text had no wider meaning.**
>
> The President suggested that in accordance with the practice followed in previous Conventions, the French word 'refoulement' ('refouler' in verbal use) should be included in brackets and between inverted commas after the English word 'return' wherever the latter occurred in the text.
>
> He further suggested that the French text of paragraph 1 should refer to refugees in the singular. ....

The two suggestions made by the President were adopted unanimously. The record of the Swiss intervention on 11 July (Weis p. 235) wholly confirms the accuracy of the Dutch observations on 25 July and clarifies the meaning of the UK's final intervention:

> The Swiss representative said the Swiss Federal Government saw no reason why Article 28 should not be adopted as it stood, for the Article was a necessary one. He thought, however, that its wording left room for various interpretations, particularly as to the meaning to be attached to the words 'expel and return'. In the Swiss Government's view, the term 'expel' applied to a refugee who had already been admitted to the territory of a country. **The term 'refouler' on the other hand, had a vague meaning; it could not, however, be applied to a refugee who had not yet entered the territory of a country. The word 'return' used in the English text, gave that idea exactly.** Yet, Article 28 implied the existence of two categories of refugees: refugees who were liable to be expelled, and those who were liable to be returned. In any case, **the States represented at the Conference should take a definite position regarding the meaning to be attached to the word 'return'. The Swiss Government considered that in the present instance the word applied solely to refugees who had already entered a country, but were not yet resident there.** According to that interpretation, **States would not be compelled to allow large groups of persons seeking refugee status to cross its frontiers.** He would be glad to know whether the States represented at the Conference accepted his interpretations of the terms in question. If they did, Switzerland would be willing to accept Article 28, which was one of the Articles in respect of which States could not, under Article 36 of the Draft Convention, enter a reservation.

The Swiss concern about "large groups" was opposed by nobody and immediately backed up by expressions of concern about "mass influx of refugees" (Netherlands), "large groups of individuals who presented themselves" (Italy), "a large influx of refugees" (Germany, France), with which the UK, Canada and Belgium seem more or less explicitly to have associated themselves. These concerns had a significant part in shaping the content and public meaning of art. 33.

Style Committee on 25 July (the very day of the Convention's adoption) responded directly to an observation by the UK representative, who – in line with prior Swiss, French, German, Italian and Swedish observations – said that he assumed "*refoulement*" had no wider meaning than "return". The President's response was to propose from the Chair that the French word be inserted in parentheses wherever the English word appeared. All states agreed to this proposal. The clarification certainly might have been much clearer. To capture the intention of the meeting, the word "return" should have been inserted in parentheses wherever the French word appeared. But in the context of the discussions of 11 and 25 July,[15] that intention -- and therefore the meaning of the insertion actually made – was clear to any reasonable, good faith observer then, and so is equally clear now.[16] It was: to limit the term *refoulement* so that it extended only to removing from within the state's territory, and did not extend to refusal of *initial* entry through the border posts[17] (or elsewhere) and on into the state.[18] The Court in *Hirsi Jamaa*, in indicating (and the concurring

15. Nothing in the extensive discussions on 11 and 25 July (see preceding footnote) leaves room for Judge Pinto de Albuquerque's argument quoted in n. 19 below, or for his conclusion on the meaning here of *refouler/refoulement* – a conclusion which he articulated plainly and which the Court itself articulated most unobtrusively (see n. 100 below). The historical-critical discussion by Stevens J for the US Supreme Court in *Sale* (n. 103 below), though abbreviated, is superior, and sufficient for a sound conclusion. It would have been further strengthened by noting also the uncontested anxieties about "large groups of persons *seeking refugee status*" (Switzerland), "mass influx *of refugees*" (Netherlands), "large groups of individuals who presented themselves" (Italy), "a large influx of *refugees*" (Germany, France), with which the UK, Canada and Belgium seem more or less explicitly to have associated themselves: see Weis between n. 652 and n. 655.

16. On intent, meaning and the reasonable observer (aware of context), see e.g. *Mannai Investment* [1997] AC 749 per Lord Hoffmann; and Finnis, *Intention and Identity* (Oxford University Press, 2011) at 31-3.

17. Lord Bingham's sound discussion of the drafting of art. 33(1), in *R v Immigration Officer Prague Airport, ex p. Roma Rights* [2004] UKHL 55, recalls at para. 13 that each party to the earlier Convention of 1933, the Convention relating to the International Status of Refugees, had by acceding to that Convention undertaken "not to remove or keep from its territory by application of police measures, such as expulsions or non-admittance at the frontier (*refoulement*), refugees *who have been authorized to reside there regularly*, unless the said measures are dictated by reasons of national security or public order", and the judgment goes on to comment:

> This language might be understood to oblige contracting states to admit refugees coming to seek asylum, but in the opinion of a respected commentator the word *refouler* in the authoritative French text was not used to mean «refuse entry» but «return» «reconduct» or «send back», and the provision *did not refer to the admission of refugees but only to the treatment of refugees who were already in a contracting state*. (emphasis added)

The "respected commentator" was doubtless Professor Atle Grahl-Marsden, whose *Commentary on the Refugee Convention 1951* (Geneva: 1963) was published by the UNHCR itself in 1997, https://www.unhcr.org/3d4ab5fb9.pdf, and says (Comment (3) on art. 33):

> Even though "refoulement" may mean "non-admittance at the frontier" ("refusal of leave to land", "exclusion", "Abweisung", "Avvisning"), and that [sic] the term was understood in this sense by the Secretariat of the League of Nations when translating (unofficially) the text of the 1933 Convention, it is quite clear that the prohibition against "refoulement" in Article 33 of the 1951 Convention does not cover this aspect of the term "refoulement". Mr. Zutter, as Swiss observer at the Conference, stressed that Article 33 "could not ... be applied to a refugee who had not yet entered the territory of a country. The word 'return' used in the English text, gave that idea exactly". This view was supported by other delegates.
>
> That Article 33 forbids return and not "non-admittance" is also made clear by the words "to the frontiers of territories ..." in the English text and even more so by the words "sur les frontières des territoires ..." in the French text.

18. In the same Comment, Grahl-Madsen (n. 17) says:

> If a Contracting State has placed its frontier guards right at the frontier, and has fenced off its territory, so that no one can set foot on it without having been permitted to do so, the State may refuse admission to any comer without breaking its obligations under Article 33. Article 33 produces the strange result, as pointed out by Robinson, that, "if a refugee has succeeded in eluding the frontier guards, he is safe; if he has not, it is his hard luck". And if the frontier control post is at some distance (a yard, a hundred meters) from the actual frontier, so that anyone approaching the frontier control point is actually in the country, he may be refused permission to proceed farther inland, but he must be allowed to stay in the bit of the territory which is situated between the actual frontier line and the control post, because any other course of action would mean a violation of Article 33(1).

judgment in arguing for)[19] the opposite, is again producing not so much an interpretation that is "living" as a misinterpretation, a sheer misreading.

The effect (and it seems the intent) of this misinterpretation of non-*refoulement* ("the principle of *non*-refoulement") is that it is no longer possible to prevent the "mass influx of persons",[20] inflows which the parties to the critical decisions of 25 July 1951 insisted – against the advice of their idealistic drafting committee – must be left by the Convention fully preventable, insistence that led to the linking of the words "return" and *refoulement*. The states which agreed the text of the ECHR and the Refugee Convention in 1950-53 considered that actions like those of Italy in 2009 (see IV.B below) and Spain in 2014 (see IV.D) are not *refoulement*.

19. See *Hirsi Jamaa* (n. 97 below), in the concurring judgment of Judge Pinto de Albuquerque at p. 67:

> the French term of *refoulement* includes the removal, transfer, rejection *or refusal of admission of a person*. The deliberate insertion of the French word in the English version has no other possible meaning than to stress the linguistic equivalence between the verb return and the verb *refouler*. (emphasis added)

The Judge is mistaken. The actually intended meaning of the deliberate insertion was to limit the reference of *refouler* to that of "return", in line with the demands by the many states above-mentioned (which all assented then and there to the insertion because they, like doubtless everyone there, knew its intent). Though this concurring judgment is elaborately documented, its drift may be gauged from its final words (echoing the final words of Blackmun J's dissenting judgment in *Sale*):

> Refugees attempting to escape Africa do not claim a right of admission to Europe. They demand only that Europe, the cradle of human rights idealism and the birthplace of the rule of law, cease closing its doors to people in despair who have fled from arbitrariness and brutality. That is a very modest plea, vindicated by the European Convention on Human Rights. "We should not close our ears to it."

The first and second sentences state a distinction without difference, and the first is wrong: the Court was upholding precisely such a *claim of right* made by 24 such persons. The exhortation not to close our ears comes well from a legislator or citizen, not so well from a judge committed to the rule of law.

20. The term used in the UN resolution of 1967, part I.H n. 14 above.

II. The "evolutive", "living" instrumentalising of the ECHR

Only after nearly 40 years did the European judiciary start on the ill-judged cumulation of court decisions that have built up a vast structure of judge-made asylum and refugee rights. In the ECHR zone, this structure has marginalized the Refugee Convention, substantially nullified its precautions, and overridden the exceptions and conditions or qualifications that protected national self-determination and the basic interests of each country's own vulnerable citizens.

The judicial extensions to refugees and illegal entrants' legal rights impact greatly on our administration and administrative structures. That impact is first of all on the staff of the Home Office's Border Force (and their counterparts in other European states) who make initial decisions about entry, and then on the officials of (and contractors with) the Home Office's other two immigration-related Directorates, dealing with entry, leave to stay, deportation and removal and much else. What these staff, officials and agents need to know about judge-made law has to be filtered to them through the Immigration Rules and accompanying Instructions. Made by the Home Secretary and scrutinized by Parliament,[21] the Rules and Instructions need frequent supplementation and amendment, not infrequently to accommodate new judicial articulations of human rights, sometimes to push back against them.[22]

Various accessible sources study the general judicial theories of interpretation (or inflationary "interpretation") that underlie the torrent of case-law.[23] So the present paper's discussion of those theories or attitudes is restricted to some of the essentials.

The process has its origins earlier (and not in the context of immigration law) when, in February 1975, in *Golder v UK*,[24] the ECtHR created a right of access to civil courts, a right that had unquestionably been deliberately excluded from the ECHR's art. 6 guarantees of fair trial. Three years later, the ECtHR gave a name to the theory on which this deliberately excluded

21. All changes in the rules must be promptly notified to Parliament (Immigration Act 1971 s. 3(2)), and a resolution of either House can disapprove. Sometimes, as in 2012, new rules are debated and positively approved (as by the House of Commons, without dissenting vote, on 19 June 2012).

22. The over 400 Rules and 30 Appendices in the current iteration run to over 1,175 pages. The Rules were archived four times in 2012, but much more frequently in subsequent years (15 times in 2019); significant and multiple amendments make a new iteration necessary on average once every month or two. Though many of the amendments originate in administrative, legislative or political considerations, many are attempts to respond to judge-made requirements or invalidations.

23. For overviews see the essays by two leading judges, Lords Sumption and Hoffmann, in Barber, Ekins and Yowell (eds.), *Lord Sumption and the Limits of the Law* (Oxford: Hart Publishing, 2015), and in the same volume Finnis, "Judicial Law-Making and the 'Living' Instrumentalisation of the ECHR."

24. [1975] 1 EHHR 524 (4451/70), 21 February 1975 (Plenary).

right was judicially inserted into the ECHR. In April 1978, in *Tyrer v UK*[25] (a case about what counts as inhuman or degrading treatment), the Convention is for the first time named a "*living instrument*".

A. Strasbourg's "living instrument" doctrine

Judges who say the ECHR must be treated as a *living instrument* tell us what that picturesque term means: the text of the ECHR (the "instrument", the document) "must be interpreted *in the light of present-day conditions*". Both the term and this formulaic proposition remain in constant use by the Court and its followers. But the term has a touch of absurdity, and the formula means much more than meets the eye.

The oddity of the term or slogan "living instrument" is that there is no justification for saying that an instrument (treaty, contract, convention, constitution) interpreted and faithfully applied *according to its original public meaning* is a *dead* instrument. The probable European author of the term "living instrument", the Danish international law scholar and judge (then of the ECJ, later of the ECtHR) Max Sørensen, put it forward in a context which reveals that he did so while in the grip of a fallacy. For he propounded this fallacy to the ECHR colloquium (in Rome in November 1975) at which he baptized the ECHR "a living legal instrument". A few paragraphs before that baptism, he had propounded the fallacious proposition that, if the Court were to interpret and apply ECHR art. 3 (against subjecting people to torture or inhuman or degrading treatment) in such a way that normal Western European countries, in normal conditions, would be in compliance with its provisions, "that would make the provisions utterly meaningless"![26] As if the unchanging law of murder is meaningless in a city where no murders are committed.

The same strange thought can today be found hidden within a closely related and equally often deployed ECtHR refrain or mantra: that the ECHR's provisions must be interpreted in such a way – dynamic and evolutionary -- that "its guarantees are practical and effective and not theoretical and illusory". The proposition is employed constantly to *expand* the ECHR's "guarantees" so that claims of a kind that the ECHR certainly was meant not to cater for can be now catered for and acceded to – overriding the settled expectations of states and their laws. For thus the Court can assure itself that it (and the law it creates) will go on *making a difference*. But it is fallacious and little short of absurd to imagine that, if all those laws and expectations are fully compliant with the ECHR (as understood by its founders and drafters and signatories), the ECHR's guarantees must be "theoretical and illusory" (Sørensen's phrase "utterly meaningless", cooled a little and recycled). The more recent mantra – "practical and effective" – despite its appearance of reasonableness, is in its operation and rhetorical effect just as misleading, unbalanced, and unbalancing[27] as

25. [1978] ECHR 2 (5856/72), 25 April 1978 (Chamber), para. 31.

26. On all this, and some of the name's prehistory, see pp. 85-120 of the last essay cited in n. 23 above.

27. For why should not the restrictions (including restricted meanings for guarantee terms) and qualifications deliberately introduced into the articulation of rights in ECHR be practical and effective, too? On this fallacy, see III.B.5 before n. 56 below.

Sørensen's more artless formulation of the same fallacy.

The other formula, "interpret *in the light of present-day conditions*", is even more unsatisfactory. In its apparent sense, it would be acceptable to any lawyer, including those who think that agreements and constitutions should be applied according to their original public meaning. For that meaning may implicitly include the application of the agreed provisions to new circumstances (for example, new technologies) which may fall within the meaning of a provision's terms even if they were circumstances not foreseen by the drafters or signatories. But the formula, as deployed by the ECtHR, muffles its own intended force and sense, which is that the ECHR's provisions must be interpreted – and then imposed -- in the light of, and in line with, present-day conditions *and opinions and "standards"*.

This means that the Court has, with minimal publicity or transparency, adopted a strategy of giving new answers to old questions – old in the sense that they are questions *the Convention's makers* took their Convention to have answered (for example, by *deliberately excluding* certain matters from its protection). That strategy goes well beyond the accepted lawyerly strategies for giving old (or newly adapted) answers to *new* questions (e.g. applying the instrument's provisions to new technologies).

Thus the Court since the late 1970s has functioned ever increasingly as a permanent law-reform commission *and* legislative body, amending the ECHR where it considers it defective – defective by reference to modern elite opinions and standards – and applying the amended instrument even against states whose government, legislatures and people do not share those opinions and have never signed-up or assented to them.

Even Sørensen, having become a judge in the ECtHR, protested against the Court's willingness to give (impose) new answers to old (settled) questions. Everyone knew that the wording of the ECHR provision about freedom of association had been devised so as to preserve the British acceptance of "closed-shop" compulsory union membership. But in 1981 the Court simply struck that institution or practice down as incompatible with the "essence" of freedom of association.[28] The protests of Sørensen and other dissenting judges were not against the Court's view about how much associational freedom is desirable. They shared that modern elite opinion. Their objection was to the ECtHR's willingness to amend the ECHR by including what had been excluded by careful wording the significance of which was known to and accepted by everyone at the time

28. *Young, James and Webster v UK* (7601/76, 7806/77), 13 August 1981 (Plenary).

of the ECHR's founding.[29]

If the Convention is to be amended to accommodate new circumstances and attitudes or moral beliefs, so that it gives new answers to old questions, the amendment should only be achieved by agreement between the states party to the Convention. The point had been made in powerful dissenting judgments by a notable British expert on the law of treaties, Judge Sir Gerald Fitzmaurice, in a number of the main cases that introduced and then began to extend "living instrument" (mis)interpretations.[30] But he died before the closed-shop cases, and Judge Sørensen died a few months after them. Since then there have been few judgments dissenting from the living instrument doctrine, or from the identical doctrine of "dynamic and evolutive interpretation".[31]

The ECtHR's dynamism did not start to work on immigration-related matters until 1985, and cautiously began with a new "principle" (border regulation is subject to the right to private life), albeit not practical new effect (see n. 44 and text at nn. 169-173 below). But from 1990 on, its transformative effects have been increasing in impact, and accelerating, as we see in IV.A below.

B. UK courts and "living instrument" doctrine

In the early years of the ECtHR's self-appointed new role as a kind of law reform agency, British courts had little need to concur or even to comment. And when the Human Rights Act 1998 made it necessary for them to "take into account" the Strasbourg case-law,[32] the Ministers sponsoring the statute imposing on them this duty – along with the more specific and far-reaching responsibility of enforcing "Convention rights" within this country as part of our own law[33]– had indicated their approval both of the "living instrument" doctrine itself and of the changes wrought by it up to the time they launched the Bill for the Human Rights Act in 1997/8. The Blair Government openly intended the Act to authorize, and perhaps even

29. See generally pp. 85-120 in the last essay cited in n. 23 above. As *Halsbury's Laws of England* (2013) vol. 88A para. 599 accurately says:

> As a result of the Convention's status as a "living instrument" recourse to the travaux préparatoires of the Convention is unnecessary and where necessary [*sic*] they may be ignored: see eg *Sigurjonsson v Iceland* (1993) 16 EHHR 462, in which the Icelandic government sought to resist the applicant's argument that ... art. 11 (freedom of association) included an implied right not to join an association by reference to the travaux préparatoires, which showed that such a right was deliberately omitted; however, the [ECtHR]...ignored the travaux préparatoires on the basis that the Convention was a living instrument and had to be interpreted in light of the growing measure [NB] of common ground domestically and at the international level *that the right not to join an association was inherent in the [ECHR] art. 11*. (emphases and comment added)

As that way (italicized) of putting it shows, opinion about the desirability of a right of opt out is, at best, systematically confused – more by the ECtHR than by domestic and international opinion – with ascertaining the meaning of what was agreed to in art. 11; and at worst is treated by the ECtHR as simply substituting for that agreed meaning.

30. For example: *Golder v UK* (n. 24 above); *Tyrer v UK* (n. 25 above); *National Union of Belgian Police v Belgium* (1975) 1 EHHR 578; *Ireland v UK* (1978) 2 EHHR 25; *Marckx v Belgium* (1979) 2 EHHR 330.

31. There are occasional judicial protests against particularly extravagant and undisciplined excesses in the Court's pursuit of the doctrine, such as the dissent by five of the most senior and distinguished judges in the ECtHR Grand Chamber in *Hirst v UK (No. 2)* (2005), arguing that the Court's decision to impose prisoner-voting on the UK was wrong because more legislative than interpretative. But even these judges confused the application of the ECHR in "changing conditions" with the adaptation of the ECHR to "an emerging consensus as to the standards to be achieved", wrongly approving the second along with the first.

32. Human Rights Act 1998, s. 2(1).

33. Human Rights Act 1998, s. 6.

require, UK courts to follow in the same path.[34]

The mainstream British judicial response has been marked by confusion, but in substance and effect has been an acceptance of full-blown "living instrument" analysis.

The confusion can be illustrated in many cases. Here is one, from *N v Home Secretary* (2005), a decision discussed for its substance in part V.A below – a good and necessary decision in many ways, departed from in cavalier fashion by the Supreme Court in 2020.[35] The judgment of Lord Hope, later Deputy President of the Supreme Court, is representative:

> [The argument] is about the treaty obligations of the contracting states. The Convention [ECHR] … is based on humanitarian principles…. [Those principles] may also be used to enlarge the scope of the Convention beyond its express terms. *It is, of course, a living instrument.* But … the question must always be whether the enlargement is one which the contracting parties would have accepted and agreed to be bound by.[36]

That last sentence reads like a firm constraint on living-instrumental importation of up-to-date attitudes. It reads as if it makes primary a substantially historical question about what the original contracting parties wished to include and could agree upon, and what they did not wish to include or simply could not agree upon.[37] Answering this question would enable the courts to keep faith with the old, agreed answers to *old questions*. But Lord Hope went on immediately to define "the judicial task", by quoting what Lord Bingham said in 2003:

> …the process of implication is one to be carried out with

34. See the White Paper passage quoted by Lady Hale JSC in *Re G (A Child) (Adoption: Unmarried Couple)* [2008] UKHL 38; [2009] 1 A.C. 173 at para. 119, where she said:

> The Government' s white paper, *Rights brought home: the Human Rights Bill*, 1997, Cm 3782, said this at para. 2.5:
>
> > 'The convention is often described as a 'living instrument' because it is interpreted by the European Court in the light of present day conditions *and therefore reflects changing social attitudes* and the changes in the circumstances of society. In *future our judges will be able to contribute to this dynamic and evolving interpretation of the Convention*.'
>
> For what it is worth, there were also clear statements by the Home Secretary in the House of Commons … and by the Lord Chancellor in the House of Lords … that the courts must be free to develop human rights jurisprudence and to move out in new directions. (emphases added)

Lady Hale was here arguing in support of the House of Lords decision in that case, to adopt an interpretation of the ECHR so novel that it had not yet been adopted (indeed, had been disapproved) by the ECtHR.

35. See at n. 161 below on *AM (Zimbabwe)*.

36. *N v Home Secretary* [2005] UKHL 31 (see at n. 149 below) at para. 21 (emphasis added). In *Sepet v Home Secretary* [2003] UKHL 15 at para. 6 Lord Bingham had said: "the [Refugee] Convention must be seen as a living instrument in the sense that while its meaning does not change over time its application will," and then had immediately added (by quotation): "Unless it [the Convention] is seen as a living thing, adopted by civilised countries for a humanitarian end which is constant in motive but mutable in form, the Convention will eventually become an anachronism;" and again (by another quotation): "It is clear that the signatory states intended that the Convention should afford continuing protection for refugees in the changing circumstances of the present and future world. In our view the Convention has to be regarded as a living instrument…." In all these passages it is wholly unclear what the reference to "living" is meant to add or convey, and why it is not sufficient to say that, like any document providing for future contingencies, these Conventions were established with a public meaning (original public meaning) applicable to many circumstances – including circumstances more or less unenvisaged by the Conventions' makers – a meaning not limited to the instances considered by those makers. (Thus the ECHR's protection of property and possessions obviously extends – and was intended by its makers and taken by their audience to extend – to forms of property not yet invented at the time of Protocol 1.)

37. Even so, the quasi-historical inquiry here suggested by Lord Hope may go further in the direction of evolutionary interpretation than is permitted by the Vienna Convention on the Law of Treaties 1969, arts. 31 (general rule of interpretation) and 32 (supplementary means of interpretation).

> caution, if the risk is to be averted that the contracting parties may, by judicial interpretation, become bound by obligations which they did not expressly accept *and might not have been willing to accept*. As an important constitutional instrument the Convention is to be seen as a "living tree capable of growth and expansion within its natural limits" (*Edwards v A-G Canada* [1930] AC 124, 136 per Lord Sankey LC), but those limits will often call for very careful consideration.[38]

The trouble with this passage is that, as Lord Bingham and Lord Hope knew, most interpreters who favour "living tree" and "living instrument" interpretation do not define the "natural limits" of the living instrument by reference to the intentions (known or reasonably conjectured) of the original framers of the treaty or constitution, nor by any consideration of what those framers would (at the time of its conclusion/adoption) have accepted or rejected. Rather, these interpreters proceed simply and unconstrainedly by seeing what meaning the instrument's words will bear given – and with a view to promoting -- today's assumptions and attitudes about, say, humanitarian principles. Lord Hope, like Lord Bingham, was thus trying to ride two horses which are liable to diverge more widely than any possible straddle.

In practice – with the 2019 exception discussed in IV.B.5 below – they and, so far, all other British judges have been willing to follow the main living instrument "interpretations" adopted by the ECtHR, aware that the Strasbourg court does not accept the constraints of historical intention, original public meaning, or "what would have been agreed to", but is willing and ready to give new answers to the old questions, questions that were in the minds of the framers. Sometimes, indeed, our judges are ready to adopt an interpretation that would certainly have been rejected by the framers and has not yet been approved by the ECtHR[39] – or even has been disapproved by it.[40]

That, as we have seen, is what the Government intended in launching the Human Rights Act 1998. It does not inevitably follow that therefore it is a proper interpretation of the Act as written and enacted. But in any event, the issue here – as elsewhere in this paper – is not whether or how much to blame the British judiciary for not denouncing Strasbourg's fundamental misconceptions. It is whether, having seen the errors, we can rationally discuss what to do about them, lest persisting in them do us irrevocable harm.

38. *Brown v Stott* 2001 SC (PC) 43, [2003] 1 AC 681, 703 (emphasis added).
39. See n. 34 above.
40. *R. (Nicklinson) v Ministry of Justice* [2014] UKSC 38; see Finnis, "A British 'Convention Right' to Assistance in Suicide?" Law Quarterly Review 131 (2015) 1–8 at 2.

III. Opening up to unlawful entry and stay

What are the main doctrines by which the judiciary's "living", "evolutive" interpretations have helped transform Europe into a zone of widely evaded immigration control? Which are the doctrines that, because they have the judicially ascribed treaty status of authoritative ECtHR interpretations of the ECHR, have wedged the door ajar? For this treaty-status, often treated as a "constitutional" status, obstructs administrative and even legislative reforms of the well-intentioned judicial-political doctrines that now may reasonably be considered to be (or to be becoming) unjustly burdensome to and dangerous for Europe's countries and peoples. The doctrines can be headlined-

- "no return to ill-treatment" (part IV), extending art. 3 ECHR;
- healthcare and welfare (part V), further extending art. 3;
- "family/private life" (part VI), extending art. 8 ECHR, and
- "no bright lines" (part VII).

A. "A noteworthy cosmopolitan achievement"

Surveying the meaning and implications of the Strasbourg doctrine concerning ECHR art. 8's "right to private and family life", as it stood in 2014, Daniel Thym concluded with approval: it is "a noteworthy cosmopolitan achievement".[41] Professor Thym is a paradigm of the able academic lawyers who in due course may become the majority judges of the ECtHR: he writes as Professor of Public, European and International Law at the University of Konstanz (on the borders of Germany, Switzerland and Austria), where he is Co-Director of the Research Centre of Immigration & Asylum Law. His website indicates his many connections with important European politico-legal-academic centres of influence and decision-making, and many scholarly publications, including an authoritative legal

41. Daniel Thym, "Residence as De Facto Citizenship? Protection of Long-term Residence under Article 8 ECHR" in Ruth Rubio-Marín, *Human Rights and Immigration* (Oxford: Oxford University Press, 2014) 106-44 at 144. See also his 2020 description: "a cosmopolitan honeymoon", at n. 136 below.

textbook, on all the immigration matters considered in this paper.[42] His 2014 essay on how the ECtHR has transformed the fact of long-term residence into a status of irremovability just short of a citizen's — and in many cases equal in efficacy to a citizen's — is a model of informed, judicious precision. His own warm approval of the transformation breaks the surface only at the very end.

That takes us to the heart of the matter. On his chapter's first page, Thym notes that the ECtHR "has long assumed a pioneering role" and was "the first international court to *extend* the human rights of foreigners beyond the sphere of forced migration [here he references the Refugee Convention 1951] to voluntary migration". The Court, he goes on, did this pioneering "on the basis of Article 8 ECHR".[43]

The judicial deployment of that article will be considered in part V below. But it is worth looking here and now at its structure:

> 8. *Right to respect for private and family life*
>
> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Immediately visible is one of the ECHR's most regrettable defects of wording and conceptual structure. The drafters and founders failed to see that *interests* such those mentioned in art. 8(1) do not – and logically cannot -- amount to specific *rights* until (and just to the extent that) they have been restated, redefined, in terms more specific than (say) "respect for private and family life, home and correspondence". There is, for example, no human right to use one's private life, or one's home, to plan a criminal offence or even civil wrong. So there is no human right

42. http://www.jura.uni-konstanz.de/en/thym/daniel-thym/daniel-thym/ In reflecting on judicial power, one may be helped by some remarks he makes in "Separation versus Fusion – or: How to Accommodate National Autonomy and the Charter? Diverging Visions of the German Constitutional Court and the European Court of Justice", European Constitutional Law Review 9 (2013) 391–419 at 406) about the ongoing power struggle between the German Federal Constitutional Court and the CJEU:

> Karlsruhe [the German Court] has managed successfully to portray the *Grundgesetz* [German Constitution] as a microcosm of social and political conflicts within Germany which are, then, resolved through the interpretation of human rights. To accept that European law and the [European] Court of Justice may have an important word to say on these matters would lay the axe to the root of Karlsruhe's domestic clout.

In other words, these two great centres of judicial power take for granted that one or the other of them will settle decisive "social and political conflicts within Germany", and will do so "through the interpretation of human rights". Elected legislatures and the people of Germany are now to some extent spectators of their own powers and destiny; the extent is limited by the concern of the German Constitutional Court, thus far, to be more responsive to constitutional responsibility and democracy/separation of powers than, say, the Canadian Supreme Court is.

43. "Residence as De Facto Citizenship?" at 106. His essay gives briefer attention to art. 3, which (as we see below, part IV) has – as interpreted! – at least equal if not greater transformative potential.

accurately describable as: "to private life and the home, period". Instead, everyone has a (profound and real) *interest* in these goods, and has the right to pursue, use and enjoy them just to the extent that that pursuit, use and enjoyment is compatible with the rights of others, and with the just interests of those other people (interests of the many kinds referred to generically (or perhaps by samples) in art. 8(2)).

Only when made sufficiently specific to accommodate those competing art. 8(2) interests can the art. 8(1) interests be reasonably thought to be rights.[44] So the art. 8(2) interests of *other* people and groups, when they are more important interests, limit the legal protection of art. 8(1) interests. Only by establishing how much they limit it can we define what the art. 8(1) *rights* actually are. These rights, once they are thus sufficiently specified, are no wider than the ambit within which any law, policy or act impinging on them is unjustifiable (= not justified). In the many circumstances where the art. 8(2) interests are reasonably thought to be *more important* than a specific aspect of or element in an art. 8(1) interest, it was truly inept for the drafters of art. 8 to say that any law or public act which gives that thought effect is an "interference with" a "right".

Thus when Thym says that the ECtHR "extended human rights", he in fact means that it decided that the *interests* of certain immigrants, including illegal and fraudulent entrants, should in certain classes of case — classes all too vaguely specified — be regarded as *more important* than the competing interests of "society" (that is, of the country's citizens and residents individually, familially and collectively). Those competing interests include the upholding of a firm and fair immigration system so as to preserve and protect employment and forms of culture, education, defence and social life supportive of democracy and human rights. (See part VI below.)[45]

Certainly there are interests that non-citizens have, like anyone else, which are also rights simply because, for each human person (citizen or non-citizen), the description of the interest corresponds to the description of a *right*: the right, for example, not to be tortured or intentionally killed. But when a court declares that a non-citizen who entered the country illegally (clandestinely or by fraudulent misrepresentations about his identity or origins or purposes, etc.) is nonetheless entitled under art. 8 not to be required to leave the country (in effect, ever) – and that he has this entitlement because he has formed in the country some network of associations or relationships which constitute "private life" or "family life" -- the court is not, in truth, declaring a human right that the foreigner all along had, just by being a human being, a person who has an interest

44. The point is lucidly made by Lord Hughes in *R (Nicklinson) v. Ministry of Justice* [2014] UKSC 38 at paras. 263-4. In more implicit form, this will also be what the ECtHR Grand Chamber had in mind in holding in *Abdulaziz* (1985) (see n. 171 below) that although (1) art. 8 was "applicable in the present case" (para. 65), still (2) having "due regard to the needs and resources of the community and of individuals" and "the particular circumstances of the persons involved" (para. 67), the refusal of leave to the foreign spouse to enter involved no lack of "respect for family life" (para. 69) and so no violation of art. 8. This mode of analysis was "consigned to history" ("an old decision") by the majority of the UK Supreme Court in *R (Quila) v Home Secretary* [2011] UKSC 45 at paras. 43, 72, a consignment which makes technical analysis of art. 8 issues superficially clearer but overlooks the underlying point made by Lord Hughes and by the text above.

45. Especially text at nn. 199 - 200.

in those associations or relationships. Nor is it declaring a treaty-based right he or she all along had. It is declaring that that person's *interests* (subjective or objective) in private and/or family life should as a matter of justice prevail – and will be made by the court to prevail via art. 8 – over any competing *social interests* (actually the interests and wellbeing of other persons, and groups), such as those mentioned in art. 8(2).[46] And that is what Thym and countless others call "extending a right".

Many of the assessments of importance made by the ECtHR (and national courts) "extending rights" have been, or may have been, morally sound. But neither their legal learning, nor the forms and restrictions of litigation, nor domestic constitutional order, nor the international order, equipped these judges, or indeed authorised them, to take the responsibility of imposing their judgment of importance and preference on the legislatures of European states. What was extended in these decisions was the rule of judges over immigration policies and our borders.

A good many of those extensions will or may well have protected human, moral rights that in justice were rightly recognised, or *ought* to have been recognised – real, morally warranted human rights, one might say – and given effect to by the legislatures or administrative agencies. But not all were, in that sense, protections of real, morally warranted human rights. What can be said with certainty is that, under the name of human rights, those decisions extended the *legal* rights of immigrants. And in polities such as ours, this paper argues, such extensions should be made only by or under the supervision of legislatures. Legislatures can and regularly do act after informed and careful scrutiny of the whole range of competing interests, and a wide range of evidence about the side-effects, long-, short- and medium-term, of extending the legal rights protecting and promoting immigrants' interests – interests which it would certainly be an exaggeration to say are unrepresented or impotent, or even under-

46. The prescribed process of judicial reasoning is summarized in many cases, for example, in an immigration context, by the House of Lords in *Razgar* (2004) (n. 191 below) paras. 17-18. In every case where the "private life" interests -- here the interests and claims of an illegal ("irregular") "long-term" resident -- are sufficiently serious to "engage" art. 8(1), but the legislative framework authorises or requires his or her removal (or in other kinds of case, refusal of leave to enter), the authorities, overseen by the judges, must follow a process of thought suggested by art. 8(2). *First* they must consider whether that removal – an "interference with his right" -- is "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." Then, if removal (or refusal of entry) is so *necessary*, they must go on to consider whether the consequent "interference" is "*proportionate* to the legitimate public end sought to be achieved." That determination will "always involve the *striking of a fair balance* between the rights of the individual and the interests of the community which is inherent in the whole of the Convention."

    Thus it is routinely taken for granted that – but never lucidly explained how -- measures can be, in their precise content and application, both *necessary* and at the same time unnecessary (because disproportionate). And the prejudicial contrast between "rights" of the individual and "interests": of the community conceals, or at least obscures, what art. 8(2) itself indicates: community interests *include* the rights, moral, human, treaty-based and/or legal, of other individuals.

represented, in our legislature.[47]

Many people favour more or less cosmopolitan, globalist, world-government-oriented aspirations. They would like to weaken and sooner or later abolish independent states, sovereignty, self-determining peoples, and territorial state boundaries. These views, like more or less opposing views, are pre-eminently a matter for debate and decision by civil society and the country's legislature, which has constitutional authority to act – and not infrequently has acted, as in recent years in Sweden and Germany and Italy -- on more or less cosmopolitan ideals. But the only authentic jurisdiction of the Strasbourg court is to give effect to the rights declared in the ECHR,[48] which is not a compact for promoting cosmopolitan aspirations.

Nothing in the ECHR, understood as the treaty solemnly agreed in 1950, disqualifies or even undermines a citizenry's or government's or legislature's judgment that the human interests and rights — of citizens and non-citizens alike, in-country or abroad — are best respected and promoted by a very restrictive immigration policy. And by its fair and effective enforcement against those who take steps to circumvent it fraudulently or by massed or clandestine entry or in other ways unlawfully, or who even after years of residence are so criminally inclined that it is reasonable to deport them. Equally, nothing in the ECHR disqualifies radically less restrictive and more welcoming laws, even laws inspired by cosmopolitan policies.

It is not for *courts* to opt for either the welcoming or the restrictive, still less in the name of policies such as cosmopolitanism (to use Daniel

47. Cathryn Costello's informed and scholarly book, *The Human Rights of Migrants and Refugees in European Law* (Oxford University Press, 2015), argues at p. 9 that:

> To put it strongly, when the human rights of the unenfranchised migrant are at issue, the democratic credentials of elected bodies are lacking. While some aspects of migration control and migration status may be justified, by definition, the bodies setting these standards are not representative of those affected interests. Accordingly, majoritarian concerns about judicial review and human rights dissipate.

That is (she is arguing), such concerns about legitimate authority to make immigration law need not be taken seriously. But when the political facts are considered with more attention, it becomes clear that the interests of unenfranchised migrants are more effectively represented in most of today's democratically elected legislatures than are the interests of many people who have been voting for thirty, fifty, or seventy years as citizens by birth. Admission-seekers are indeed vulnerable groups, but it is simply mistaken – indeed, absurd – to think that they are "deprived of... political means to influence legislation and the political process". Accomplished persons like the author participate in bodies such as the European Council for Refugees and Exiles (106 NGOs in 40 countries collaborating in advancing the rights of refugees and exiles), the 3,500-strong Immigration Law Practitioners Association, and other groups with exceptionally effective access to legislators and national and international policy-makers.

And the thesis that in the field of migration control, majoritarian concerns about judicial review and human rights "dissipate" either asserts or entails that the views of citizens about the impact of unlawful immigration on the fate of their community do not count in the end, and that ultimate control of migration should be by judges, who will or (on this view) should have learned in law school that the "statist border control prerogatives" constitutionally exercised by legislatures are entitled to no deference and are ripe for judge-managed "transformation" (which, if the judges and "the juridical model" were to prove too slow, might in turn have to yield to the "disruptive and innovative methods of social action ... needed if the full inclusivity of human rights is to be realized": p. 326).

The present paper presupposes – but also suggests some reasons for thinking – that the rights, interests and well-being of, in principle, everyone everywhere are and will continue to be better served by structures of responsibility divided along national-state lines and prizing a constitutional separation of legislative from judicial powers.

48. ECHR art. 1 "*Obligation to respect human rights.* The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I [arts. 2-18] of this Convention."

art. 19. "*Establishment of the [European Court of Human Rights].* To ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto, there shall be set up a European Court of Human Rights."

Thym's term) that are no part of the law of the ECHR. Whether a country should have an open migration policy is up to it. The ECHR did not and properly does not commit anyone to such a policy. Nor does its true meaning and effect change so as to incorporate cosmopolitan ideals, policies or enactments during a period when they are in the ascendant, and by such incorporation to block the democratic reversal of such enactments or policies.

But Thym's exposition and historical assessment of the law is certainly correct, and instructive. "Article 8 ECHR has been employed by the judges to push the Convention [ECHR] beyond its original scope into new domains…"[49] "Certainly, the ECHR was always meant to confer rights upon non-citizens. Yet migration has been deliberately left outside the scope of the Convention."[50] In Thym's words:

> The *travaux préparatoires* show that the issue of asylum was discussed, but left outside the ECHR framework, also with a view to ongoing discussion on the 1951 Refugee Convention… while legal immigration was considered to fall within the *domaine réservé* of state sovereignty, which only carefully drafted international norms – such as Arts. 2 and 4 of the Additional Protocol No. 4 to the ECHR – would selectively limit, while maintaining the principle of state discretion in immigration matters at large.[51]

"For the first three decades of its existence, the ECtHR maintained that the ECHR does not regulate the entry and stay of foreigners."[52] But now: "The central element of the Court's new approach concerns the reconceptualization of family and private life. … As a result, long-term residence status now enjoys autonomous human rights protection independent of the family situation. This is remarkable."[53]

Thym goes on to show how the main factor limiting the ECtHR's opportunities to enforce its brand-new human right to regularize illegal stay is the fact that "most national immigration laws provide routes for regularization for migrants who could reasonably make claims" under art. 8 in that article's "remarkable" new ECtHR-imposed living meaning.[54] So, in countries where the laws of the country so provide, migrants can appeal to those laws, and only relatively rarely need to rely on an art. 8 claim. But the fact that generous-minded legislatures got there first, mostly

49. "Residence as De Facto Citizenship?" (n. 41 above) at 107 .

50. Ibid., 108.

51. Ibid. 108 n. 15. Protocol 4 was adopted in 1963. The UK has signed but never ratified it – it is not in force in relation to the UK. Its art. 2 protects freedom of movement *within* the territory of a state by persons "lawfully within the territory", and everyone's freedom to *leave* any country. Even these rights (more properly, strong interests) are declared in the same article to be subject to legal restrictions protecting interests of the sort listed in art 8(2) ECHR, plus *ordre public*. Art. 4 Protocol 4 prohibits "*collective expulsion* of aliens". Not until forty-nine years had passed did the ECtHR presume to say that maritime interdiction of, or even perhaps fences against and/or official refusals of permission for, the attempted entry of the state by masses of persons who had never entered it or its territorial waters would be "collective expulsion", a thought that the drafters of 1963 would have rejected out of hand. See part IV.B & C below.

52. "Residence as De Facto Citizenship?", 112.

53. Ibid., 114-5 (emphasis added). By "new approach" he refers to the ECtHR's decision in *Slivenko v Latvia* 48321/99 Judgment 9 October 2003 (GC).

54. "Residence as De Facto Citizenship?", 119.

unforced, only makes it clearer that Strasbourg's "push" was the assuming of a power which the states party to the ECHR had, quite reasonably, reserved to nationally debated and legislatively adopted immigration laws.

So much by way of general introduction. In part VI below, the matter reviewed is art. 8. But at this point it is convenient to consider in some depth how another article, art. 3 ECHR, has been used by Strasbourg to force open the doors to unauthorised -- even unashamedly illegal -- entrants who enter in a mass or mixed stream, among whom there is a "real risk" that there may be one or a few or some persons who might ("real risk") be ill-treated somewhere if not allowed entry at least with a view to adjudicating their claims. In Thym's brief summary, "Article 3 ECHR has [since the early 1990s] been turned into an instrument for refugee protection also in situations which are not covered by the Refugee Convention"[55] – situations which, we may add, were meant by its signatories not to be covered, but left to the self-determination of civilized states.

B. Seven Fallacies Foundational to this Revolution

Five fallacies have already been mentioned and briefly illustrated. They are closely interrelated and overlap each other

1. The first fallacy was baked into the terminology of the ECHR: that a right can be "interfered with" justifiably, by just and permissible actions or forbearances. In truth, of course, the norms identifying "interferences" as just and justified are norms specifying the limits and content of the right, a right which, properly understood, *does not extend to* such countervailing matters and conduct as involve no breach of duty, and so in all such instances is not interfered with.
2. The second is that unless a constitution or treaty/Convention is given a "living" interpretation making it provide new rules to give effect to new opinions about old problems, it is a dead or dead-letter or "anachronistic" constitution, treaty or Convention. In truth, of course, it remains alive and provides all the old answers agreed on at the time of adoption, and authorises the ECtHR to uphold and enforce them against recalcitrant, backsliding governments and public authorities in member states. New opinions should be accommodated by revision according to the agreed procedures for amendment by agreement.
3. The third was perhaps another way of articulating the second: unless an agreed provision is extended to provide new answers, the provision is empty and useless. Not so!
4. The fourth was again similar: unless rights provisions are colliding with some aspects of current governmental practice they are useless and empty. In truth of course, they are not at all empty or useless if they are being fully complied with by governmental self-discipline.
5. The fifth fallacy, again perhaps reformulating the fourth, asserts

55. Ibid., 112.

> (as the ECtHR constantly does) that unless some right (or some prohibition) is treated as extending to some domain or circumstance not previously regarded as within its scope, the right in question – or the ECHR's guarantee of it – will fail (or cease) to be "practical and effective", and will be (or become) "theoretical and illusory". Like the third and fourth, this mantra, as deployed, is always question-begging, in the strict and proper sense. Arguing in a vicious circle, the ECtHR in deploying it makes not just one gratuitous assumption but two. It gratuitously assumes that, unless extended, the right cannot be enforced against sham compliance and will become illusory. It also gratuitously *assumes* what it needs to *show*: that the right or prohibition can be extended to the new domain consistently with the scheme and wording of the ECHR *as it was meant and agreed* by the states party to its drafting and adoption.

In January 2019, in *R (Hallam) v Secretary of State for Justice*,[56] the UK Supreme Court held (by majority) that a stream of ECtHR decisions about art. 6(2) are so implausible and incoherent that our national supreme court should not follow them. Though the *Hallam* majority notices this development only once or twice in passing, the pump that was pushing this murky stream was the mantra/fallacy: rights must be broadened in scope, and supplemented with implied "second aspect" rights, lest the originally stated right be rendered "theoretical and illusory" rather than "practical and effective".

Since our supreme courts have not made this complaint about the Strasbourg's handling of the ECHR rights brought to bear on control of immigration, it is worth looking briefly at what was involved in *Hallam*. Art. 6(1) ECHR introduced a framework of rights in relation to "the determination… of any criminal charge against him". Art. 6(2) says simply: "Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law." And it is indeed obvious that this ECHR right to be presumed innocent must not be rendered illusory by artificially restricted national definitions of "criminal offence" or by national rules of proof that empty the presumption of its significance. But, beginning in 1983, the ECtHR has given art.6(2) an application extending far beyond criminal proceedings (art. 6(1)'s "determination of criminal charges"). Strasbourg did so for the reason it identified openly in 2013 (after reviewing and reaffirming 30 years of its own chaotic case law):

> Without protection to ensure respect for the acquittal or the discontinuation decision *in any other proceedings*, the fair-trial guarantees of article 6(2) *could risk becoming theoretical and illusory*. What is also at stake once the criminal proceedings have concluded is the person's reputation and the way in which that person is perceived by the public.[57]

56. [2019] UKSC 2; the majority on this point were Lords Mance, Wilson, Hughes and Lloyd-Jones.
57. *Allen v United Kingdom* (2013) 63 EHRR 10, para. 94 (emphases added).

UK Supreme Court judgments trying to make sense of the art. 6(2) case-law before and after 2013 have identified a *core of sense*: after an acquittal, public authorities must not assert or suggest that the acquitted accused ought to have been convicted (and if they do, he is entitled to compensation for damage to reputation or feelings). But, as the same judgments have noted, even this core of sense "involves a *remarkable extension* of a provision that on the face of it is concerned with the fairness of the criminal trial."[58] And the core of sense is left behind by ECtHR judgments driven by the almost absurd notion that what is *said* about the already acquitted accused in *any other subsequent proceedings* "could risk" making the fair-trial guarantees of art. 6(2) "theoretical and illusory" (even though the fair trial is behind him and no further criminal proceedings are in prospect!). Lord Wilson, in *Hallam*, para. 85, showed in detail how–

> in its rulings upon the extent of the operation of article 6(2)..., the ECtHR has, step by step, allowed its analysis to be swept into hopeless and probably irretrievable confusion. An analogy is to a boat which, once severed from its moorings, floats out to sea and is tossed helplessly this way and that.

The resulting combination of error and incoherence led Lord Wilson (and less explicitly three other Justices) to abandon the Supreme Court's policy of being "strikingly loyal" to Strasbourg.[59]

We will see in sub-parts V.A and V.B how the ECtHR decisions on art. 3, making it severely impact control of unlawful migration, have similarly, step by step, allowed the Court's radical extension of art. 3 – an extension driven by the same fallacious "risk of becoming theoretical and illusory" – to fall into "hopeless and probably irretrievable confusion". We will also see how in the *AM (Zimbabwe)* case in 2020, Lord Wilson and the rest of the Supreme Court, confronted by the latest position of the ECtHR's unmoored art. 3 boat – and aware of its collision with the core of sense that had been found for it in 2005 by an exceptionally energetic and careful rescue mission by the Law Lords, gratefully followed by the Grand Chamber majority in 2008 – brushed aside that rescue operation and tied our law to the helplessly drifting and tossing ECtHR boat.

Why this difference of approach by the Supreme Court – on the one hand the 2019 art 6(2) extension case (*Hallam*) and on the other hand

58. *Serious Organised Crime Agency v Gale* [2011] UKSC 49 para. 34 (emphasis added) (Lord Phillips, for the majority) quoted with approval by Lord Mance in *Hallam* at para. 37.

59. He had said:

> 87. I turn to this court's duty under section 2(1)(a) of the Human Rights Act 1998 [the 1998 Act] to "take into account" any relevant judgment of the ECtHR. Inevitably there have been a number of observations in this court, and in the appellate committee which preceded it, that the duty to take account of such a judgment should almost always lead our domestic courts to adopt it. Particularly in the early years of the life of the 1998 Act, the UK courts were strikingly loyal to the judgments of the ECtHR notwithstanding the open texture of section 2(1)(a)...

But the review of art. 6 case-law led him to the conclusion:

> 94... (e) But I regard myself as conscientiously unable to subscribe to the ECtHR's analysis of the extent of the operation of article 6(2) and thus to declare to Parliament that its legislation is incompatible with it.

the 2020 art 3 extension case (*AM (Zimbabwe)*[60])? The answer can only be speculative. Art. 6(2) deals with lawyers' law. The chaotic ECtHR extension here threatens the rule of law proximately and directly, by demanding, at best, opacity in judgments and, at worst, distortion or frustration of many legal proceedings in which the conduct of an acquitted person comes up for re-examination for the purposes of compensating him, or compensating the complainant in the unsuccessful criminal proceedings, or protecting the child he was acquitted of abusing. But art. 3, as extended, deals with questions quite different in themselves from how to conduct legal proceedings – the question whether to admit, or to deport, or to deploy taxpayers' funds and medical resources – and in these wider fields, the ECtHR's transformation of itself into a law reform agency meets more approval among our judiciary:

> 84. We afford profound respect to the decisions of the ECtHR and recognise its *unparalleled achievements in raising the standards* according to which member states of the Council of Europe, undoubtedly including the UK, must treat their people.

The words (of Lord Wilson in *Hallam*) here italicized convey a respectable *political* assessment. But the ECHR was about upholding and enforcing treaty-agreed standards,[61] not about empowering a set of judges to give effect to their own opinions about which of those agreed standards should be "raised," and what counts as raising rather than corrupting them.

60. *AM (Zimbabwe)* v *Home Secretary* [2020] UKSC 17 (argued 4 December 2019, decided 29 April 2020), para. 34 (Lord Wilson, for the Court):

> Our refusal to follow a decision of the ECtHR, particularly of its Grand Chamber, is no longer regarded as, in effect, always inappropriate. But it remains, for well-rehearsed reasons, inappropriate save in highly unusual circumstances such as were considered in *R (Hallam) and R (Nealon) v Secretary of State for Justice (JUSTICE intervening)* [2019] UKSC 2, [2020] AC 279.

Highly unusual? The "circumstances" considered in *Hallam*, insofar as they concerned the ECtHR's case law, argumentation, inconsistency, etc. were not so unusual as to find no parallel in the circumstances constituted by the sequence of art. 3 cases considered in part V below. The art. 3 sequence involves somewhat fewer steps in the "dialogue" between the ECtHR and the UK courts, but the elements are the same, including the same fallacy-driven extension, the UK judges' rescue mission, successful and adopted by the ECtHR for a time and then ditched with neither explanation nor (as Lord Wilson points out) candour by the ECtHR.

61. "No one expected that the minority would modify their legal systems in order to bring them into line with a Protocol acceptable to the majority. It was thus the task of the experts to find texts … which represented the minimum standards obtaining in Western Europe as a whole" (A.W. Brian Simpson, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention* (Oxford University Press, 2004), 791 (ch. 15, text at fn 121), quoting a formal and, it seems, universally well-received British statement to the meeting of Ministers and Advisers, 30 April to 1 May 1951). Simpson comments that this corresponds to the position taken more generally by the Juridical Section [committee] that launched the drafting of the Convention itself in 1949 and that said of its proposals:

> It is applicable to States possessing different constitutional systems, and which do not have precisely the same criteria in the matter of rights and liberties. In addition, this provisional solution appears as readily acceptable to governments, since it does not require any modification of the constitutional laws of their countries.

(ibid 661, commentary by the Juridical Section on its draft Convention, 12 July 1949, emphasis added). Again, the motion proposed by the chairman of that Section and 44 others and acted upon if not adopted in August 1949 by the Consultative Assembly was for a Convention:

> *to maintain intact* the human rights and fundamental freedoms assured by the *constitutions, laws, and administrative practices actually existing* in the respective countries *at the date of the signature of the convention.*

(ibid 671, emphasis added).

Two further fallacies. These again are inter-related, and they shape the ECtHR's mishandling of the "absolute" obligation enshrined in art 3 ECHR. They are:

> 6. If a norm(rule) is absolute (unqualified, exceptionless), it should be interpreted broadly, and
>
> 7. such a norm must entail associated positive obligations, which must or at least can also be absolute.

In truth, however, critical theoretical study of norms (= rules, standards guiding and assessing choice) has shown that any norm which absolutely (= exceptionlessly, whatever the circumstances) excludes from deliberation and choice any and every act (or deliberate omission) of a certain type must, and will, conform to a certain logic.

Some scholars hold, and others deny, that there are absolute moral norms, true moral propositions picking out and banishing from deliberation certain types of act. But there is wide agreement that, if there are such norms, each of their specifications of a prohibited type of act must be *by reference to the intentions* (object(s), purpose(s)) with which the conduct or behaviour involved in the act is chosen (and carried out).[62] That is to say: however benevolent and beneficial one's further ends are, one must not have *a purpose* (intention, object) of engaging in an activity, or bringing about a state of affairs, of the type specified and condemned by that exceptionless moral norm.[63] If a system of moral thought includes such absolute norms -- or if a legal system or treaty accepts or lays down and includes such norms -- it can avoid incoherence only by keeping them (the type) *restricted* to acts intended to cause the harm against which the norm seeks to protect. At least in their absolute, indefeasible force, such norms cannot – on pain of inexorably generating incoherent, contradictory prohibitions – be taken to extend to exceptionlessly prohibiting also the unintended creation of a risk that effects (or states of affairs) of that sort will occur.

In short: logic requires that a norm's absoluteness be so understood that its scope as an absolute is *narrow*, and no broadening of its scope as an

62. Some philosophers argue that the specification could be limited to *actions* as opposed to omissions. But this goes against the entire movement of modern criminal law, and the sense of ethical responsibility extending to deliberate omissions *intended* to result in effects which the chooser has some responsibility and capacity to avert (parent deliberately starving his child; co-pilot, intent on crashing the plane, deliberately omitting to open the cockpit door (locked by the exiting captain) to allow the captain to return and save the aircraft; etc.). It is intentions and intended effects that matter, not the presence of physical behaviour as such (or the precise route by which efficaciously intended and willed effects are caused)..

63. Torture, as defined in the U.N. Convention against Torture or Other Cruel, Degrading or Inhuman Treatment (1984), exemplifies such an act-specification (= act-type-specification) in terms of object, i.e. of what is *intended/purposed as a means*:

> For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

Note that "intentionally", by itself, without the "for such purposes as", would not necessarily connote *intent* or *purpose*, since in idiomatic English it is contrasted with "unintentionally", which connotes accident or mistake or lack of foresight. See *Intention and Identity* (n. 16 above) at pp. 142, 184, 190.

absolute is allowed.[64]

A couple of hypothetical examples. Even if preventing P from entering a country or domain "causes", by side effect, a real risk that he will be killed outside by his enemies, it is nonetheless irrational not to compare with that risk the real risk that if he *is* allowed to enter *he* will kill *his* enemies Q and R and S.... So the norm absolutely prohibiting intentional killing cannot rationally be extended to prohibit doing an act knowing (but not intending) that it "creates" – better, leaves unaverted and uneliminated – a real risk of intentional killing.

Or again, judges choosing to impose a sentence of imprisonment may well be aware that doing so imposes on the convict a real risk of abusive, degrading treatment (e.g. of his becoming the victim of vicious offences such as rape in prison by other prisoners); but letting the convict go free will create a real risk that he (and others) will commit vicious offences which *his* victims would otherwise have been spared. So the absolute norm against subjecting anyone to degrading treatment (art. 3 ECHR) cannot absolutely rule out sentencing to imprisonment, for there are circumstances in which *not* sentencing to imprisonment *would incur the same kind of risk of the same kind of bad outcome*. (But, of course, when sentencing in face of risk of bad treatment in prison, it would be unjust not to try to reduce the risk of abuse.) We are all morally (and often legally) responsible for the foreseen or reasonably foreseeable side effects of our actions and omissions. But, on pain of incoherence, moral (and legal) assessment of right and wrong in causing side effects *cannot* be guided by any of the exceptionless negative norms that identify as always ("absolutely") wrong certain types of *intention* and *carrying out of intention* – torturing, for example. All the norms (moral or legal) for assessing side-effects are – rationally must be – non-absolute: considerations of fairness, fidelity to undertakings, relative risks, and so forth.

The Strasbourg doctrine that art. 3 is absolute, and absolutely prohibits *causing* a real risk of conduct[65] or effects[66] of a kind referred to in the article, entails – necessarily results in – the sort of incoherence outlined in the previous five paragraphs.[67]

Having given unilateral priority to (a) eliminating a risk of one sort of

64. Contrast the ECtHR's doctrine, at nn. 101, 146 below. Lord Bingham saw the point, but put it too weakly, in *R (Pretty) v DPP* [2001] UKHL 61, [2002] AC 800 at para. 13: "the absolute and unqualified prohibition on a member state inflicting the proscribed treatment requires that 'treatment' should not be given an unrestricted or extravagant meaning." This is weak, because tautologous, since meaning is never unrestricted and should never be ascribed or identified extravagantly; but we can see what he was – correctly -- driving at. (Unfortunately, in the next paragraph he accepts without criticism the ECtHR holding in *D v UK* (1997) 24 EHHR 423 (a holding discussed below in part V.A) which extends the line of cases begun in *Soering* (n. 72 below), that there is art. 3 "treatment" when the state's "direct action against" D will have "the inevitable effect" of severely increasing his suffering (even though the suffering results from his disease, and the state action of removal – on account of his bad criminal record and bad immigration history– was not aimed at terminating his (NHS) medical treatment); and in *Paposhvili v Belgium* (2016) the ECtHR Grand Chamber relaxed "treatment" to include cases where the state action of flying someone from the UK to his home country would create a "real risk" that, given that country's relative lack of medical facilities, his life might be significantly shorter than if he remained on NHS treatment indefinitely: see at nn. 146 and 159 below.)

65. E.g. *Chahal v UK* (22414/93) 15 November 1996 (Grand Chamber [GC]), at n. 86 below.

66. E.g. *D v UK* 24 EHHR 423, (30240/96) 2 May 1997 (Chamber), n. 146 below.

67. This logical issue about exceptionless prohibitions first plainly articulated in modern philosophy by G.E.M. Anscombe, *Ethics, Religion, and Politics* (Oxford: Blackwell, 1981), 58. See also John Finnis, *Intention and Identity* (n. 16 above) at 195-6; Joseph M. Boyle, "Intention, Permissibility, and the Structure of Agency", ACPQ 89 (2015) 461-78; John Finnis, *Fundamentals of Ethics* (Oxford: Oxford UP, 1983) 112-20; *Moral Absolutes*, 67-73.

bad side effect over (b) eliminating the risk of the bad side effects of its doing (a), the Strasbourg court has gone on to add a further dimension of arbitrariness to its handling of art. 3. For, again ignoring the logic of moral absolutes, the Court has compounded the problem by treating art. 3's *force* (namely, as exceptionless) as a basis for answering the question "What is art. 3's *scope*?". To the question whether art. 3 is a narrow, precise norm, or an expansive one (catching many kinds of action and omission), the ECtHR has given exactly the wrong answer. It has inferred that the article's scope must, precisely by reason of the article's force, be expansive! The inexorable result of this fallacy is explained in V.A below, in relation to the ECtHR's decision in *N v UK*. That decision makes visible the incoherence, the self-contradictoriness, that the logic of exceptionless norms makes inevitable.

No one seems to have answered the proposition with which Lord Justice Laws concluded a careful analysis of the case-law around art. 3 as that stood in 2004:

> Article 3 is said to be absolute… But the term is misleading. …if it is taken to mean that the executive government *in no case* has any legitimate power of judgment whatever as regards the protection of individuals from suffering which is inhuman or degrading to the extent which article 3 contemplates, then it is false.[68]

In sum, Art. 3 makes perfect sense as an absolute norm, but only if its scope is understood as the forbidding of any and every *intentional* (= deliberate) subjection of someone to torture or inhuman or degrading treatment. It is not a coherently intelligible norm if it requires absolute avoidance of the subjecting of anyone to the risk of suffering (whether at someone's hands, or from impersonal causes). For this (besides being a norm whose judicial imposition flouts the Rule of Law) is not a norm that can be adhered to exceptionlessly. Occasions will arise when adhering to it entails violating it.

68. *R (Limbuela) v Home Secretary* [2004] EWCA Civ 540, [2004] QB 1440 at para. 67. His further conclusion that the "legal reality" of art. 3 "may be seen as a spectrum" of kinds of state decision was in varying terms and tones disapproved by most of the Law Lords on appeal in *R (Limbuela) v Home Secretary* [2005] UKHL 66, [2006] 1 AC 396, but with no good reason, and no alternative way of describing or handling the variety of situations to which the "living" interpretation of art. 3 has been applied.

IV. Art. 3 as "absolute": non-refugee "humanitarian protection"

At first glance, the legal doctrines and decisions considered in this Part may not seem to concern the way Britain maintains its borders – how officials handle *incomers*, first at the border and then with more opportunity for investigation and due consideration of facts, law and merits. What the development of these doctrines directly concerned was expulsion – the conditions under which states can *expel* someone from their territories. Still, expulsion (or the power to do it) is an important part of maintaining borders. And the judicial development of doctrine, sketched in this Part, has great impact on the wider aspects of immigration control discussed in Parts V, VI and VII, aspects which make little sense without an awareness of the judge-created restrictions on expulsion.

A. Introduction to art. 3 ECHR

At the climax of this development of doctrine, in *Hirsi Jamaa* (2012), the Strasbourg court decided, in substance, that turning away boatloads (and presumably crowds on dry land) is *refoulement* and *expulsion*, regulated by all the art. 3 prohibitions and restrictions on removal that the Court had developed over 20 years, and reinforced by a confessedly new and expanded understanding of the ECHR's prohibition on "collective expulsion" (art.4 Protocol 4). Even though the prohibition on "collective expulsion" does not apply to the UK since its EU Charter equivalent ceased to be part of UK law on 1 January 2021, *Hirsi Jamaa* will in its reasoning and its result continue to affect profoundly – even after the ECtHR's 2020 pause (IV.D: *MN and NT v Spain*) – how UK officials can handle mixed flows of immigrants, both at airport "borders" and in the Channel and other UK waters and their coasts. Concerning the only measures likely to stem a large mixed influx, *Hirsi Jamaa* says in substance that such measures not only amount to collective expulsion strictly forbidden by art. 4 of Protocol 4 ECHR (a protocol that itself does not apply to the UK), but also (collective or not) are absolutely forbidden by art. 3 ECHR (which does apply to the UK).

Art. 3, headlined "Prohibition of Torture", says simply: **"No one shall be subjected to torture or to inhuman or degrading treatment."** Its original public meaning certainly was and is this: it prohibits absolutely, i.e. exceptionlessly, indefeasibly, every choice – whatever the circumstances

– to subject someone to torture or to inhuman or degrading treatment. That is, it prohibits every choice to do or omit something *in order that* – with intent that[69] – someone be subjected to some such treatment. That meaning, with that exceptionless force, is confirmed by art. 15(2)'s stipulation that art. 3 (like arts. 2, 4(1) and 7) *cannot* be derogated from (that is, set aside, even temporarily) on the ground that the exigencies of war or public emergency, even emergency *threatening the life of the nation*, call for it to be set aside.

The Strasbourg court has taken art. 3 and deployed it to create a whole system for compelling states to grant political and non-political asylum – or right of entry and abode under humanitarian ("secondary") protection.[70] In doing so, the Court has defied (or been unconscious of) the logic of absolute norms. It has, equally, defied the intentions of the signatories of the ECHR. Those intentions, very deliberately formed, were confirmed in the nearly contemporaneous adoption of the UN's Convention on the Status of Refugees, art. 33.

The general rationale of the judicial deployment of art. 3 ECHR is stated by the ECtHR in *Pretty v UK* (2002). That was a case about assisting suicide, far removed from migration and asylum, and from torture. The rationale stated in *Pretty* is as follows:

> [1] …art. 3 has been most commonly applied in contexts in which the risk to the individual of being subjected to any of the proscribed forms of treatment emanated from intentionally inflicted acts of state agents or public authorities. [2] It may be described in general terms as imposing a primarily negative obligation on states to refrain from inflicting serious harm on persons within their jurisdiction. [3] However, in light of the fundamental importance of art. 3, the court has reserved to itself sufficient flexibility to address the application of that article to other situations that might arise.[71]

Now, if this "reserving to" the judiciary of an open-ended power were

69. See n. 63 above.

70. This regime is not the only doctrinal structure created by the Court on the back of art. 3 and "living instrument" methodology. A concertina-like range of state duties to investigate serious crimes or even civil wrongs (whether committed by public officials or not), and to compensate persons for failures to sufficiently carry out these duties, is now growing alongside and (despite some judges' protests) in competition with classic principles of tort: see the discussion of authorities and doctrine in *Commissioner of Police of the Metropolis v DSD* [2015] EWCA Civ 646 especially paras 44 – 46, 50 (Dyson MR for the Court). There is pressure, so far resisted, for an "art. 3-based" duty to investigate alleged breaches of "art. 3-based" duties not to return or deliver to real risk (and presumably to investigate alleged breaches of the duty to investigate…): see *Al-Saadoon v Defence Secretary* [2016] EWCA 811, n. 82 below. In any event, the ECtHR accepts that these affirmative (positive) art. 3 duties (even if non-derogable under art. 15) are *not* absolute (but rather circumstance-relative in strength), whereas its asylum regime, discussed below, is constructed largely by inflating art. 3 obligations by *unadmitted* extension far beyond their exceptionless ("absolute") paradigm (core).

71. *Pretty v UK* (2002) 35 EHRR 1 at para. 50 (enumeration added). Notice that "risk" in sentence [1] immediately stretches art. 3 beyond the paradigm of torture (and other intentional infliction of suffering or indignity). The paradigm or central case of torture (see n. 63 above) is *not* of intentionally doing something from which there "emanates" a "risk" that X will suffer great pain. Torture properly speaking is: doing something that causes X great pain with intent that it cause X that pain – doing something in order to subject X to such pain.

Similarly, there can be little doubt that the word "treatment" in art. 3 was intended to mean, and meant, ways of dealing with ("treating") a person that are intended to (= chosen in order to) degrade or dehumanize him – and not simply, as sentence [1] claims, intentionally doing something from which, *contrary to the acting person's (official's, state's) intentions and hopes and precautionary efforts*, there emanates a risk that X will undergo degradation or dehumanization as a result (side effect) of Y's acts or of some non-human causality (unpleasantly lethal or disfiguring disease, for example).

really based on no more than "the importance of" art. 3, it would amount to usurpation – for the same importance would surely have led the drafters of the Convention to make their own provision for such "other situations", that is, to impose some positive duties, such as to take steps to prevent, or steps to investigate. It is often argued that they did. For art. 1 ECHR provides that "The High Contracting Parties shall *secure to everyone within their jurisdiction* the rights and freedoms defined in [arts. 2 – 18] of this Convention," and it is not certainly or unquestionably mistaken to take art. 1 as imposing on states the *implied duty* to take reasonable steps to *prevent* the imposition of art. 3 mistreatment on anyone within their jurisdiction. And it is not obviously unreasonable to speak of that (allegedly) implied duty as a *positive* obligation impliedly *imposed by art. 3 (read with art. 1)*; or to observe that the importance of art. 3 entails that the relevant implied positive obligation is a weighty one.

But when states have argued that this implied positive obligation (to protect persons from the risk that *other* states or persons will violate their art. 3 rights) must, though weighty, be limited (qualified) by a state's *other* positive obligations to protect its citizens from abuse or violation of *their* human rights, the ECtHR has in many leading cases replied with the mantra that art. 3 is an absolute, and is unconditional and unqualified in its command not to do anything that would *expose someone to real risk* of art. 3 abuse, or of undergoing – anywhere in the world – sufferings similar, as sufferings, to those that that state itself might intentionally (and unlawfully) inflicted – even sufferings not intentionally imposed by anyone at all.

The resultant range of positive obligations cannot be "absolute". That follows from the very logic of norms (see III.B above). And even when "absolute" is watered down to "unqualified by consideration of the complainant's own conduct", the resultant positive obligations far exceed anything that those who drafted and accepted art. 3 intended thereby to impose -- or would have accepted that it could extend to imposing (see IV.C below). For that resultant is an open-ended (and judicially enforceable) set of positive responsibilities of the state: to provide protection, residence rights, food, housing and healthcare (not to mention compensation for injuries, assistance in suicide, and much else). The defiance of the founders' intention is all the more evident given that art. 3 not only is non-derogable even to avert threats to the life of the nation, but also makes no reference to competing individual or communal interests *and rights* that might qualify its implied positive obligations, in line with qualifications or limitations stated in the ECHR's later articles.

B. From no extradition (Soering) to no push-back (Hirsi Jamaa)

The ECtHR did not launch its "living instrument" extension of art. 3 until forty years after the ECHR's entry into force. Characteristically, its first move was much more cautious than is usually noticed: its *essential*

reasoning is largely defensible, and does not provide the support it has subsequently been taken to give to the regime of asylum law erected "on the basis of" art. 3.

Soering (1989)

The decision in *Soering v UK*[72] was -- in substance if not in all its articulations – a decision that remained at least in large part coherent with, and respectful of, the rational requirements of an exceptionless norm (= rule, standard). The ECtHR ruled that extraditing the fugitive German citizen Soering from the UK -- to face charges for murders committed by him in the US -- would violate art. 3 by subjecting him to inhuman treatment, since conviction in the US might result in a long period on death row.[73] Now extradition is a process for surrendering someone to a foreign state[74] *so that* he can and will be subjected to the legal processes and process-based treatment of the requesting state. So in this case extradition included the conditional purpose (intent) of enabling Soering to be sentenced to death (if, that is to say, he were to be convicted of capital crime and sentenced to death). The purposes (intentions) of the UK[75] were bound to track (some of) those of the requesting and receiving state, and included the conditional intent that he be punished in any manner authorised in that state – which in a case such as this includes a manner that the ECtHR judged inhuman. We can even describe this conjunction or overlapping of intentions (purposes) as complicity of the UK in the inhuman US treatment, a kind of complicity that involves *mens rea* ("guilty mind"). It involves no element of "strict" liability (liability for consequences one causes, more or less regardless of whether one intended them).

So, if this rather precise understanding of what distinguishes extradition from simple deportation (or expulsion, or even hand-over) is correct,

72. *Soering v UK* (14038/88) 7 July 1989 (Plenary), para. 102.

73. The ECtHR could not and did not say that capital punishment itself is a violation of art. 3, for even the "abolition of the death penalty" by art. 1 of Protocol 6, adopted in 1983 (and amending art. 2 of the ECHR itself by cancelling its permission of the death penalty), was subject to exception "in time of war" (art. 2 Protocol 6). (Protocol 13, adopted in 2002 and in effect from 2003, abolished the death penalty in all circumstances, for ratifying ECtHR members, that is, all members save Russia, Azerbaijan and Armenia.)

74. Thus the key interpretative sentences in *Soering* (para. 88) are:

> ...were a Contracting State knowingly to surrender a fugitive to another State where there were substantial grounds for believing that he would be in danger of being subjected to torture, however heinous the crime allegedly committed. Extradition in such circumstances, while not explicitly referred to in the brief and general wording of Article 3 (art. 3), would plainly be contrary to *the spirit and intendment of the Article*, and in the Court's view this inherent obligation not to extradite also extends to cases in which the fugitive would be faced in the receiving State by a real risk of exposure to inhuman or degrading treatment or punishment proscribed by that Article (art. 3). (emphases added)

By appealing to the "spirit and intendment" of art. 3, rather than to "ordinary meaning" as required by the Vienna Convention on the Law of Treaties, or even simply to the article's "intent", the Strasbourg court implicitly concedes that it is departing from the Convention *as intended and meant by its signatories*.

The idea of interpreting by reference first and foremost to "spirit" has been embedded in the doctrine of the ECJ/CJEU since 1964. But the flavourful phrase "spirit and intendment" seems to have come from English charity law; before the Charities Act 2006 (now consolidated in the Charities Act 2011) codified what counts as a "charitable purpose", the test was whether a purpose was within "the spirit and intendment" of the preamble to a statute of 1601, and the flexibility with which the courts deployed the phrase over centuries is captured by the codifying provision (2011 Act s. 2(1) with 3(1)), which lists 12 classes of purpose and then a 13th: "any purpose that may reasonably be regarded as analogous to, or within the spirit of, any purposes falling within" those 12 classes; and a 14th: "any purpose that may reasonably be regarded as *analogous to, or within the spirit of*, any purposes which *have been recognized* [under charity law] as falling within" any of the classes referred to.

75. This is settled not by the hopes and desires of UK officials involved in the extradition, but by the rational content of the plan proposed by the US extradition request and adopted by the UK's agreement accordingly to extradite.

Soering is, in itself, a limited decision.[76]

Cruz Varas (1991)

The judicial extending and refashioning of art. 3 began to take on a radical character within two years, in *Cruz Varas v Sweden*.[77] For this case was about expulsion, not extradition. Ignoring the consequent difference in the intentionality of the removing state, the plenary ECtHR held that art. 3 applies equally to expulsion, since this too is "action which has as a direct[78] consequence the exposure of an individual to proscribed ill-treatment."[79] The Court in *Soering* had inserted into its judgment this broad formulation, in which causality ("direct consequence") silently replaces complicity in the proper sense (intent to assist). And now the Court in *Cruz Varas* took up this formula, and by treating it as fundamental left all trace of real complicity behind. As is usual if not universal in ECtHR jurisprudence, profound shifts of doctrine occur in inconspicuous phrasing, and then are made without any acknowledgement of their significance[80] — of their great logical implications for the law, and their great consequences for the future of ECHR states, their governments and their peoples.

The extension of art. 3 carried forward in *Cruz Varas* fails to answer the UK's principal argument in *Soering* (an argument which the *Soering* judgment buries in its fleeting report of six UK arguments, and then evades):

> it would be straining the language of art. 3 intolerably to hold that by surrendering a fugitive criminal the extraditing State has "subjected" him to any treatment or punishment that he will receive following conviction and sentence in the receiving State.[81]

76. This conclusion, focussed on "...treatment", is independent of any issue about the soundness of its assumptions or holding about "inhuman...".

77. *Cruz Varas v Sweden* (15576/89) 20 March 1991 (Plenary). Hector Cruz Varas was one of about 30,000 Chilean citizens whom Sweden received after the Pinochet coup against the Allende government in 1973. Sweden granted asylum to "a large proportion" of them (para. 51) but refused asylum to him despite his increasingly detailed allegations of torture; he was deported to Chile in October 1989 (more than a year after the lifting of the state of emergency; a plebiscite rejection of Pinochet's rule; the commencement of return of exiles; and the initiating of democratic processes leading to constitutional amendment in July 1989). Cruz Varas's claims to have been tortured were in the end treated by the ECtHR as not credible, and his application to the ECtHR under art. 3 was dismissed on the facts.

78. On the inherent ambiguity of the term "direct" (in relation to actions, causes, consequences, etc.) – between *intended* and (not intended but) *causally immediate*, see "'Direct' and 'Indirect' in Action" (2001), in *Intention and Identity* (n.16 above), 235-68.

79. *Cruz Varas* para. 69, citing *Soering* para. 91. On the facts, an 18: 1 majority held that this expulsion did not expose Cruz Varas to a real risk of torture etc. in Chile and so did not violate art. 3. The nine judges who dissented on a more procedural aspect of the case asserted that *Soering* itself extended to "extradition and expulsion", and that "It cannot be otherwise, since the Convention provides for a real and effective protection of human rights for all persons present in the member State; their governments cannot be permitted to expose such persons to serious violations of human rights in other countries." Here, and throughout Strasbourg art. 3 jurisprudence, "expose" equivocates between intention and effect. So, to the extent that it refers to side effects, the passage is a *petitio principii* – that is it begs the question, in the strict sense of that phrase: it uses its conclusion as a premise, and is thus emptily circular as reasoning.

80. "70. Although the present case concerns expulsion as opposed to a decision to extradite, the Court considers that the above principle also applies to expulsion decisions and a fortiori to cases of actual expulsion."

81. *Soering* n. 72 above, at para. 83.

Certainly the linguistic strain is tolerable when, as in *Soering*, there is *complicity* – intent to assist, say, torture.[82] But when (a) complicity is replaced by efforts to *avert* an evil considered to be possible (really possible) rather than *probable*, and (b) the action that happens to have the side effect of making (as one necessary causal condition among others) that evil possible is an action (removal out of our country) motivated only by urgent concern to protect the rights of citizens of the expelling state, then (c) the now ignored UK point shows its truth.

For it is impossible to say that "the ordinary meaning to be given to the words ['to subject to torture…'] in their context"[83] extends to a case where the expelling state has no complicity in the receiving state's past or future possible misdeeds but, rather, has urgent rights-based reasons for the expulsion. For instance, it would be unreasonable to say that (to adapt the facts in *Chahal*)[84] the *UK subjected or was complicit in subjecting Chahal to torture … contrary to art.* 3 if, in the event and in line with the assurances extracted by the UK from India, he was left unmolested by India after his expulsion from the UK and return to India. And it would be absurd to say so if, in the event, he was unexpectedly welcomed by a new government with garlands and honour. But in cases where there is no complicity, the Court's doctrine has these implications.[85]

There will, of course, be cases where a combination of the high probability and significant gravity of harm makes it unreasonable and unjust to cause/incur it when the intended good effects are to some extent uncertain and the risk to citizens of the expelling state is low. But in considering this, one has left behind the indefensible risk-based absolute

82. Or perhaps also intention's functional rough equivalent, recklessness: knowledge of probability along with an *unwarrantable* ("reckless") inattention to the reasons for trying to avert the evil or to avoid making it possible. *Soering*-type extradition is, of course, near the outer margins of complicity in the punishments legally available, but is I think within those margins. What counts as complicity may come into focus now that, a generation later, the courts are resorting to the presence or absence of complicity as a basis for limiting the reach of art. 3 ECHR, in face of claims that it imposes on a state not only (A) a duty not to torture etc. and (B) a duty not to expel in face of real risk of torture etc. but also (C) a duty to investigate alleged breaches by its agents of the type-(B) duty (which could also mature into (D) a duty to investigate alleged breaches of the type-(C) duty…). *Al-Saadoon v Defence Secretary* [2016] EWCA Civ 811, at paras. 138, 142, holds that there is no type-(C) duty unless the alleged breach of the type-(B) duty involved at least *complicity* in the alleged type-(A) breach.

83. Vienna Convention on the Law of Treaties art. 31(1).

84. *Chahal* n. 65 above and n. 86 below.

85. For an instance of the confusion and fictions the courts have fallen into in face of this self-inflicted problem, consider this passage from the (otherwise reasonable) decision of the Supreme Court in *Lord Advocate (Taiwanese Judicial Authorities) v Dean* [2017] UKSC 44:

> 26. In *Bagdanavicius* [[2005] 2 AC 668] Lord Brown of Eaton-under-Heywood, who gave the leading speech in the House of Lords, observed (para. 7) that it has long been established that article 3 imposes an obligation on the part of a contracting state not to expel someone from its territory where substantial grounds are shown for believing that he will face in the receiving country a real risk of being subjected to treatment contrary to that article. He cited *Soering v United Kingdom* (1989) 11 EHRR 439 as the initial authority for the principle that t*he act of expulsion in such a circumstance constitutes the proscribed ill-treatment*. The expulsion itself breaches article 3 if such risk in the receiving country emanates either from acts of the public authorities of that state or from persons or groups of persons who are not public officials. In the latter circumstance, it is not sufficient to show that there is a real risk of suffering serious harm at the hands of non-state agents. In para. 24 Lord Brown deprecated a failure in such cases to distinguish between the risk of serious harm on the one hand and the risk of treatment contrary to article 3 on the other. He said: "In cases where the risk 'emanates from intentionally inflicted acts of the public authorities in the receiving country' (the language of *D v United Kingdom* (1997) 24 EHRR 423, 447, para. 49) one can use those terms interchangeably: the intentionally inflicted acts would without more constitute the proscribed treatment. Where, however, the risk emanates from non-state bodies, that is not so: any harm inflicted by non-state agents will not constitute article 3 ill-treatment unless in addition the state has failed to provide reasonable protection. … *Non-state agents do not subject people to torture or to the other proscribed forms of ill-treatment, however violently they treat them:* what, however, would transform such violent treatment into article 3 ill-treatment would be the state's failure to provide reasonable protection against it." (emphases added_

and is in the zone – one of duty to secure rather than duty to refrain – where the criterion is relative to proportion and disproportion of means to end(s), and involves the Golden Rule, consideration of commitments, mutual expectations, reciprocity of burdens, and so forth.

Chahal (1996)

Chahal v UK[86] gave a definitive ruling that amounts to this: an expelling state is liable under art. 3 even though it is in no way complicit in any possible torturous or inhuman intentions of the receiving state. It is liable whatever the gravity of the risk to its people which the state seeks to avert by someone's expulsion, and whatever the extent of the precautions it takes against torture or inhuman treatment of the expellee by the receiving state.

The UK actively and (it seems) bona fide sought (and received) assurances and reassurances that Chahal "would have no reason to expect to suffer mistreatment of any kind at the hands of the Indian authorities".[87] for the UK wished to deport him not in order to advance any purpose of India but exclusively to protect the UK's own citizens (and others in the UK) from bad consequences (including human rights violations) really possible at the hands of Chahal or his accomplices if he were not deported. But the plenary ECtHR held that, nevertheless, he must not be deported. The deportee's activities in the expelling state, "however undesirable or dangerous, cannot be a material consideration."[88] The extreme implications of the *Chahal* decision became explicit in *Saadi v Italy*.

Saadi (2008)

In *Saadi v Italy*,[89] the UK intervened[90] to argue (in effect)[91] that where a removing state (1) had no intentions of the kind prohibited by art. 3, and (2) had no complicity in any intentions of that kind on the part of the receiving or any other state, and (3) had sought and obtained assurances from the receiving state that it too had no such intentions and forbad them, and (4) was proposing to remove the foreign national of the

86. *Chahal v UK* (22414/93) 15 November 1996 (GC).

87. *Chahal* at para. 35.

88. *Chahal* at para. 80.

89. *Saadi v Italy* (37201/06), 28 February 2008 (GC).

90. In the years immediately preceding *Saadi*, a number of other states besides the UK were planning to intervene in the next appropriate case before the Grand Chamber to support the UK in overturning or restricting the implications of *Chahal*; the briefs of some of them were available on the internet. The ECtHR's unsatisfactory procedures seem to have resulted in a procedural ambush, whereby only the UK discovered (in time to intervene) that the Grand Chamber intended to hear *Saadi* before *and instead of* (!) the long-awaited appeals for which those briefs had been prepared. Italy's case being argued with legally inexplicable weakness, the UK alone was heard on the merits and limits of *Chahal*, by a Grand Chamber intent, as emerged, on a maximalist interpretation and application of *Chahal*. This was a procedurally dubious episode, capped with a formally elegant but substantively bad judgment.

91. See *Saadi* paras. 119 -122. The Home Secretary, John Reid, stated to the House of Commons on 24 May 2007 (*HC Deb*. col. 1433):

> We wanted to deport foreign terrorist suspects, but were prevented from doing so by the courts' interpretation of article 3 of the ECHR and particularly by the *Chahal* judgment, an outrageously disproportionate judgment stating that we cannot deport a terrorist suspect if there would be any threat to him if he were sent abroad. We must have regard to that, but we are prohibited from having regard to the threat that will be posed to the other 60 million people in the country if he remains here. That is outrageous.

For "any threat" he should, strictly, have said "any 'real threat'".

receiving state exclusively to protect the rights of persons in the removing state, rights – especially the right to life under art. 2 – that were at real risk from the presence of the deportee, then (5) its removal of him need be no violation of art. 3. The UK argument was, in substance, that once intention and complicity (intention or recklessness) are excluded, there rationally remains only a fair comparison of risks of bad consequences of the kind which art. 3 seeks to avert; outside the zone of intention (complicity), the reach and force of art. 3 cannot be absolute. It must, rationally, be relative to comparative risks in the various possible circumstances.

This sound argument was brushed aside or overlooked by the ECtHR in a judgment notable for its viciously circular refusal to engage with the UK argument that art. 3 cannot rationally be absolute across the full range to which the Court has extended it. The Court's response was simply to refer, repetitiously,[92] to the "absolute nature of art. 3".[93]

But that absoluteness is part of the problem, not of the solution. As has been seen (III.B.5 above), the interpretation summed up in the mantra "art. 3 is absolute" entails contradiction in *at least* any circumstances where choosing non-removal imposes on citizens of the would-be removing state real risks of inhuman treatment or death at least as unfair as the risks[94] of inhuman treatment[95] imposed on the removed persons (without the removing state's complicity) because of the bad dispositions of official or other[96] persons in the receiving state (or in some eventual receiving state).

The force of the objection, and the self-imposed incapacity of the Court to respond to it, are illustrated by the result in, and results of, *Hirsi Jamaa v Italy* (2012),[97] an ill-reasoned decision which has had many foreseeable bad side-effects. Among these, only the most immediate was the creation of a real risk – indeed a near certainty -- that people would drown at sea, a risk that has since then become actuality well over 20,000 times off these north African shores (over 5,000 in 2016, over 1,200 in 2019, and again in 2020; and at a similar rate in early 2021).

92. *Saadi* paras 127, 137, 138, 140.

93. *Saadi* para. 138:

> .... Accordingly, the Court cannot accept the argument of the United Kingdom Government, supported by the [Italian] Government, that a distinction must be drawn under Article 3 between treatment inflicted directly by a signatory State and treatment that might be inflicted by the authorities of another State, and that protection against this latter form of ill-treatment should be weighed against the interests of the community as a whole.... *Since protection against the treatment prohibited by Article 3 is absolute*, that provision imposes an obligation not to extradite or expel any person who, in the receiving country, would run the real risk of being subjected to such treatment. (emphasis added)

94. See text after n.64 above.

95. Or of death, torture or degrading treatment.

96. "Owing to the absolute character of the right guaranteed, the Court does not rule out the possibility that Article 3 of the Convention may also apply where the danger emanates from persons or groups of persons who are not public officials." *Hirsi Jamaa* para. 120. The phrase "does not rule out the possibility" is liable (like several other phrases regularly used by the ECtHR) to mislead, for provided the danger (risk) is real and the government unable to obviate it, the Court clearly regards art. 3 as applicable and violated: ibid. para. 120. And its case law illustrates this abundantly: start the list with *D v UK* (n. 147 below, or with the last sentence quoted in n.93 above from *Saadi*). And see n. 101 below.

97. (2012) 55 European Human Rights Reports 21 (27765/09) 23 February 2012 (GC).

Hirsi Jamaa (2012)

On 6 May 2009, following an agreement with the Libyan government (at that time an effective one), Italian officials intercepted three vessels on the Mediterranean high seas 35 miles south of the Italian island of Lampedusa; on board were some 230[98] Somalis and Eritreans seeking to reach the Italian coast; all were taken on Italian ships back to Libya. Twenty-four of these 230 applied to the ECtHR; some of the 24 were later (before the *Saadi* judgment) granted refugee status by either UN or Italian authorities. Before setting out for Italy, none had applied for refugee status to either of the UNHCR units functioning in Libya in 2009. The ECtHR Grand Chamber in February 2012 unanimously held that Italy's actions not only violated ECHR Protocol 4 (prohibiting "collective expulsion of aliens"), but also, and primarily, violated ECHR art. 3 as interpreted in *Soering*, *Chahal*, and *Saadi*.[99] The basis for this finding was the "real risk" that Libya, despite its agreement with Italy, would permit inhuman treatment of the applicants in Libya and – perhaps more cogently, on the evidence – would arbitrarily (and against the terms of its agreement with Italy) repatriate the applicants to countries where they faced a real risk of inhuman treatment.

It might be thought that the fact that the applicants were for some hours on or in Italian government vessels – vessels assimilated by Italian law to Italian territory -- makes the case an insignificant routine application of rules or doctrines applicable to all expulsions from national territory. But this narrow reading would entirely misunderstand the case's significance in law and in fact. For the judgment of the Grand Chamber held (as inconspicuously as could be managed)[100], and the concurring judgment of Judge Pinto de Albuqueque extensively emphasised, that–

(1) art. 3 is violated whenever any exercise of state A's jurisdiction intentionally prevents a would-be immigrant from gaining entry to state A and thereby has the effect – however contrary to state A's intentions and despite its bona fide precautionary measures -- that he is exposed

98. See *Hirsi Jamaa*, para. 33.

99. The Grand Chamber also found a violation of the art. 13 ECHR right to an effective remedy:

> 13. Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

The radical implications of this finding, too, are pointed out (with approval) by Mariagiulia Giuffre, "Watered-down rights on the high seas: Hirsi Jamaa and others v Italy (2012)", [2012] International & Comparative Law Quarterly 728 at 742:

> In line with *Medvedyev* and *Al-Skeini*, the decision in *Hirsi* corroborates the view that States can be held [liable] under the Convention even for extraterritorial actions carried out by or on their behalf. Therefore, **if States set in motion offshore mechanisms of either non-admission** or removal after interdiction at sea--**which limit the possibility of individuals to challenge State decisions**--a violation of the right to an effective remedy under Article 13 of the ECHR could take place.

100. *Hirsi Jamaa*:

> 134...the rules for the rescue of persons at sea and those governing the fight against people trafficking impose on States the obligation to fulfil the obligations arising out of international refugee law, including the *non-refoulement* principle (see paragraph 23 above).
>
> 23. In its *Note on International Protection* (13 September 2001) (A/AC.96/951, § 16), UNHCR... indicated that the principle of *non-refoulement* laid down in Article 33 [Refugee Convention], was: "...a fundamental component of the absolute prohibition of torture and cruel, inhuman or degrading treatment or punishment. The duty not to *refoule* .... encompasses **any measure attributable to a State which could have the effect of returning an asylum-seeker or refugee to the frontiers of territories** where his or her life or freedom would be threatened, or where he or she would risk persecution. This **includes *rejection at the frontier, interception*, and indirect *refoulement*, whether of an individual seeking asylum or in situations of mass influx**." (emphases added)

to some real risk of inhuman treatment, if not by state B (the receiving state, or the state from which he set out to gain entry to A), then by a subsequent receiving state C or D… or by persons within state C or D for whose criminal conduct no state authorities anywhere had even indirect responsibility or culpability;[101] and (2) art. 13 (right to remedies) is violated whenever that exercise of state jurisdiction has the effect of preventing the investigation of the would-be immigrant's request for, or need for, asylum or for international protection (protection against violation of art. 3).

The judgment of the Grand Chamber in *Hirsi Jamaa* exhibits all the main fallacies and vicious circularities identified above (III.B). In particular, every argument that the obligation and rights articulated in the ECHR are defined or limited in some respect is treated – explicitly, and without argument – as *evading* the obligations of member states. And at the decisive points (paras. 134-135), the scope of art. 3 is taken to be established by the meaning of *non-refoulement* in other documents, such as the UNHCR's misconstrual of *refouler* in the Refugee Convention (I.G above), the EU Charter of Rights, and a letter from an EU official to EU member states.

C Justifications and Implications Hirsi Jamaa

Interdiction operations (indeed, push-back)[102] at least as severe in humanitarian terms as Italy's were upheld by the US Supreme Court in 1993 as fully compatible with the Refugee Convention and international law: *Sale v Haitian Centers Council*.[103] And when the reasoning (and justifiability of the result) in *Sale* was contested in 2004 by the leading expert on refugee law (Guy Goodwin-Gill, as counsel for the UN High Commissioner for Refugees), his invitation to disapprove it was rejected – certainly by two,

101. This last-mentioned immense extension of art. 3 had already been made by the ECtHR years before, at latest in 1997, in *D v UK* (see at n. 146 below).

102. Interdiction operations such as Australia's for some years before 2008 and then again after 2013 include options other than push-back literally construed, such as conducting (e.g. by towing) *to a safe third-country* for processing and eventual settlement there or elsewhere outside Australia. See Brennan, n. 106 below. Persons seeking entry on interdicted boats are disqualified from settling in Australia, which accompanies this disqualification with regular admission of about 18,000 UNHCR-recognised refugees.

103. *Sale v Haitian Centers Council* (1993) 509 U.S. 155. At 163-65 the Court describes the operations the legality of which it upheld against challenges based on interpretations of both US and international law:

> With both the facilities at Guantanamo and available Coast Guard cutters saturated, and with the number of Haitian emigrants in unseaworthy craft increasing (many had drowned as they attempted the trip to Florida), the Government could no longer both protect our borders *and* offer the Haitians even a modified screening process. It had to choose between allowing Haitians into the United States for the screening process and repatriating them without giving them any opportunity to establish their qualifications as refugees. In the judgment of the President's advisers, the first choice not only would have defeated the original purpose of the program (controlling illegal immigration), but also would have impeded diplomatic efforts to restore democratic government in Haiti and would have posed a life-threatening danger to thousands of persons embarking on long voyages in dangerous craft. The second choice would have advanced those policies but deprived the fleeing Haitians of any screening process at a time when a significant minority of them were being screened in.
>
> On May 23, 1992, President Bush adopted the second choice. After assuming office, President Clinton decided not to modify that order; it remains in effect today [21 June 1993]. The wisdom of the policy choices made by Presidents Reagan, Bush, and Clinton is not a matter for our consideration.

probably by four, perhaps by all five Law Lords: *Roma Rights*.[104] In the Court of Appeal, his invitation had been accepted in relation to push-backs *to* a persecuting home country, but had been rejected in relation to UK refusals, *in* a persecuting country, to give leave to enter the UK.[105]

In considering whether *Hirsi Jamaa* misinterpreted the ECHR, the issue is not what general or customary international law is or ought to be. Nor is it whether Italy's interdiction-with-pushback operations were conducted as fairly as they could (and morally should) have been. They were operations apparently somewhat more attentive to the affirmative moral duty to screen passengers (to identify refugees from a territory unsafe for them) than the US operations upheld in *Sale*; but distinctly less attentive by comparison with any of the various iterations of interdiction operations

104. Judge Pinto de Albuqueque in *Hirsi Jamaa* refers at p. 65-6 to *Roma Rights*, and mistakenly fails to accept that the Law Lords (expressly Lord Hope at paras. 65-71 with Lord Bingham's express concurrence at para. 31, implied concurrence of Lady Hale and Lord Carswell) approved the US Supreme Court's decision in *Sale v Haitian Centers Council* (1993) 509 US 155 that push-back (even pushback with no screening to detect refugees) to Haiti from outside US territorial waters was lawful under international law. Brennan, n. 106 below traces (at his n. 103) the shifts in Professor Goodwin-Gill's position about the historical intentions and public meaning of the Refugee Convention. His principal treatise is admirably frank in stating:

> Probably the most accurate assessment of States' views in 1951 is that there was no unanimity, perhaps intentionally so. At the same time, however, States were not prepared to include in the [Refugee] Convention any article on admission of refugees; *non-refoulement* in the sense of even a limited obligation to allow entry may well have been seen as coming too close to the unwished-for duty to grant asylum.

Guy S. Goodwin-Gill and Jane McAdam, *The Refugee in International Law* 3rd ed. (Oxford University Press, 2007, reprinted 2011), 206-7. On the other hand, the summary on p. 206 of the key discussions that are summarized in fn 14 above is quite unbalanced, even allowing for the constraints of brevity.

105. Thus Simon Brown LJ, in *Roma Rights Centre v Immigration Officer at Prague Airport* [2003] EWCA Civ 666 at par. 34: "For present purposes I propose to regard *Sale* as wrongly decided; it certainly offends one's sense of fairness." But he went on:

> 35. ... Lord Lester submits that ... [if] it is impermissible to return refugees from the high seas to their country of origin, why should it be permissible to prevent their leaving in the first place? How can the legality of the putative receiving state's action be determined simply by reference to which side of the frontier (perhaps a land frontier) the prospective asylum seeker is standing?
>
> 37. ... It cannot be suggested that on any construction of article 33 [Refugee Convention], however generous, a right of access to this or any other country to claim asylum can be found within it. So far, indeed, from this being so, not merely article 33 itself but the Convention as a whole can be seen to be concerned not with permitting access to asylum seekers but rather with the non-return of those who have managed to gain such access. Having defined as refugees solely those who have already left their own state, the Convention then imposes on member states a series of obligations with regard to them. Article 33 itself, as already explained, is concerned *only with where a person must not be sent, not with where he is trying to escape from*. The Convention *could have, but chose not to, concern itself also with enabling people to escape from* their own country by providing for a right of admission to another country to allow them to do so.
>
> 43. It is, indeed, accepted by the appellants that a state is under no obligation to admit refugees. How then can there be an obligation not to impede but rather to admit someone so that he can become a refugee?
>
> 47. In the end ... all Mr Goodwin-Gill's submissions [for the UNHCR] rest on this: that no individual state can impede the flow of prospective asylum seekers to its shores. To do so, it is said, either precludes their becoming refugees and thereby benefiting from articles 31 and 33 in the first place (if they have to remain in their country of origin), or at least "avoids" or "diverts" onto other states the burden of processing their claims and providing them with sanctuary where appropriate. For the reasons already given these are not arguments I feel able to accept. (emphases added)

With all this the other two members of the Court of Appeal "entirely agreed".

by Australia since 2001.[106] Nor is the present question whether the Italian operations complied with the EU norms and policies recited in the ECtHR's Judgment – they did not. The question is only about the authentic meaning of the ECHR obligations on which the Court in *Hirsi Jamaa* relied: art. 3 ECHR, and art. 4 of Protocol 4 ECHR (and, with either or both, the art. 13 right to effective remedies).

On art. 3 enough has been said above. What about art. 4 Protocol 4? It was adopted in 1963, and prohibits "collective expulsion of aliens".[107] The United Kingdom signed the Protocol in 1963 but is the only signatory state, other than Turkey, not to ratify it. The equivalent identical provision in art. 19.1 of the EU's Charter of Fundamental Rights was, however, in force in the UK until 31 December 2020.

The Grand Chamber in *Hirsi Jamaa*, to justify its holding that this Protocol article prohibits a state from "pushing back" or interdicting from its waters – rescuing and returning to other shores – large groups manifestly intent on illegally entering its territory (and manifestly in danger of perishing if left on the high seas), relied above all on the ECtHR doctrine that "the Convention is a living instrument which must be interpreted in the light of present-day conditions" and "in a manner which renders its guarantees practical and effective and not theoretical and illusory" (para. 175). In doing so it tacitly admits that it is departing decisively from the original intended and public meaning of the protocol. As is argued in II.A above, these twinned post-1975 ECtHR doctrines or formulae about interpretation are misleading descriptions for a process of judicial creation of new guarantees.

The Court in *Hirsi Jamaa* puts them into effect with a series of question-begging (circular) arguments all heading to the conclusion that there is *expulsion* wherever – even far from its shores -- a state's officials "exercise its jurisdiction"[108] with the "effect" that it "prevents migrants from reaching the borders of the State" (para. 180) and so prevents "detailed examination of the individual circumstances" of everyone in the group

106. On these, and many of the matters relevant to *Hirsi Jamaa*, see Frank Brennan SJ, "Human Rights and the National Interest: the case study of asylum, migration and national border protection" (2016) 39 Boston College Int'l & Comp. L. Rev. 47-86. Fr Brennan's book, *Tampering with Asylum: a universal humanitarian problem* (University of Queensland Press, 2nd ed. 2006) was influential in persuading the Australian Government to reverse its maritime interdiction policy in 2007. Under the six years of the regime enacted in line with Brennan's 2006 prescriptions, over 1,100 people lost their lives trying to enter Australia irregularly by sea. Since this regime was in turn reversed and interdiction efforts resumed in September 2013, no such deaths are known to have occurred [see Monash University Border Deaths Database (latest data end of 2020)]. Brennan's 2016 article accepts that the predictions on which its author based his 2003/2006 policy were mistaken ("These results proved that commentators like myself were wrong." p. 50), and though still critical of several aspects of Australia's interdiction regime and practice, persuasively argues (against the weight of opinion among international lawyers) that interdiction with deflection to a safe third country is a morally and legally sound practice. (*Hirsi Jamaa* rightly held Libya to have been in 2009 not a safe country, for these purposes; whether pushing back boats to Libya should be considered immoral cannot be assessed correctly without considering the relevance of the realistically likely identities, character and purposes of the persons in them, and the relevance of the circumstances in which they chose to set foot in Libya and/or chose not to depart from Libya in the direction of their home country.)

107. See n. 51 above.

108. Here the ECtHR builds on its remarkable decision, six months earlier, in *Al Skeini v UK*, 55721/07, 7 July 2011 (Grand Chamber) setting aside, without explanation, its former doctrine on what counts as exercising state jurisdiction abroad. Judge Pinto de Albuquerque at p. 76 in *Hirsi Jamaa* mistakenly ascribes to the House of Lords in *Roma Rights* (see nn. 6 and 17 above) a view unique to Lord Steyn, and overlooks the opinion of all the other Law Lords that the operations of UK immigration officers at Prague airport were almost certainly not an exercise of jurisdiction. For the (unadmitted) 2019 retreat from *Al Skeini* in this sort of context, see *MN v Belgium*, IV.E below.

(paras 177, 185).[109] The effect of this unhistorical application of Protocol 4, a misinterpretation encouraged by the Court's prior and concurrent misinterpretation of art. 3, is not simply that European states are only prohibited from towing boats ("boat people") back to the shores of a persecuting state. That sort of interdiction is morally repugnant and wrong in all but very exceptional circumstances.[110] The effect of *Hirsi Jamaa* – unless and until its doctrine is limited in some way – goes far wider. States party to the ECHR are prohibited also from towing boats back to the shores of a sufficiently safe state such as Turkey was in late 2015 when nearly a million people landed in Greece from Turkey, fleeing not Turkey but dangerous or indigent lands beyond, hoping for refuge not in Greece but in more prosperous lands ahead.

It is wholly unlikely that the states which drafted the Refugee Convention[111] would 12 years later have promoted and adopted a provision against "collective expulsion" if they had thought that a Court would use this so as to impose on them a prohibition of such conduct, let alone an absolute prohibition. After all, the term "expulsion" had been used in art. 33(1) of the Refugee Convention, where it plainly referred to people who had been within the expelling state for a stretch of time:

> 33. *Prohibition of expulsion or return ('refoulement').*
>
> (1) No Contracting State shall expel or return ('*refouler*') a refugee in any manner to the frontiers of territories where…

Neither in 1951 nor in 1963 would the contracting states have

109. Thus, for example, para. 177:

> the purpose of Article 4 of Protocol No. 4 is to prevent States being able to *remove* certain aliens without examining their personal circumstances and, consequently, without enabling them to put forward their arguments against the measure taken by the relevant authority. If, therefore, Article 4 of Protocol No. 4 were to apply only to collective expulsions from the national territory …, a significant component of contemporary migratory patterns would not fall within the ambit of that provision, notwithstanding the fact that *the conduct it is intended to prohibit can occur outside national territory* and in particular, as in the instant case, on the high seas. *Article 4 would thus be ineffective in practice with regard to such situations*, which, however, are on the increase. The consequence of that would be that migrants having taken to the sea, often risking their lives, and not having managed to reach the borders of a State, would not be entitled to an examination of their personal circumstances before being expelled, unlike those travelling by land. (emphases added)

And para. 178:

> To conclude otherwise, and to afford that last notion [*expulsion*] a strictly territorial scope, would result in a discrepancy between the scope of application of the Convention as such [as explained in *Al Skeini* : JF] and that of Article 4 of Protocol No. 4, which would go against the principle that the Convention must be interpreted as a whole. Furthermore, as regards the exercise by a State of its jurisdiction on the high seas, the Court has already stated that the special nature of the maritime environment cannot justify *an area outside the law where individuals are covered by no legal system capable of affording them enjoyment of the rights and guarantees protected by the Convention* which the States have undertaken to secure to everyone within their jurisdiction… (emphases added)

All these arguments fail because they baldly assume and use the desired *conclusion* as a *premise* for reaching it. And the last argument further, even more questionably, assumes that if "expulsion" does not include non-admittance, the high seas are (or would be treated as) an area in which Italy would be free to do what it liked with people (have them murdered, raped or enslaved, perhaps?). Such argumentation is mere rhetoric, without rational force.

110. But what if the boat people are fleeing war criminals? Or, as a calculated risk, entered the persecuting or unsafe state from or via the territory of a non-persecuting and safe state, for the sole reason that they wish to reach a rich state with an ample welfare system? (The mass inflows of 2012 to the present seem to belong largely in the latter category of scenario.)

111. Recall its numerous precautionary provisions against mass migration, provisions *extended* and supplemented in 1967: see part I above.

contemplated accepting that a prohibition on *expulsion* extended to any and every refusal -– whatever the circumstances – to admit large crowds onto their territories (such as the million or so arriving in Greece in late 2015), or the erection of fences against mass or clandestine entry.

Nor is there any indication that they would have accepted a more limited exceptionless prohibition, one restricted to requiring that states always – whatever the circumstances – allow everyone approaching their borders to enter so as to afford all of them an individual opportunity of explaining their personal circumstances with legal assistance, however many others are entering or have already entered the territory, and however manifest and undisguised the intent of some or very many of them (as in late 2015) to make no prompt bona fide claim for refugee status but instead to enter, without leave, so as to improve the economic, educational and other such prospects of themselves and perhaps their families at home, or to pursue some ideological cause lawfully or, in some cases, unlawfully. While appreciating the Court's humanitarian intentions, the contracting states would with ample reason have rejected its suggestion[112] that its interpretation simply called on them to act *in good-faith* compliance with their undertakings – undertakings so freely reinterpreted in circumvention of the intentions and legitimate expectations with which they entered into those undertakings.

The inherent effect[113] of the ECtHR's mutually supportive errors in *Hirsi Jamaa* about art. 3 ECHR and art. 4 Protocol 4 is precisely what was feared in 1951 by the Dutch, the Swiss, the British, the Italian, the German and the Swedish governments (to mention only those that plainly articulated their fears): practically irrevocable exposure of signatory countries to "mass influx of persons" coming directly or indirectly from failed states (or indeed from impoverished, or relatively poor, states) -- without recourse to resistance by *efficacious* denial of leave to set foot here.[114] As to art. 3: If there is a real risk that even one among a group seeking entry (say, by being landed openly or clandestinely[115] from a boat or flotilla) is fleeing some real risk of death or inhuman conditions, and if that one person would be at some real risk of that risk materialising unless granted entry (and not subsequently efficaciously required to leave), *all* members of the group, however many, must be allowed entry for screening, even

112. *Hirsi Jamaa* at para. 179.

113. The judicial doctrine in play in *Hirsi Jamaa* and *Saadi v. Italy* has greatly limited the relevance of the UK's rules about asylum and humanitarian protection, such as the Refugee or Person in Need of International Protection (Qualification) Regulations 2006, SI 2006/2525 and Immigration Rule 334.

114. The nullification of littoral states' interdiction operations is tantamount to permission to set foot ashore, with all that that connotes in increased practical probabilities of acquiring a new and better life, a new country. Thereby incentivised are numerous poor choices: of facilitators ("people smugglers"), to equip them with transport, false stories, and other aid; of would-be immigrants, to run the high risks that in fact result in thousands of drownings; and of states, to cut back, sooner or later, both on maritime rescue operations and acceptance of refugees through the UNHCR settlement programmes.

115. The EU border agency Frontex reports that one *modus operandi* is to land immigrants at unpoliced beaches where they can come ashore by mingling with the swimmers (and from there making their way to wherever they will in the Schengen Area). Frontex, *FRAN Quarterly Q3 2014* pp. 22-3.

in circumstances where entry amounts, *de facto*, to indefinite stay.[116] As to art. 4 Protocol 4: there need not be even one person at risk – all are entitled to be admitted so as make possible an investigation, individual by individual, of their personal circumstances (however small the likelihood that those circumstances could be discovered accurately by enquiry sought to be made of thousands of persons, many of whom, even when they can be found, are strongly incentivised to fabricate accounts of their circumstances, and to destroy all evidence of their true origin or status). Unless they could be intercepted and diverted to some safe third state ready to receive them to its shores for screening and settlement, all must be admitted into a territory which – internal border checks having been largely dismantled – tends to become as wide as Europe's Schengen area.

And once admitted, they can never be required to leave – even though a country can be found to accept them and means be found to get them there, and even though the Refugee Convention's conditions for expulsion are satisfied because (a) they are not real refugees (because not meeting the Convention definitions, or because war criminals) or (b) are guilty of serious crimes or (c) are a threat to public security etc – if requiring them to leave would put them at risk, a risk described in very open terms: risk that they would find themselves in, or be sent on by some ECHR or non-ECHR state to, a country where they would be at risk (i) because of widespread violence, oppression or other dire conditions in which they might be caught up, or (ii) because of the risk of being sent on to some such country.

Indeed, once those who entered Greece en masse in 2015 had made their way to Greek soil and through Greece to some other ECHR state, they generally could not be required to go back to Greece -- for the ECtHR (and latterly the ECJ/CJEU) had ruled that the Greek and Italian states are presumptively incapable, in practice, of processing immigrants to standards sufficiently respectful of their rights as these states struggled to come to terms with mass migration and its impact on their country's humanitarian and social welfare systems.[117] None of the hundreds of thousands entering through Italy who make their way to other EU states could be required to go back to Italy without a case by case assessment of whether each illegal entrant's human rights would be sufficiently respected in Italy.[118]

116. The ECtHR in *Hirsi Jamaa* found that all returned to Libya in that case were at risk (though Libya was not in 2009 a failed state), but the Court's focus (para. 133) on a lack of screening during the return journey, and (para. 125, 146, 152-8) on risk of intermediary *refoulement* by Libya, like its general doctrine of real risk, implies the wider position stated in the text sentence. "The fact that a large number of irregular immigrants in Libya found themselves in the same situation as the applicants does not make the risk any less individual where it is sufficiently real and probable…" (para. 136).

117. In the ECtHR: *MSS v Belgium and Greece* (2011) 53 EHRR 28 (GC) reversing the general result in *KRS v UK* (2008) 48 EHRR SE 129. In the CJEU, *NS (Afghanistan) v Home Secretary* (Cases C-411/10 and C-493/10) [2013] QB 102 (Grand Chamber, 21 December 2011). It is permissible to wonder whether the pressure to have Greece declared unsafe, and the ECtHR's decision to do so, was affected by the fact (reported in *MSS* at paras 125-6) that the success rate for asylum applications processed in Greece (the country through which 88% of all persons entering Europe for asylum in 2009 entered) was in 2008 0.1% at first instance and (according to the Court) less than 4% on appeal (though according to the UNHCR document mainly relied upon by the Court, 24% of appeals were successful), compared with a success rate at first instance in the next six most applied-to European countries of over 36%. UNHCR, *Observations on Greece as a country of asylum*, December 2009, pp. 17-8.

118. *R (EM) (Eritrea) v Home Secretary* [2014] UKSC 12 (19 February 2014).

In 2014 actual events similar to the scenarios sketched above occurred hundreds of times -- Italy alone received by sea over 170,000 unauthorized persons[119] almost all in such circumstances that *de facto* if not also *de jure* they could not efficaciously be required to leave.[120] In 2015, 154,000. In the first nine months of 2016, 130,000.[121]

In the last three months of 2015, Greece alone received by sea (and allowed to pass through towards other EU states) 480,000 persons,[122] none of whom could be required by any ECHR member-state to go back to Greece. In 2015 as a whole, well over a million people entered the EU without leave.[123] There were over 1,350,000 asylum applications in the EU in 2015, nearly 75% of them by males.[124]

During the first two months of 2016 nearly 150,000 people arrived by sea in Greece, but by May the number was negligible. The UN Refugee Agency's explanation for this change listed a variety of factors including "the implementation of the EU-Turkey agreement [of March 2016]" and "increased border control operations in the Aegean Sea". But the factor it placed first was: "an understanding amongst refugee and migrant populations that the Balkan route is now closed" – that is "the introduction of restrictive border policies and the 'closure' of the border between Greece and FYR Macedonia on 8 March".[125]

Receiving states in Europe could thus be subjected to an increasingly perceptible and effectively irreversible change in their demography and

119. Frontex, *Risk Analysis 2015* p. 19 records 171,000 detected illegal crossings to Italy. Italian ships found the corpses of some 3,000 men, women and children who had drowned in 2014 (in 2015, 154,000 detected crossings to Italy and another 3,000+ drowned), in the absence of the interdiction operations prohibited by *Hirsi Jamaa*. In one "black week" in April 2015, more than 1,200 drowned between Libya and Sicily, after the replacement of *Mare Nostrum* (Italy's well-intentioned but not far-sighted response to *Hirsi Jamaa*) by a Frontex-organized Operation Triton, an operation still deprived, by law, of the essential deterrent: interdiction. As to the facts about the effects of Mare Nostrum and Triton, and a different evaluation, see *https://deathbyrescue.org/report/narrative/* (accessed 17 March 2021).

    On 13 April 2016 over 500 people from Somalia, Ethiopia, Egypt and elsewhere drowned when their boat from Libya to Italy capsized with 41 survivors. The smugglers' fee was $1800 per person. One survivor lost six male siblings. http://www.unhcr.org/572753416.html By 1 October 2016, over 3,500 people had lost their lives at sea in 2016 attempting to reach Europe (many hundreds of them in the week running up to 29 May: UNHCR, Refugees/Migrants Emergency Response – Mediterranean, Regional Overview 18 July 2016).

120. In 2014 65,000 applications for international protection were made in Italy, of which only 5% were from Syria and Iraq; 60% were from West Africa, and nearly 20% from Bangladesh and Pakistan. In the first nine months of 2015 over 60,000 applications were made in Italy, with much the same distribution. Italian Council for Refugees, *Asylum Information Database, Italy*, Third and Fourth Updates (January and December 2015). In 2016 less than 1% in total were from Syria, Iraq and Afghanistan combined, and less than 5% from Bangladesh and Pakistan combined: UNHCR , Refugee Bureau Europe, Monthly Data, August 2016, figure 9.

121. International Organization for Migration, 7 September 2016: http://migration.iom.int/europe/, which is harmonized with UNHCR data: http://data.unhcr.org/mediterranean/regional.php

122. Frontex, *Western Balkans Quarterly Risk Analysis: Quarter 4, 2015* (Warsaw, March 2016) p. 7: http://frontex.europa.eu/assets/Publications/Risk_Analysis/WB_Q4_2015.pdf

123. The same official's agency's report on 2015 in *Risk Analysis for 2016*, settles on a figure of 1 million: "The year 2015 was unprecedented for the EU and its external borders, with 1.8 million detections of illegal entries associated with an estimated one million individuals." Preface by the Executive Director, Frontex [European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union], *Risk Analysis for 2016*, Warsaw, March 2016, p. 5 (emphases added). Other careful analyses suggest that the true figure must be about 1.5 million. About 1.3 million applications for asylum or subsidiary (art. 3 ECHR) international protection were made in the EU in 2015; 715,000 in 2019, and many thousands of adult illegal entrants did not make asylum claims.

124. European Asylum Support Office, *Latest Asylum Trends – 2015 Overview*, p. 1; Eurostat, *Asylum Statistics* (data extracted on 2 March and 20 April 2016,), Figure 1; [European Commission] *European Migration Network Bulletin* 14th ed. April 2016, p. 3 and Figure 1a). Of these, 95-97% were first-time applications: Eurostat, *Asylum Quarterly Report* (data extracted on 3rd March 2016), Table 1.

125. UNHCR, *Europe's Refugee Emergency Response Update no. 25*, 18 April-9 May 2016, p. 1.

conditions of existence.[126] Such changes could amount, in the medium and long term, to more than the changes always in the short term likely if not inevitable in states adjacent to a failed state. Such adjacent states typically receive refugees proportionately much higher in numbers, but with much higher expectation all round that these persons *would return* to their home country at the end of its civil war or other dire emergency. But as the German experience with Turkish "guest workers" convincingly showed, and the experience of France, Belgium and the UK tended to confirm, European states with welfare systems, and a rule of law -- made possible by their accumulated social capital -- could have no realistic expectation that more than a small proportion of those who enter in these ways would ever return voluntarily.

Circumstances could be envisaged in which such changes -- forced upon receiving states by large mixed flows of migrants the reception of whom the ECtHR seemed in practical effect to mandate – would reasonably be regarded as harmful to the whole country and its peoples.[127] Leaving aside other, more vivid possible dangers, it was not unreasonable for states and their peoples to have real concerns about how far, and how stably, they could integrate such large numbers of persons of a cultural formation strongly different in constitutionally significant ways. [128]

One of the contributing causes of all this, the ECtHR's response, seemed – until early 2020 – to have been settled, both in principle and in practice: in immigration/non-*refoulement* contexts, art. 3 is an absolute; it is therefore to be interpreted not strictly but expansively, and of course cannot be derogated from even in face of dangers affecting the life of the

126. At the end of a balanced survey of evidence, Paul Collier concluded:

> Contrary to the prejudices of xenophobes, the evidence does not suggest that migration to date has had significantly adverse effects on the indigenous populations of host societies. Contrary to self-perceived 'progressives', the evidence does suggest that without effective controls migration would rapidly accelerate to the point at which additional migration would have adverse effects, both on the indigenous populations of host societies and on those left behind in the poorest countries.

Paul Collier *Exodus: Immigration and Multiculturalism in the 21st Century* (Penguin, 2013, 2015), 245.

127. Art. 15 of the ECHR speaks of "threatening the life of the nation"; the UK courts and the ECtHR alike in the *Belmarsh Prisoners* case (nn. 243-245 below) held that the terrorist threat in 2001/4 could reasonably be regarded as rising to that level.

128. *Refah Partisi (No. 2) v Turkey* (2003) 37 European Human Rights Reports 1, para. 123 (ECtHR Grand Chamber, quoting and adopting *Refah Partisi (No.1)* (2002) 35 European Human Rights Reports 3 at para. 72):

> . . . the Court considers that sharia, which faithfully reflects the dogmas and divine rules laid down by religion, is stable and invariable. Principles such as pluralism in the political sphere or the constant evolution of public freedoms have no place in it . . . [A] regime based on sharia . . . clearly diverges from Convention values, particularly with regard to its criminal law and criminal procedure, its rules on the legal status of women and the way it intervenes in all spheres of private and public life in accordance with religious precepts. . . . [A] political party whose actions seem to be aimed at introducing sharia . . . can hardly be regarded as an association complying with the democratic ideal that underlies the whole of the Convention.

nation (to use the ECHR's own phrase).[129]

It was a response that, as a matter of treaty interpretation and application, had only one sound element: the signatory states did intend to condemn and *renounce* unconditionally all intentional infliction by them of torture or inhuman or degrading treatment, and did intend to commit to running the risk that such renunciation might materially, even critically, hamper their efforts to defend themselves against war, terror or other forms of physical or constitutional harm.[130] After all, they (or main signatories among them) had run that risk in their war against the Nazis, who freely engaged in such practices. But the signatories did not commit themselves to accepting mass entry of "refugees" in circumstances where refugees in the proper sense – persons if not strictly entitled to enter, certainly intended to have all the rights conferred by the Refugee Convention – cannot at entry be sorted out from people with no moral entitlement to come in, or from dangerous people who need to be kept away.

Though all these criticisms of the ECtHR instantly incurred imputations of hard- and cold-heartedness, inequity, iniquity, moral panic, xenophobia and more severely opprobrious modern epithets, the facts seem clear enough. The Court had adopted an unconstitutional *method* of responding to the humanitarian, security, and other elements of such critical situations: choosing to impose, in the exercise of judicial power, an extension of art. 3 (and of art. 4 Protocol 4, and also of art. 13) that could only be properly made by exercising the law-creating powers of treaty-makers. This extension seemed to *wedge ajar* the doors of Convention states. It denounced as complicity in inhuman treatment the attempt to respond to a humanitarian challenge in a manner allowed for by the architects both of the Convention to which art. 3 belongs and the Refugee Convention – the manner of a free people.

Such a people should and would decide for itself[131] (normally by its legislative organs), with awareness of the likely consequences for its members' peaceful and just freedoms *and* for the ongoing wellbeing of

129. See text after n. 55 above. The Court in *Hirsi Jamaa* states all this with deliberate reticence:

> 134…the rules for the rescue of persons at sea and those governing the fight against people trafficking impose on States the obligation to fulfil the obligations arising out of international refugee law, including the *non-refoulement* principle (see paragraph 23 above).

Paragraph 23 consists in substance of a UNHCR Note (which para. 134 then endorses):

> 23. In its *Note on International Protection* (13 September 2001) (A/AC.96/951, § 16), UNHCR, which has the task of monitoring the manner in which the States Parties apply the Geneva Convention, indicated that the principle of *non-refoulement* laid down in Article 33, was:
>
> > "… a cardinal protection principle… In addition, international human rights law has established *non-refoulement* as a fundamental component of the absolute prohibition of torture and cruel, inhuman or degrading treatment or punishment. The duty not to *refoule* is also recognized as applying to refugees irrespective of their formal recognition… It encompasses any measure attributable to a State which could have the effect of returning an asylum-seeker or refugee to the frontiers of territories where his or her life or freedom would be threatened, or where he or she would risk persecution. This includes *rejection at the frontier*, *interception*, and indirect *refoulement*, whether of an individual seeking asylum or in situations of mass influx."

(emphases added).

130. Art. 15 ECHR is the primary expression of this commitment. For in authorising derogation from Convention rights in emergencies threatening the life of the nation, it permits no derogation from the prohibition on subjecting anyone to torture or inhuman or degrading treatment.

131. See part I. C above.

desperate and deprived peoples everywhere – a wellbeing significantly dependent on the maintenance of well-functioning states of generous cultural heritage -- *and* for the survival of the constitutional systems in which the Convention was meant to have its place.[132]

Recognising such a freedom did not deny that states, like property-owners of every kind, have a moral obligation to hold the part of the world's resources that is theirs -- as property indeed, but subject to a trust for the benefit also of those who have no holding, or holdings too little for them to cope. What the recognition of this right of self-determination acknowledged was that – subject to a few authentic and therefore narrow and intention-focussed *negative* duties – such a trust cannot reasonably and justly be subjected to universal legal and judicially enforceable rules. The right of self-determination and this trust include a responsibility for consequences in law making that outreaches the range of specifically legal learning and judicial responsibility, competence, and method.

D. Pushback against fence stormers: ND & NT v Spain (2020)

The gist of IV.C's discussion of *Hirsi Jamaa*'s implications is confirmed by the surprised and dismayed commentary with which pro-refugee and pro-migrant NGOs and others responded when, on 13 February 2020, the ECtHR's Grand Chamber decided that Spain's land-frontier pushbacks did not violate the ECHR provisions just discussed. Spanish police had summarily, without exchange of words, handcuffed and marched back into Morocco the two applicants – and dozens of others, almost all like them from far-away west African countries – who in a group of about 100, starting in Morocco, had scaled each of the three very high fences between that safe state and the Spanish enclave of Melilla, the scaling and the landing being all on Spanish territory. The Grand Chamber decision – reversing a unanimous 2017 decision of the Chamber[133] – concerned art. 4 Protocol 4 (prohibiting collective expulsion) and art 13 (right to remedy), and took for granted an earlier summary dismissal of the applicants art. 3 claims. Firmly upholding the doctrines they cited from *Hirsi Jamaa*, and firmly holding that the ECHR applies to the whole area of the member state's territory (including to strips of its territory that are outside its "border fence"), the Grand Chamber nevertheless held that the *"conduct of the applicants" disqualified their claims under those provisions.*

The relevant features of their conduct are variously stated at different points in the Judgment, which does not assert that all or most of the factors are necessary to have the disqualifying effect. Features mentioned include: making entry as a group, doing so by "force" (large numbers, hazardously scaling deterrent fencing), and doing so regardless of the

132. On the considerations of justice that are important in any such deliberation about such existential acts of self-determination, see Finnis, *Intention and Identity* (n. 16 above) essay 6 ("Law, Universality and Social Identity") especially 119, and essay 7 ("Cosmopolis, Nation States, and Families") especially 125-6; and *Human Rights and Common Good* (Oxford University Press, 2011), essay 9 ("Nationality and Alienage") especially 146-8.

133. *ND & NT v Espagne*, 8675/15 and 8697/15, 3 October 2017 (Third Section).

real opportunities to apply for entry as a refugee (or for humanitarian-protection) at any of several border posts on the Morocco side of the border or at other Spanish offices in Morocco.

The Grand Chamber did not deny that the illegal entrants could easily have been escorted by the Spanish police to some office behind the border and there each be given an individual opportunity of making a case for entry (in line with the general effect of art. 4 Prot. 4 as interpreted: expulsion is "collective" unless each expellee is given such an individual opportunity). So the weight of the Grand Chamber's reasoning rests on the unmeritorious character of the mode of crossing the border regardless of lawful ways of applying for permission to enter (applications which the applicants doubtless foresaw would have been judged to be without merit).

Judge Koskelli's "partly dissenting" opinion begins by emphatically endorsing[134] the Court's unsound[135] but widely shared opinion that the principle of non-*refoulement* prohibits *every* refusal of *admission* of *anyone* seeking asylum, even when he or she is still located in a generally safe country and even if that country is his own. But Judge Koskelli, reasoning that non-*refoulement* was irrelevant because the applicants in these cases had in (conveniently separate) ECtHR proceedings been found to have no claims to asylum or international protection, dissented. Her ground for doing so was that, in interpreting "expulsion" in Art. 4 Protocol 4, the majority erred (a) in counting non-admission (refusal) as an instance of "expulsion", (b) in counting any and every immediate removal ("hot removal") from the border area as an "expulsion", and (c) by introducing two damagingly uncertain exceptions to those two erroneous rulings: (i) the exception that refusal and hot removal need not count as "*collective* expulsion" if there are some (how many? how nearby? how practicable?) *pathways to legal entry-by-application*; (ii) the exception that immediate removal, too, is not "collective expulsion" if warranted by the conduct of the applicant (use of force and/or storming by weight of numbers). In each of these enumerated ways, the Court was out of line, she judged, with what the parties to the ECHR had agreed to.[136]

Shortly afterwards, Daniel Thym, near the end of his detailed and helpful comment on the Grand Chamber's decision and the distress it

134. *ND and NT v Spain*, 8675/15 and 8697/15, 13 February 2020 (GC), Opinion of Judge Koskello, iparas. 6 and 22.

135. It is certainly erroneous as an interpretation of the Refugee Convention (see part I.E above), and if it is now the customary meaning of "the principle" in EU law, that of itself is no secure basis for settling ECHR law in the ECtHR, as Judge Koskelli emphasises in a different context; the Court's Judgment claims to be based on an autonomous interpretation of the ECHR. Later, curiously, in para. 14, she says (rightly): "Ensuring access to asylum procedures for aliens wishing to enter the jurisdiction of a State Party is therefore not a matter falling under the [ECHR], and consequently not a matter for the [ECtHR's] supervision."

136. Ibid. at para. 17. Furthermore:

> 26. An interpretation according to which the Convention will require, in the interest of effective compliance with the obligation of non-refoulement, that nobody, regardless of the circumstances, can be turned away or removed from a State Party's external borders without being granted access to an individualised procedure, is in my view neither necessary nor justified. In fact, it appears rather bizarre. I find it difficult to see why the States Parties should be expected to accept that, as a matter of principle, any persons about to penetrate their external borders must be treated as potential asylum-seekers, and that nobody can be stopped and prevented from entry without individualised procedural safeguards, including persons whose hostile intentions are obvious or are known in advance on the basis of intelligence activities....

evoked,[137] put the whole matter in context:

> Like many academics in the field of EU asylum law, I belong to the 'end of history' generation. I had just turned 16 when the Berlin wall fell and it seemed self-evident that the liberal democratic project would keep expanding. *The ECHR case law on migration is a potent expression of this cosmopolitan honeymoon.* Who would have thought thirty years ago that the prohibition of inhuman and degrading treatment would turn into a strong human rights guarantee against refoulement? And that the hitherto opaque prohibition of collective expulsion would be transformed into a de facto right to asylum? Or that the ECtHR might one day oblige states to establish meaningful legal pathways for refugees and migrants? (emphasis added)

Obligatory "meaningful legal pathways"[138] is his reasonable summation of what the Grand Chamber in *ND & NT* required as the precondition for upholding Spain's policy of pushing back illegal entrants whose conduct disqualified them from protection against collective expulsion – or, more precisely, whose conduct disqualified them from establishing that their expulsion was "collective".

As Thym there implies, the imposition of this precondition on member states was yet another "potent expression" of the 30-year (as he puts it) "cosmopolitan honeymoon" enjoyed by the courts (and by applicants for protection) over the resistance of parties to the Convention. (Judge Koskelli asked how many gateways would be required in long stretches of fence.) Yet not potent enough many commentators: the Grand Chamber decision elicited a "widespread sense of shock" because it did not amount to a "wholehearted legal pathways revolution." Sympathetic to these commentators, Thym reflects nonetheless that, though "courts can be powerful actors in a technocratic world of *supranational policy development*", "they are badly placed to embark on far-reaching changes *in a policy*

137. "A Restrictionist Revolution?" 17 February 2920, https://verfassungsblog.de/a-restrictionist-revolution/.

Thym began by noting the reaction:

> Not surprisingly, the immediate response to the Grand Chamber's *N.D & N.T* judgment rectifying [scil. upholding?] the Spanish policy of 'hot expulsions' of irregular migrants was met with 'shock' – a 'slap in the face' [to] human rights law that 'refutes the raison d'être' of the European Convention on Human Rights (ECHR). These first analyses are correct insofar as they express the utter disappointment of the authors at the immediate outcome of the case and the initial conclusion that judges backtracked from an earlier dynamic interpretation of the prohibition of collective expulsion.

138. "Legal pathways" is a phrase prominent in the UN General Assembly Resolution of 19 September 2016 adopting the *New York Declaration for Refugees and Migrants* UN doc A/RES/71/1, para.77: "We [Heads of State and Government and other High Representatives meeting in New York on that date] intend to expand the number and range of legal pathways available for refugees to be admitted to or resettled in third countries." Then para. 79: "We will consider the expansion of existing humanitarian admission programmes, possible temporary evacuation programmes, including evacuation for medical reasons, flexible arrangements to assist family reunification, private sponsorship for individual refugees and opportunities for labour mobility for refugees, including through private sector partnerships, and for education, such as scholarships and student visas."

environment, in which migration is politically salient."[139] *MN & NT* exemplifies, he concluded, the "trend towards judicial standstill after more than two decades full of revolutionary judgments".

Thym's accurate phrase "revolutionary judgments" points once again to what can reasonably be regarded as the unconstitutionality of the revolution accomplished by the courts – courts which have treated themselves as "powerful actors in a technocratic world of supranational policy development" rather than as participants with a particular kind of role in the constitutionally regulated processes of national self-government. In those processes, "policy development" is the responsibility, not of courts but – within established boundaries which, when legal rather than conventional, *are* rightly patrolled and enforced by national courts – of legislatures and governments (interacting in ways regulated by conventions and statutes) and of the electorates that choose the composition of those organs. And this allocation of responsibility for policy development is all the more appropriately reserved to legislatures and governments and electorates when the policy issues pertain to fields as multi-faceted, critical to the common good, and largely irreversible in effects, as large-scale migration.

Strasbourg responsiveness to the sharp change in *political* climate between 2012 and 2019 helps confirm the inappropriateness of this Court's whole approach to the application of the ECHR. The ECtHR has in this field apparently "paused", because it is, consciously and improperly, a political actor.

E. Another 2020 judicial standstill: MN v Belgium

Thym's prediction of an ongoing "judicial standstill" in revolutionary judgments – a standstill by judges responsive, he suggested, to the new (post-*Hirsi Jamaa*) "political salience of migration" – was made on 17 February 2020. Less than three weeks later, in a case with entirely different parties, *MN v Belgium*,[140] the ECtHR Grand Chamber confirmed his prediction. Against numerous NGOs and UN agencies who argued that the logical implications of *Hirsi Jamaa* (described above in part C) should be accepted and imposed on all states party to the ECHR, the Court by an undisclosed majority (but with no separate or dissenting opinions) called a halt – or at least a standstill. Belgium, the Court held, had not exercised jurisdiction (for the purposes of art. 1 ECHR) over Syrians in war-ravaged Syria when it prevented them from reaching Belgium – to

139. The "political salience of migration" was less gently described by Judge Pinto de Albuquerque's concurring Separate Opinion in the Chamber Judgment in *MA v Lithuania* 59793/17, 11 December 2018 (Fourth Section):

> 26. In the wake of a new and dangerous "post-international law" world, this Opinion is a plea for building bridges, not walls, for the bridges required by those in need of international protection, not walls arising from the fear that has been percolating in recent years through global sewers of hatred. Although justified as an attempt to curb illegal immigration, human trafficking or smuggling, these physical barriers reflect an ill-minded isolationist policy and represent, as a matter of fact, the prevailing malign political Weltanschauung in some corners of the world, which perceives migrants as a cultural and social threat that must be countered by whatever means necessary and views all asylum claims as baseless fantasies on the part of people conniving to bring chaos to the Western world. The culture of fear, with its delirious ruminations against "cosmopolitan elites" and "foreign" multiculturalism, and its most noxious rhetoric in favour of "our way of life" and "identity politics", has burst into the mainstream.

140. *MN v Belgium*, 3599/18,, 5 March 2020 [GC].

apply there for asylum or international protection – by denying them the short-term visa they had applied for at Belgium's embassy in the Lebanon. The applicants' claim that the denial subjected them to treatment contrary to art. 3 therefore could not be adjudicated. Even if it did subject them to a real risk of death or inhuman or degrading treatment, it did not do so contrary to the ECHR, a Convention which imposes obligations on states only within their territory or "territorial jurisdiction". The reach of arts. 2 and 3 is, so to speak, blocked by art. 1 (territorial basis of Convention obligations).

To emphasise how existentially important the Court's decision would be for the future of states, of orderly migration into Europe, and of the ECHR and Council of Europe, the argument against the asylum-seekers and NGOs was put to the Grand Chamber not only by Belgium but by eleven other states. And at the final oral hearing, the Attorney General, Geoffrey Cox QC addressed the Court, with behind him First Treasury Counsel and a substantial legal team. The Court summarised the position of the United Kingdom and other intervening states:

> assenting to the applicants' argument would mean accepting that a jurisdictional link could be self-generated by an individual submitting an immigration-related request, wherever he or she was in the world... Nor could it reasonably be accepted that the mere submission of an application or a mere decision in the area of immigration [is] sufficient to bring the individual in question under the jurisdiction of the State concerned. Thus, in the same way that an online or postal visa application [does] not create jurisdiction, that fact that an application or even a decision concerning immigrant status was made at a foreign embassy or consulate [cannot] create a jurisdictional link.
>
> If the applicants' arguments were to be accepted...the well-established principle... that a State is under no general obligation to admit aliens to its territory would become meaningless, and would give way to *an unlimited obligation on the States Parties to authorise entry to their territory to individuals who were at risk of treatment in breach of Article 3 anywhere in the world.*[141]

Against this was arrayed argumentation along the lines that had been deployed by Advocate General Mengozzi in the earlier, parallel or analogous

141. This is the paraphrase (emphasis added) of the intervening states' arguments in paras. 88-89 of the Judgment in *MN v Belgium*. Para. 90 adds:

> The third-party interveners raised a further important point which was, in their view, crucial: the complex factors surrounding asylum and immigration required international cooperation and control.... essential to enable the protection systems to operate effectively, in the interests of those persons requiring international protection. ...[T]he situation in Syria elicited deep compassion and made the smooth functioning of this system all the more important...to protect those who might need to seek refuge from persecution and not to disrupt the system by introducing the factors of disorder and instability that would inevitably result from a decision by the Court to accede to the applicants' claims.

ECJ litigation, *X, X v Belgium*:[142] Art. 3 ECHR is an absolute; so it entails not only its core negative obligation (not to torture or subject anyone to inhuman or degrading treatment) but also a positive obligation to take reasonable steps to ensure that no one is exposed to[143] such treatment or to real risks of undergoing such treatment. Granting a visa is a reasonable measure. The facts that the applicants have no connection whatever with Belgium, and that they thus have selected Belgium out of many alternative countries (and have thereby chosen to create a responsibility for Belgium), are not facts that can count against the absoluteness of the art. 3 obligation of states *not to allow* anyone in relation to whom they are exercising a public power (to grant or withhold a visa) to be exposed to the real risk of being subjected to treatment of the kind described in art. 3. Allowing such exposure is itself subjecting the person to inhuman or degrading treatment.

Just as the ECJ in 2017, unusually, did not accept its Advocate General's Conclusions in *X, X v. État Belge*, so too the ECtHR's reasons in 2020 in *MN v Belgium* tracked the counter-argument urged upon it by the UK for some other intervening states:

> 123.... the mere fact that an applicant brings proceedings in a State Party with which he has no connecting tie cannot suffice to establish that State's jurisdiction over him... [T]o find otherwise would amount to enshrining a near-universal application of the [ECHR] on the basis of the unilateral choices of any individual, irrespective of where in the world they find themselves, and therefore to create an unlimited obligation on the Contracting States to allow entry to an individual who might be at risk of ill-treatment contrary to the Convention outside their jurisdiction ... If the fact that a State Party rules on an immigration application is sufficient to bring the individual making the application under its jurisdiction, precisely such an obligation would be created. The individual in question could create a jurisdictional link by submitting an application and thus give rise, in certain scenarios, to an obligation under Article 3 which would not otherwise exist.

This might be thought to be tantamount to admitting that no *positive* obligation created by art. 3 ECHR can be absolute; no such obligation can transgress what is fair and doable in circumstances which may include not only the fate of this or that particular applicant but also the next dozen or million or ten million applicants to the same country. At least on its

142. For this final, most radical extension of art. 3 (or rather, of the EU equivalent, art. 4 CFR), see the Conclusions of Advocate General Paolo Mengozzi, 7 February 2017, in *X, X v. État Belge* (Case C-638/16 PPU), see esp. paras. 139-40, 152, 161, 163, 174. The ECJ Grand Chamber found a way of rejecting his resolution of the case without challenging (or expressly considering) his appeals to art. 3 ECHR (art. 4 CFR): *X and X v État Belge*, 7 March 2017.

143. This equivocal term "exposed" elides *putting someone out* of the house, in the rain, with *not letting them in* out of the rain (along with anyone or everyone else who is out there). "Exposing" is the word selected by Thomas Gammeltoft-Hansen and James C. Hathaway, "*Non-Refoulement* in a World of Cooperative Deterrence", Columbia J. Transnational Law 53 (2015) 235-284 at 238 to tell their readers what art. 33(1) Refugee Convention says: "The duty of *nonrefoulement*, codified in Article 33 of the Refugee Convention, prohibits states from exposing a refugee 'in any manner whatsoever' to the risk of being persecuted for a Convention reason."

face, however, it is not about art. 3 but about art. 1 – about the territorial character of obligations that states shoulder as signatories of the ECHR.

The decision in *MN v Belgium* is a standstill or pause in the progressive extending of art. 3. But it involves no rethinking of that process of art. 3 extension, and rests on a vulnerable interpretation of art. 1, retreating (how completely? how resolutely? for how long?) from *Al-Skeini* back towards the *Bankovic* reasoning that the Grand Chamber in *Al Skeini* had purposefully left behind, indeed had implicitly disapproved.

About art. 3 itself, as extended by the sequence of cases since *Soering*, there remains still in play – waiting in the wings, so to speak – the reasoning of Advocate General Mengozzi in X,X v *Etat Belge*, as he formulated it for the ECJ[144] in para. 163 of his Conclusions: art 3 ECHR (= art. 4 CFR) requires each state to grant an entry visa whenever there are serious reasons to believe that denying it would – by depriving him of a legal pathway to [seeking] international protection – have the direct consequence of leaving the applicant exposed to [the risk of] suffering treatment of the kind prohibited by art. 3. To Belgium's plea that everyone in under-developed, war-torn or disaster-struck countries would have the same right, the Advocate General's reply is: *art. 3 is an absolute and Belgium's responsibility is to honour it* (paras. 169-70). After all, he concluded, was not everyone (especially in Europe) moved to indignation by the image of little Alan, the boy lying drowned on a beach in 2015 after his Syrian family were shipwrecked fleeing Turkey for Greece [and Canada]? This is a reminder of the law's [=ECHR's] command, not an appeal to emotion... (para. 175).

So these pauses or standstills in the living development of doctrine are unstable, vulnerable. As Judge Koskenni forcefully warned in her MN & NT dissent, much litigation is in prospect, aimed – if not overtly at overturning the standstill cases themselves – at, for example, establishing how extensive and workable must be the legal pathways into Europe that are needed (according to the standstill doctrine) to justify rejecting and/or expelling on grounds of the numbers and/or conduct involved in unauthorised border crossings.

144. The Advocate General's argument did not prevail. As the ECtHR remarks in one of its dispositive paragraphs (124) in *MN. v Belgium*, "In this context, the Court notes that the CJEU ruled in a case [= *X and X v État Belge* Case C-638/16 PPU, 7 March 2017] similar to the present one that, as EU law currently stands, the issuing of long-stay visas falls solely within the scope of the Member States' national law."

V. Art. 3 relativized: life-saving healthcare sometimes terminable

A. D v UK restrained by N v UK

Lord Justice Laws' 2004 demonstration that the ECtHR's claims about the "absolute" character of art. 3 are false[145] has never been refuted. But it has had no impact on the ECtHR or on Britain's highest court. As the last sub-Part suggests and this Part will show, the ECtHR had already, by 2004, demonstrated its willingness to contradict itself about art. 3. Yet it has continued to extend the reach of art. 3 far beyond its true scope – what Laws LJ called its paradigm -- as an absolute, that is, exceptionless exclusion of actions or omissions intended to torture, degrade or reduce a person to a sub-human condition. This section outlines some of the main consequences of this extended reach of ECtHR control over state policies that are far removed from that paradigm.

D v UK (1997)

In 1997, the ECtHR held that the UK would be violating art. 3 if it returned to his home country (St Kitts in the West Indies) a previously deported drug dealer who, having contracted AIDS, unlawfully came back to the UK without leave, simply for the purpose of committing further serious offences here. While in detention for crime and then for deportation processes, he had received elaborate and expensive medical treatments totally unavailable in St Kitts. For lack of these, he would die sooner in St Kitts, and in more distressing circumstances than he would in Britain, having in St Kitts (seemingly) no family or friends. As the ECtHR accepted, *nothing* that would be done to him, *or happen to him*, in St Kitts would "in itself" either subject him, or amount, to torture or inhuman or degrading treatment.[146] But the ECtHR held also that for Britain to return him *would subject* him to inhuman and degrading *treatment* proscribed by art. 3.[147] Its reasoning is characteristically opaque, fallacious and in part incoherent:

145. *R (Limbuela) v Home Secretary* [2004] QB 1440 at 1468 para. 67. See n. 68 above.

146. 24 EHHR 423 at para. 49. One of the many unsatisfactory features of the ECtHR Grand Chamber's decision in *Paposhvili* in 2016 is its murky statement of the way art. 3 bears on persons in the position of D and Paposhvili:

> 192. The Court emphasises that ... [t]he responsibility that is engaged under the Convention in cases of this type is that of the returning State, on account of an act – in this instance, expulsion – *which would result in an individual being exposed to a risk of treatment prohibited by Article 3*.

Taken at face value, the italicised words are incompatible with the sequence of "reasoning" in *D*, though the result is the same and the Court in *D* itself, quite inconsistently with that "reasoning", says (in sentence [2] in the quotation below from para. 49] that it is concerned about "a risk of *proscribed treatment in the receiving country*", yet the only "treatment" it can point to as proscribed is the expelling country's act of deportation.

147. *D v UK* 24 EHHR 423, (30240/96) 2 May 1997 (Chamber)

> 49. [1] It is true that this principle [scil. that art. 3 applies regardless of the gravity of the applicant's misconduct] has so far been applied by the Court in contexts *in which the risk* to the individual of being subjected to any of the proscribed forms of treatment *emanates from intentionally inflicted acts of the public authorities in the receiving country or from those of nonState bodies in that country* when the authorities there are unable to afford him appropriate protection.... [2] [The ECtHR] is not therefore prevented from scrutinising [= upholding!] an applicant's claim under Article 3 (art. 3) where the source of the risk of proscribed treatment in the receiving country stems from factors which cannot engage either directly or indirectly the responsibility of the public authorities of that country, or which, taken alone, do not in themselves infringe the standards of [art. 3]. [3] To limit the application of art. 3 in this manner would be to undermine the absolute character of its protection. (emphasis and enumeration added).

In short, even when there is no risk that the illegal entrant will be subjected in the receiving (home) country to inhuman or degrading treatment by persons or other "factors", the removing country's act of removing him back to his home country – with the effect of discontinuing treatment available in the UK but unavailable (or not available *to him*) in that country – would be (or subject him to) inhuman or degrading treatment. Equally proscribed by art. 3 would be a UK decision to stop providing him with expensive medical treatments.

At least one set of premises employed in this decision would open up the health and welfare systems of every relatively prosperous country to all persons – from among the many millions of dying, disabled or gravely ill worldwide -- who, for the sake of getting medical and other support not obtainable at home, could contrive by stealth, fraud, or other crime to set foot anywhere in the UK (or even just call for assistance from within its territorial waters).[148] To the thus creatively inferred negative obligation not to deport – an obligation soon to be judicially expanded much further still – was added the equally creatively inferred but more burdensome positive obligation to supply expensive and elaborate medical treatment which, when successful in arresting deterioration, may be required continuously for decades. Being derived from art. 3, neither kind of obligation can be qualified in any way by the recipient's fraudulence, violence or other misconduct and contempt for this country and its law-abiding residents.

Reasonable and admirable as it may well be for a people's representative institutions to undertake such open-ended obligations, it

148. The Court may have been pointing to a narrower set of premises, with less sweeping further consequences, when it said (para. 53):

> the respondent State has assumed responsibility for treating the applicant's condition since August 1994. He has become reliant on the medical and palliative care which he is at present receiving and is no doubt psychologically prepared for death in an environment which is both familiar and compassionate. Although it cannot be said that the conditions which would confront him in the receiving country are themselves a breach of the standards of Article 3, his removal would expose him to a real risk of dying under most distressing circumstances and would thus amount to inhuman treatment.

is not constitutionally acceptable for those obligations to be imposed by transforming and departing from the intended and public meaning of treaty provisions to which that people's government signed up, nearly 50 years earlier, with different purposes in mind and without the faintest intimation that anyone could make and impose such transformations.

N v Home Secretary (2004/5)

The illegal entrant in *N v Home Secretary* (2004/5),[149] while suffering (aware of it or not) advanced AIDS in Uganda, flew to the UK on a false passport, and being "refused entry", but seriously ill, was admitted next day to a major NHS hospital in London. There she was successfully treated through many medical complications and crises. Thus, six or seven years later when her appeals were heard, this by-then 24-year-old woman had a life expectancy of decades – but only if the expensive drugs and medical facilities here remained available to her, at public expense. In Uganda her life expectancy would be a year or two.

The Court of Appeal and the Law Lords, overruling the immigration adjudicator, held that the Home Secretary's decision to deport her (after the failure of her asylum claim) did not contravene art. 3. The humanitarian case for letting her stay was pressing, "very powerful indeed", indeed "overwhelming". But (the judges went on) her plight was not exceptional; millions of people are in like plight and thousands come to the UK as illegal entrants but are able to stay for some considerable time during which our medical facilities and care restore them to a condition of health which will not survive their return to their home country. In cases such as N's or D's, art. 3 applies only (as Strasbourg had said in *D v UK*) in really exceptional cases. What is an exceptional case? Lady Hale rejected as "not at all helpful" the "test" suggested by Laws LJ in the Court of Appeal: Is the humanitarian appeal of the case "so powerful that it could not in reason be resisted by the authorities of a civilised state?"[150] Her own test was: Has "the applicant's illness reached such a critical stage (i.e. he is dying) that it would be inhuman treatment to deprive him of the care which he is currently receiving and send him home to an early death unless there is care available there to enable him to meet that fate with dignity"? To this narrow and circular test, she added: "It sums up the facts in *D*. It is not met on the facts of this case."[151] Expanding on Lady Hale's unexplained "he is dying", several of the Law Lords identified a rational distinction between *D*'s case and N's. Lord Nicholls put it like this:

> In D and in later cases the Strasbourg court has constantly reiterated that in principle aliens subject to expulsion cannot claim any entitlement to remain… in order to continue to benefit from medical, social and other forms of assistance provided by the expelling state. Art. 3 imposes no such "medical care" obligation on contracting states. … But in *D*,

149. [2005] 2 AC 296, [2005] UKHL 31.

150. para. 66.

151. para. 69.

> *unlike the later cases, there was no question of imposing any such obligation on the United Kingdom. D was dying, and beyond the reach of medical treatment then available.*[152]

Lord Brown made the same point, to identify the rationale of the line implicitly drawn by the ECtHR in similar cases subsequent to *D v UK* :

> 91. ...D's illness had attained its terminal stage and... D, unlike the later applicants, had no prospect of medical care or family support on return home. *It is perhaps not, however, self-evidently more inhuman to deport someone who is facing imminent death than someone's whose life expectancy would thereby be reduced from decades to a year or so.* ...[153]

So the difference between *D* and *N* was not in terms of humanitarian considerations such as degree of suffering, but was rationally discernible, nonetheless, as Lord Brown explained:

> 93. *The logical distinction between the two very different scenarios* presented respectively by D and the later cases is surely this. D appeared to be close to death... The critical question there was accordingly where and in what circumstances D should die rather than where he should live and be treated. D really did concern what was principally a negative obligation, not to deport D to an imminent, lonely and distressing end. Not so the more recent cases including the present one. Given the enormous advances in medicine, the focus now is rather on the length and quality of the applicant's life than the particular circumstances of his or her death. In these cases, therefore, the real question is whether the state is under a positive obligation to continue treatment on a long-term basis.

Lord Nicholls had indeed given much the same explanation to the humanitarian conundrum:

> 13. ... D was dying. But [N's] condition ... will rapidly become terminal, as soon as her life-preserving medication is discontinued. This prompts a further question: why is it *unacceptable* to expel a person whose illness is irreversible and whose death is near, but *acceptable* to expel a person whose illness is under control but whose death will occur once treatment ceases (as may well happen upon deportation)?[154]
>
> 14. As I see it, these questions are not capable of satisfactory humanitarian answers. ...

152. para. 15 (emphasis added). At para. 17 Lord Nicholls added: "It would be strange if the humane treatment of a would-be immigrant while his immigration application is being considered were to place him in a better position for the purposes of article 3 than a person who never reached this country at all." This is a *further* answer by Lord Nicholls to the question he had himself raised in para.13: "Why is it *unacceptable* to expel a person whose illness is irreversible, and whose death is near, but *acceptable* to expel a person whose illness is under control but whose death will occur once treatment ceases (as may well happen on deportation?"

153. The sentence here italicised is the one quoted by Lord Wilson in para. 17 of *AM (Zimbabwe)*, (and alluded to by him in para. 34: see at n. 162 below.

154. Emphases in original.

> 15. Is there, then, some other rationale underlying the decisions in the many immigration cases where the Strasbourg court has distinguished D's case? *I believe there is*. The essential distinction is not to be found in humanitarian differences. Rather it lies in recognising that article 3 does not require contracting states to undertake the obligation of providing aliens indefinitely with medical treatment lacking in their home countries. ... This is so even where, in the absence of medical treatment, the life of the would-be immigrant will be significantly shortened. But in D, unlike the later cases, there was no question of imposing any such obligation on the United Kingdom. D was dying, and beyond the reach of medical treatment then available.

In short, the question whether the "treatment" (deportation as such) is inhuman (proscribed by art. 3) is settled not by considering the degree of the deportee's suffering, but by asking whether forbidding the deportation would result in burdens on the deporting state (such as medical and welfare expenses) that, when considered in terms of the numbers of actual *and potential* illegal entrants in similar situations of need and vulnerability, are too much to fairly require a state to undertake.

But that is simply to say that art. 3 is not an absolute. Its negative command (as extended by the ECtHR in *D*) – *not to return anyone to risk of death or danger even though no one and no "treatment" is the cause* of the risk – is inapplicable where the alternative to returning someone will be great expense to the returning state, expense indefinitely great because of the other persons in similar circumstances now and/or in future.

There is no way of reconciling the reasoning in *N v Home Secretary* with the reasoning in *Chahal*, *Saadi* and *Hirsi Jamaa*. Of the two lines of authority, *N v Home Secretary* is the more defensible, in terms both of rational coherence and of treaty interpretation. It was, indeed, adopted by the ECtHR – though only for a decade, before being abandoned by that Court and, with an inappropriately immediate deference, by our Supreme Court, as we shall see in the next sub-Part.

N v UK (2008)

The 14 majority judges in the ECtHR Grand Chamber remained silent about the inconsistency between the Court's lines of authority about art. 3,[155] an inconsistency pointed out trenchantly by the three dissenters. The majority just went ahead and upheld the House of Lords in *N v Home Secretary* both as to result and as to essential reasoning. They ruled that, although *D v United Kingdom* should be upheld, it should be limited to such "very exceptional" cases (paras. 42, 43, 44) lest art. 3 "place too great a burden on the Contracting States" (para. 44). For, they said, not only

155. *N v United Kingdom* (26565/05) 27 May 2008 (GC). Note that the majority (unlike the minority) seem to take some care not to adopt the argument, adopted in *D v UK* (and many other cases), that art. 3's scope can be inferred from – and must be wide because of -- its "absolute" character; they preferred instead to infer its width (as extending to *D*-like situations) from "the Article's *fundamental importance* in the Convention system" (an importance appealed to also in the key paragraph in *D v UK*, along with "absolute" character. (Whether or not that is ultimately a distinction without a difference, this "importance" premise is a *petitio principii*; the question is whether the side effects it forbids states to cause are more important than the side effects that respecting this prohibition will impose on states and their peoples.)

is the ECHR "essentially directed at the protection of civil and political" rather than "social and economic" rights, but also: "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" ([44]).

Again, that amounts to an admission that art. 3 is not an absolute. The admission is made, however, with no accompanying acknowledgement that the ECtHR's main cases on art. 3 hold, and stress, that it is absolute.

Incoherence, then, is a mark of the ECtHR's premier venture in legislation – its art. 3 law of asylum and immigrant protection. It is a self-contradiction that the logic of moral absolutes makes inevitable (III.B above).

This body of law is not a sound interpretation[156] of the ECHR. Its judicial production and maintenance is a standing affront to the rule of law. It could not be made either coherent or sound without returning to the true principle of art. 3: the outlawing of all conduct (acts or omissions, whether one's own or others') *intended* (whether as a means or an end) to torture, degrade or subject to inhuman treatment. Equivalents of *intending* include *planning*, *trying*, doing or omitting something *in order to*, *with a goal of*… and others. Any replacing of intention by *substitutes* such as *causing*, *directly bringing about*, *foreseeably resulting promptly and inevitably in*, *responsible* for -- all of them far from the meaning of "intended to" – makes incoherence and arbitrariness in the application of art. 3 inevitable.

The dissenting minority of three judges in *N v UK* preferred the absolutist line of authority, and were willing to impose on states – to an indeterminate extent –the incalculable burdens that forbidding N's deportation would entail: of providing expensive medical care to anyone indigent from an indigent country who can set foot in a Convention state. They seem tacitly to acknowledge the rational fragility of their own position -- and thus of art. 3 case-law as a whole, with its supposedly exceptionless imposition of liability for side effects as much as for intended effects. For they intimate, implausibly, that there is no likelihood that more than rather few will ever claim these rights, and that the burden on states is only "budgetary".

156. See, *mutatis mutandis*, Lord Bingham's careful discussion, after elaborate arguments of counsel in *Roma Rights* (n. 6 above), of the principle of good faith in the Vienna Convention on the Law of Treaties, and customary international law, concluding (para.19):

> there is no want of good faith if a state interprets a treaty as meaning what it says and declines to do anything significantly greater than or different from what it agreed to do. The principle that pacta sunt servanda [agreements are to be fulfilled] cannot require departure from what has been agreed. This is the more obviously true where a state or states very deliberately decided what they were *and were not willing to undertake* to do. (emphasis added)

That was the position of all nine judges who heard the *Roma Rights* case, in the High Court, Court of Appeal, and House of Lords, the principal treaty argument for the applicants having been squarely based on the Vienna Convention arts. 26 and 31: "26. Every treaty in force is binding upon the parties to it and must be performed by them *in good faith*. 31(1) A treaty shall be interpreted *in good faith* in accordance with the ordinary meaning to be given to the terms of the treaty and their context *and in the light of its object and purpose*."

B. D unrestrained: Paposhvili and AM (Zimbabwe)

From 1998 to late 2016 both the ECtHR and the English courts resisted repeated and diverse humanitarian urgings that *D v UK* should be extended and *N v Home Secretary*[157] and *N v UK* be circumvented or overruled.[158] But before too long, the Belgian authorities, including judicial tribunals, softened and broadened their conception of inhuman or degrading removal, and in 2016, in *Paposhvili v Belgium*[159] the Grand Chamber, following the Belgian judicial lead, effectively overrode and reversed *N v UK*. It did so while purporting only to "clarify" *N*; in no way did it admit that its judgment was incompatible, as it plainly is, with the result in *N v UK*. To the narrow category of removals identified in *N v Home* Secretary and *N v UK* as contrary to art. 3, *Paposhvili* adds a broad category or pair of categories, thus:

> The Court considers that the "other very exceptional cases" within the meaning of the judgment in N. ... should be understood to refer to situations involving the removal of a seriously ill person in which substantial grounds have been shown for believing that he or she, although not at imminent risk of dying, would face a real risk, on account of the absence of appropriate treatment in the receiving country or the lack of access to such treatment, of *being exposed to* [a] a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering or *[b] to a significant reduction in life expectancy*.[160]

Now the House of Lords in *N v UK* had taken it as established both (i) that N would on removal to Uganda be at real risk (even if far from a certainty) of a significant reduction in life expectancy, and (ii) that that did not make N's situation exceptional, let alone very exceptional. What reasons, then, did the Grand Chamber in *Paposhvili* advance for thus radically departing from its own case-law (and the serious considerations that underpinned that case-law)?

None whatever. It simply recited the case-law and then added the bare, one-word comment that that case-law "has deprived aliens who are seriously ill, but whose condition is less critical, of the benefit of [art. 3]". The word "deprived" does all the work of implicitly – but never explicitly – disapproving *N* and its progeny, and is all the reason the ECtHR deigns to offer.

157. For example, on 30 July 2015, refusing leave to appeal from the Court of Appeal decision in *GS (India) v Home Secretary* [2015] EWCA Civ 40, and five associated cases (two Court of Appeal decisions), Lady Hale, Lord Hughes and Lord Toulson said: "With regret, the Panel can foresee no reasonable prospect of this Court departing from *N v SSHD*": UKSC 2015/0121. The multiple applicants in these appeals suffered from end-stage kidney disease (but were kept in stable and relatively satisfactory condition by dialysis etc.) and faced early and unpleasant death within a very few weeks following their removal from the UK to territories where such medical resources would be unavailable to them.

158. *Paposhvili v Belgium* para. 179 lists eight cases between 2012 and 2015 in which the ECtHR declined applications based on the extension of art. 3 made in *D v UK*. Para. 180 summarises a 2013 case where the application was successful, but does not explain how this coheres with para.178's assertion that an examination of the case law since N "has not revealed any examples" where humanitarian considerations against removal led to the same result as in *D v UK*.

159. 41738/10, 13 December 2016, GC.

160. para. 183, emphases and enumeration added.

AM (Zimbabwe)

A month or so into lockdown 2020, in *AM (Zimbabwe) v Home Secretary* (2020), the UK Supreme Court – treating *Paposhvili* as decisive – unanimously "departed from" *N v Home Secretary*. The single judgment, by Lord Wilson, rightly castigated the ECtHR in *Paposhvili* for its evasive and misleading talk of "clarifying" N when in truth its new criterion, especially limb [b], entails reversing *N* pursuant to a "living", that is, law-creative "interpretation" of the ECHR. But Lord Wilson's judgment left quite unexplored the question whether there was adequate justification for the change in doctrine. And it gave only scant attention to the question whether the UK courts should follow a decision of the ECtHR so unsatisfactorily reasoned and inconsistent with so much prior Strasbourg case law.

This is surprising. After all, *Paposhvili* wholly failed to address the serious reasons accepted by a very hard-working and articulately thoughtful panel of Law Lords in *N v Home Secretary* (and then by a reason-stating 14:3 majority in *N v UK*, not to mention the Court of Appeal in *N v Home Secretary*, whose leading judgment by Laws LJ is echoed in that majority Opinion). Those two judicial panels had drawn a tight *and reasoned* line, expressly motivated not by narrowly focussed "humanitarian" distinctions as such, but by consideration of what humanity – and the treaty provision art. 3 ECHR – requires of, or permits to, a state in terms of undertaking or declining alleged positive-obligation burdens of lifelong medical care of a person who has no right to be in the country but is receiving benefits out of reach of most or very many of his or her fellow-citizens. That line-drawing, and those lines of reasoning alike, were imperiously brushed aside, without being rationally addressed, by *Paposhvili*. So there was and is a live question: Should the Supreme Court simply go along?

The Supreme Court palmed the question off with a fallacy:

> ... there is no question of our refusing to follow the decision in the Paposhvili case. *For it was 15 years ago, in the N case... that the House of Lords expressed concern that the restriction of art. 3 to early death only when in prospect in the returning state appeared illogical: see para. 17 above.*[161] In the light of the decision in the *Paposhvili* case, it is from the decision of the House of Lords in the N case that we should depart.[162]

The phrase "appeared illogical" is supported by nothing in the cited para. 17 save Lord Brown's sentence quoted in italics at n. 153 above (and by Lord Wilson in para. 17) and Lord Nicholls's sentence/question alluded to in the next sentence of para. 17, and quoted in n. 152 above. What Lord Wilson omits to mention at this critical point[163] is that – as set out at some length above – Lords Brown and Nicholls, having raised this question-objection about *apparent* illogicality, each went on, expressly (and the other

161. See at n. 153 above.

162. *AM (Zimbabwe)*, para. 34, emphasis added.

163. In para. 17 of *AM (Zimbabwe)* Lord Wilson briefly, indeed elegantly, sets out Lord Brown's resolution to his own doubt. But in para. 34, disposing of the question of following *Paposhvili*, no reference is made to that resolution, still less to the highly practical significance of the considerations about burdensome positive obligations that underpin that resolution (as also Lord Nicholls's, Lord Walker's and perhaps others').

Law Lords tacitly), to answer it. Each showed how, leaving to one side the interpretative justifiability of *D* itself, and going beyond appearances, there is nothing *illogical* in drawing the line at *D* and going no further, and that the decision to deport N was fully logically self-supported. For states do not "subject anyone to inhuman treatment" within the meaning of art. 3, nor even act inhumanely, if they determine that they have no positive and unqualified, misconduct-blind obligation to provide lifelong care to non-citizens who unlawfully entered or remain in the country (and in some cases entered by fraud for the sole purpose of committing crimes and receiving expensive treatment and welfare support).[164] The moral claim of such persons to receive such treatment for the rest of their life jars with the fact that, in the country which they left behind in order to unlawfully enter the UK, their fellow citizens mostly or frequently do not and cannot receive it at all.[165]

The Law Lords' expressing of "logic" doubts in *N* had a purpose. That purpose was not to suggest that art. 3 properly entails *Paposhvili* and *AM (Zimbabwe)*. It was to suggest that the openly novel position adopted by the ECtHR in *D* is hard to square with authentic treaty interpretation,[166] because of the incalculably open-ended positive obligations it threatens to impose on states and the huge incentive it threatens to give to unlawful entry for health purposes with really burdensome consequences for lawful residents. The Lords in *N* went along with the novel position adopted in *D* both because it was the ECtHR's position, and because it could be contained and limited to (in short) deathbed cases – where, at the point of the decision to deport or not deport, the burden on the state would be terminated by death about as soon as by removal.

It is unsatisfactory, therefore, for the Supreme Court in *AM (Zimbabwe)* to offer only a bland allusion to those doubts (abstracted from their authors' own resolution of them) to justify *an opposite purpose*: of ruling that there could be no question of challenging *Paposhvili*'s immense expansion of *D*? Worse, that expansion, neither admitted nor explained by the ECtHR, entails incalculably large substantive burdens and, to make matters even

164. In the *GS (India)* litigation in 2014, Kay LJ said of *D v UK* and *N v UK*: "They concern effectively illegal entrants who can properly be described as 'health tourists'": *GS (India) v Home Secretary* [2015] EWCA Civ 40, para.1. Lady Hale (*N* v UK at paras. 57-59) took pains to suggest that *N* was not a health tourist, but pointed out that, art. 3 being an absolute, it is irrelevant for art. 3 purposes how unmeritorious or even vicious the conduct of the applicant has been or is.

165. In para. 93 of *N v Home Secretary*, Lord Brown expressly states that there is a logical distinction between *D* and *N*, as decided; that immediately follows his listing in para. 92 of the costs entailed by acceding to N's claims: medicines, welfare, damage to immigration control, and incentivisation of persons overseas suffering from painful or life-threatening illness.

166. Thus Lord Hope at para. 53:

> ...the effect of any extension [beyond *D v* UK] would be to widen still further the gap that already exists between the scope of articles 32 and 33 of the Refugee Convention and the reach of article 3 of the Human Rights Convention to which [gap] the Strasbourg court referred in *Chahal v United Kingdom* (1996) 23 EHRR 438, para.80. It would have the effect of affording all those in the appellant›s condition a right of asylum in this country until such time as the standard of medical facilities available in their home countries for the treatment of HIV/AIDS had reached that which is available in Europe. It would risk drawing into the United Kingdom large numbers of people already suffering from HIV in the hope that they too could remain here indefinitely so that they could take the benefit of the medical resources that are available in this country. This would result in a very great and no doubt unquantifiable commitment of resources which it is, to say the least, highly questionable the states parties to the Convention would ever have agreed to.

The multiple applicants in *GS (India)* and associated cases (n. 164 above) were suffering not from AIDS but from kidney disease, and there are many other analogous conditions.

more serious, is accompanied by the sudden and equally unexplained imposition on states of novel procedural burdens. States wishing to remove someone must now prove that the medical facilities actually available to the deportee in his or her home country *would eliminate any real risk that his or her lifespan would be significantly shortened by removal* from NHS facilities to that country's.

Just as questionable was the Supreme Court's decision in *AM (Zimbabwe)* to adopt and make its own (para. 32) the fiction asserted by the ECtHR in *Paposhvili* that the expansive categories delineated in *Paposhvili* include only "very exceptional" cases. The Courts in *Paposhvili* and *AM (Zimbabwe)* never confronted the reality – which had been of the essence of the Lords judgments[167] in N – that such categories are *not really exceptional*.

When the new doctrine in *Paposhvili* and *AM (Zimbabwe)* is joined up with the position about "the principle of non-*refoulement*" as read into (or out of) art. 3 in *Hirsi Jamaa*, art. 3 accords rights of entry and stay to all persons, anywhere in the world, who have an illness that may well ("real risk") shorten their life significantly unless treated with medical facilities not available *to them* in their home countries but available to anyone in the UK's NHS. Then factor in the most frequently stated implication of art. 3's judicially proclaimed absoluteness: that it is "unqualified" in the precise sense that its application cannot be affected by criminality or other demerits of its beneficiaries – cannot be forfeited – and is the same irrespective of the security of the state and its people. *Refusal to admit* all such persons with a view to prolonging their lives significantly has now become an inhuman violation of art. 3 even if they threaten – perhaps openly – to commit massacres and other crimes during their perhaps lifelong stay in our midst.

Citing logic, *AM (Zimbabwe)* has ushered *Paposhvili* into our law[168] without any show of concern for its logical implications.

167. At para. 55 Lord Walker summarises all the other judgments: "This is a very sad case but it is, unfortunately, not exceptional." At para. 13, Lord Nicholls said, referring directly to *D* and the ECtHR's claim there that it represented only the "very exceptional": "13. The difficulty posed by this decision [scil. *D v UK*] is that, with variations in degree, the humanitarian considerations existing in the case of *D* are not ‹very exceptional› in the case of AIDS sufferers.»

168. Perhaps too optimistic, the Upper Tribunal is seeking to minimise the impact. Mr Ockelton giving the judgment of the Upper Tribunal (IAC) in *KAM v Home Secretary* [2020] UKUT 269 (IAC) said:

> 52. Whilst the case of *N v UK (2008) 47 EHRR 39* has recently been reconsidered by the Strasbourg Court in *Paposhvili v Belgium [2017] Imm AR 867* and adopted by the Supreme Court in *AM (Zimbabwe) v SSHD [2020] UKSC 17* so as to broaden the category of ‹exceptional case› falling within Art 3 in medical/health cases (and here by analogy we assume in ‹living condition› cases), it remains a rigorous test requiring serious and immediate suffering reaching the high Art 3 threshold or a significant diminution in life expectancy (see [27]-[31] per Lord Wilson in *AM*).

VI. Art. 8 ECHR: rights to family reunion and permanent residence

A second main type of judge-created obstacle to controlling immigration involves the *pull* created by the prospect that if one stays long enough or has some active, even exploitative involvement with the private affairs of citizens of the country, one may become entitled to stay for ever (despite the cessation of the circumstances that made one a refugee;[169] or despite the illegality and fraud involved in one's original entry and in all or many of one's subsequent dealings with the country's authorities). This second obstacle to immigration reforms is the ECtHR's extended interpretation of art. 8 ECHR. To be sure, this has been taken up and elaborated in EU and indeed British legislation for which politicians or bureaucrats, not judges, are directly responsible. But the judiciary has not failed to tell politicians and bureaucrats that, whether or not they foresaw this, they are bound to introduce and maintain some such policies, laws and systems.

Art. 8 reads:[170]

> 8. *Right to respect for private and family life*
>
> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

It protects the right of everyone present in the country – including even non-citizens illegally present -- against arbitrary interference with private life, children, home and correspondence. It is fanciful to suppose that it was meant to affect such legislative schemes as might rationally and

169. The Refugee Convention art. 1.C(5) terminates a refugee's Convention status as soon as "the circumstances in connexion with which he has been recognized as a refugee have ceased to exist", unless there remain "compelling reasons arising out of previous persecution for refusing to return to the country of his former habitual residence". The ECtHR's interpretation of art. 8 ECHR vastly supplements this exception.

170. Set out in II.A above, after n. 43.

even-handedly *define in advance* the legal rights of non-citizens to enter and stay, their legal obligations to leave, or their liability to be expelled – and consequently the legitimate expectations of citizens about the predictable consequences of relationships they may enter into with non-citizens.

But in *Abdulaziz* (1985), early fruit of the ECtHR's new-found "living tree/instrument" doctrine, the Court brushed aside the UK's case (presented with care and weight) that immigration control of that sort is outside art. 8.[171] The effect of this important ruling was muted (and remained muted for years), because the Court found *against* the applicants on the merits of their art. 8 claims. These claims all related to decisions they had made with full awareness of the precariousness of the non-citizen's expectation of permission to enter or stay; the foreign spouses seeking leave had married knowing full well that entry would probably be refused; so it could now be properly refused. That reasoning generally prevailed for another 15 years or so, but since then has lost most of its power to persuade the ECtHR,[172] and seemingly much if not most of its power to persuade top-level British courts. Nowadays, the radicalism of *Abdulaziz* about art. 8's sway over immigration control laws passes without notice, or at least with complete acquiescence.[173]

Section III.A above ("A Noteworthy Cosmopolitan Achievement") enlisted the judicious and frank testimony of Daniel Thym, an expert who displays and mostly commends the ECtHR's "remarkable" extension and creation of rights never envisaged, intended or provided for by the ECHR.[174] Much of Thym's analysis has concerned the Court's exploitation of the art. 8 right to respect for private and family life, Accordingly, III.A set out Article 8 complete, in both its parts, art. 8(2) being essential to the authentic specification of the right misleadingly declared, as if complete, in art. 8(1). The present Part details some of the facts underpinning Thym's assessment of the Court's treatment of art. 8 as having transformed that article into something unquestionably never intended, something "employed by the judges to *push* the Convention *beyond its original scope* into new domains".[175]

171. *Abdulaziz v United Kingdom* 9214/80, 25 May 1984 (Plenary).

172. *Biao* (n. 173 below) had and has the potential to entail that applicants like those in *Abdulaziz* would always prevail, on grounds of indirect ethnic discrimination. The entailment is, for the time being, rejected in the UK: *MM (Lebanon) v Home Secretary* (n. 183 below).

173. Its qualifying formula remains in place, as a formula:

> The duty imposed by art. 8 cannot be considered as extending to a general obligation on the part of a Contracting State to respect the choice by married couples of the country of their matrimonial residence and to accept the non-national spouses for settlement in that country.

Abdulaziz at para. 68. But the formulaic recital rarely impedes the ECtHR's regular (constant but not invariable) expansion of art. 8, often now in combination with art. 14's prohibition of discrimination on grounds of ethnic origin. See for example the Grand Chamber's decision of 24 May 2016 in *Biao v Denmark* 38590/10, reversing the Chamber judgement and the Danish Supreme Court, and holding that the Danish legislature's 2004 requirement that Danish citizens acquired the family-reunion right to bring in a foreign spouse only after 28 years from becoming citizens (whether by birth or naturalisation) could not prevent the applicant Biao from acquiring that right only two years after acquiring citizenship (by naturalization). "Living instrument" reasoning (see para. 131) and the views of bodies more fitted to advise legislatures than courts (para. 136) were accorded palpable weight.

174. See at n. 41 above.

175. *Human Rights and Immigration*, 107 (emphases added).

A. Right to admission for family residence

Abdulaziz concerned this kind of claim for admission, and though it established that art. 8 in principle can ground such a claim, the courts generally refrained from upholding these claims on the merits, until about 2000.[176] During the 1970s and early 1980s many European states decided to depart from any "guest-worker" model of temporary migration and to create extensive rights of admission to their country for purposes of "family reunification" – so that admission of one worker for (say) one year or more would regularly entail admission of, say, half a dozen more persons (spouse and children, at least) for lawful residence. This policy was eventually extended and formalized in the EU Directive on the right to family reunification.[177] The existence of these legislative codes (codes which legislatures have remained constitutionally free to reform – amend or abandon more or less completely – if they prove to be contrary to the common good, including the rights of others) has somewhat limited the ECtHR's opportunities to bar the way to such possible reforms by its ever-extending declarations of an ECHR human right to *enter for purposes of* family reunification. Until now, most people who otherwise might need or wish to invoke such a human or ECtHR right find that they have sufficient *enacted* legal rights under these codes.

Even so, the Court has not refrained from insisting on this judicially created right. Where (a) there is "a major impediment" to the resident non-citizen returning to his or her homeland, and (b) allowing his or her child (left behind in the homeland for years) to enter to join or rejoin his or her (perhaps new) family would "be the most adequate way in which the family could develop family life", [178] then (c) the Court may well hold that art. 8 is violated if the state fails to authorize that entry.[179] The Court's criterion for such a supersession of the judgment of the state's legislative and judicial authorities is no more precise than:

> … the boundaries between the State's positive and negative obligations under this provision [art. 8] do not lend themselves to precise definition. The applicable principles are, nonetheless, similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole….[180]
>
> … the Court must examine the facts of the case in the light of the applicable principles…:

176. *Sen v Netherlands* 31465/96, Judgment 21 December 2001 (First Section), citing *Gül v Switzerland* (ECtHR, 19 February 1996) and *Ahmut v Netherlands* (ECtHR, 28 November 1996), para. 63. Decisive was the presence of two children born in the Netherlands to residents of Turkish nationality, children who though not Dutch nationals had no connection with Turkey other than their parentage. This grounded the claim to enter and stay of their first child, born in Turkey and raised there by the wife's sister for nine years.

177. 2003/86/EC. This Directive does not apply to the UK, Ireland or Denmark. For analogous UK provisions, see e.g. the Immigration (European Economic Area) Regulations 2006, SI 2006/1003 as amended by e.g. SI 2015/694.

178. *Tuquabo-Tekle v Netherlands* (60665/00) 1 December 2005 (3rd Section), para. 48.

179. Ibid., para. 52 finding violation of art. 8 through failure "to strike a fair balance between the applicants' interests on the one hand and its own interest in controlling immigration on the other."

180. Ibid. para. 42.

> (a) the extent of a State's obligation to admit to its territory relatives of settled immigrants will vary according to the particular circumstances of the persons involved and the general interest;
>
> (b) 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;
>
> (c) where immigration is concerned, Article 8 cannot be considered to impose on a State a general obligation to respect the choice by married couples of the country of their matrimonial residence and to authorise family reunion in its territory.[181]

In practice, the statements of principle in (b) and (c) are hollow words – formulae cut and pasted from one judgment to another – dead letters whenever judges are sympathetic to the "particular circumstances of the persons involved" in the litigation, and willing to translate their sympathy into the "State's obligation to admit…" which they have conjured up from art. 8.

In *Quila*,[182] one of a number of remarkable immigration decisions in 2011, the UK Supreme Court deployed art. 8 to strike down (by a 4 : 1 majority) an immigration rule introduced in 2008 (with wide parliamentary approval) to combat forced marriages by denying a foreign spouse leave to enter for so long as either spouse is under 21, save in cases judged by the Home Secretary to be exceptional compassionate cases.[183] Even the EU's remarkably if not recklessly welcoming Family Reunion Directive 2003/86 (from which the UK opted out) authorizes member states to set age limits of this kind for this purpose. Lord Brown's dissenting opinion pointed convincingly to the constitutional impropriety of the courts' radical substitution of judicial for political judgment – a judgment involving a host of admitted imponderables and arguable evaluations. Although Parliament could enact the rule, the Supreme Court's judgment in *Quila* would constitute an advance declaration of incompatibility with art. 8, and no appeal can be made to Strasbourg by a government.

181. Ibid. para. 43, citing *Gül v Switzerland* (ECtHR, 19 February 1996) and *Ahmut v Netherlands* (ECtHR, 28 November 1996) para. 63.

182. *R (Quila) v Home Secretary* [2011] UKSC 45, upholding (Lord Brown dissented) [2010] EWCA Civ 1482, reversing the persuasive judgment of Burnett J [2009] EWHC 3189 (Admin).

183. The ages were raised in stages from 16 to 18 to 21 during the period 2003-2008, on the basis of empirical evidence about the age-profile of UK-related forced marriages. The existence of the exceptional "compassionate circumstances" override played little part in the majority's reasoning. The ground for *Quila* was prepared by the overthrow, first by the Law Lords and then by the ECtHR, of the scheme -- given statutory basis by the Asylum and Immigration (Treatment of Claimants etc) Act 2004, s. 19(3) and regulations made thereunder -- for combatting marriages of convenience: *R (Baiai) v Home Secretary (No. 2)* [2009] 1 AC 287; *O'Donoghue v UK* (2011) 53 EHHR 1. The story is lucidly summarized in paras. 103-6 of the Court of Appeal's judgment in *R (MM) (Lebanon) v Home Secretary* [2014] EWCA Civ 985.

B. Right to enter and stay: citizen-children's interests paramount and font

Although *Abdulaz*is was about asserted art. 8 rights to bring in a foreign spouse, and no children were involved, the ECtHR's rationale for dismissing those claims is of wide application: where decisions such as to marry – or to have children – are made with awareness of one's own or one's spouse's precarious immigration status, they will prevail over the state's interest in immigration control only in the most exceptional circumstances. Recent cases both in the ECtHR and the Supreme Court show how far this rationale – still verbally adhered to by the ECtHR – has weakened.

In ZH (*Tanzania*) (2011) neither the need for fair and firm immigration control, nor the applicant foreign mother's appalling record of immigration frauds, nor her awareness of her wholly precarious immigration status when begetting children in the UK, counted for much in the Supreme Court, focused upon the "best interests of the [citizen] child".[184] What swayed the judges most was the thought that "the child is not to blame" for such factors, though no one was contending or implying that the children were to blame.[185] The "trump card" metaphor was disavowed, but the judicial rhetoric's effect is that having a citizen child serves as an almost unbeatable trump card for a non-citizen adult illegal entrant to get leave to enter and remain. The Supreme Court correctly held that the needs of the children were only "a primary", not "the paramount" factor. But then, without convincing reason, it preferred that factor to the rights and interests alluded to in the ECtHR's constant declaration, only recently reaffirmed, that where marriage is contracted with awareness of precarious immigration status, the would-be immigrant's claim should prevail only in "*the most exceptional* circumstances".[186]

And the Supreme Court's preference for the children's interest in growing up in the country of their citizenship – an interest which many good parents have happily considered to be fairly readily outweighed – was imposed, above all, without regard to the damage to the interests of many other children, those whom would-be overstayers conceive as means – means of achieving their own purpose of acquiring the right to reside in the UK. The court's decision plainly opens up a route to immigration rights, but does so without a word about these real-world incentive effects, or the appropriateness of incurring them.

184. The immigration appeals judge Mark Ockelton, in his essay "Art. 8 ECHR, the UK and Strasbourg: Compliance, Co-operation or Clash? A Judicial Perspective", in Ziegler et al. (eds), *The UK and European Human Rights* (Hart, 2015) 215-224 at 219, remarks on the abstraction from reality involved in the fact that the child's possession of dual nationality is never mentioned by the Supreme Court in *ZH (Tanzania)* v *Home Secretary* [2011] UKSC 4.

185. The thesis that – in immigration as distinct from extradition contexts – whenever the interests of the child demand it the parent can escape the consequences of his immigration frauds and other misconduct, because "a child must not be blamed for matters for which he or she is not responsible, such as the conduct of a parent", is repeated (obiter, but in a statement of principles) in *Zoumbas v Home Secretary* [2013] UKSC 74 at para. 10 (in this case the children were not British citizens).

186. *Rodriguez da Silva v Netherlands* (2006) 44 EHRR 729 at para. 39. As Lady Hale observed, the severity of the wording was only "apparent", and was undercut by the ECtHR's actual decision (on which see Thym's comment at n. 197 below) in the immigrant's favour. See now *Jeunesse* (2014), n. 187 below.

The ECtHR[187] and the CJEU alike have followed some such sort of path to the same destination, with the same public inattention to the injustices thereby made probable.[188] In place of "the country of their citizenship", the CJEU uses the concept of European citizenship. If the deportation of a non-EU national on grounds, say, of his or her serious criminal offences in the deporting state would "risk" resulting in the departure of that national's minor children, who happen to be EU citizens, the deportation of the non-EU adult "could potentially" – and if the children had in the circumstances to leave EU territory "*would*" -- "deprive the children in question of the *genuine enjoyment of the substance of the rights* conferred by virtue of their status as citizens of the Union". That would violate art. 20 of the founding EU Treaty (establishing citizenship of the Union). So the deportation of the adult will be unlawful (subject to countervailing considerations of public order or national security, considerations assessed, however, individually and judicially, not by application of a rule). This inflation of the interests of children (whose actual Union citizenship is not endangered, whatever the outcome) in residing during childhood in the country of their nationality (or indeed in an EU state) is accomplished by the rhetoric of murky concepts such as "enjoyment of the substance", with little or no regard to the impact of the resulting rule or practice -- and the impact of abolishing the national law's automatic link between serious crime and deportation -- on real-world children other than those under the Court's gaze.

And it is a yet further court-engineered inflation of the now pervasive judicialization of countries' defences against the bad consequences of irregular immigration, a judicialization that, taken as a whole and in practical terms, renders impossible both deterrence of and defence against wide categories of illegal immigration.

As the dissenting Opinion (Judges Villiger, Mahoney [UK] and Silvis) put it, in the Strasbourg court's important *Jeunesse* decision – a decision that has moulded the "balancing" "tests" of UK tribunals and courts since 2014:

> 10. On our analysis of the facts, the balancing exercise between the interests of the applicant and her family, on the one hand, and the general interest of the community, on the other, was performed by the national authorities, including

187. In *Jeunesse v Netherlands* [2014] ECHR 1036 (Grand Chamber, 3 October 2014) the ECtHR watered down its long-standing "most exceptional circumstances" to "it is likely only to be in exceptional circumstances that the removal of the non-national family members will constitute a violation of Article 8" (para. 108) and upheld the art. 8 claim in circumstances rightly characterised by three Judges in a cogent dissent, the conclusion of which is quoted in the next paragraph below.

188. As to the CJEU: see the Judgment of the Grand Chamber, 13 September 2016, in Cases C-165/14 *Marin v Administracion del Estado* and C-304/14 *CS v Home Secretary*, applying *Zhu and Chen* (C-200/02, Judgment of ECJ Full Court, 19 October 2004) and *Zambrano* (C-34/09, Judgment of CJEU Grand Chamber, 8 March 2011). The concept of "genuine enjoyment of status as citizen of the Union" was launched in *Rottmann*, Case C-135/08 [2010] ECR I-1449, para. 42, probably wrongly, since the Treaties and the states party to them clearly intended that acquisition and loss of national citizenship be solely a matter of national law: for hints to this effect, see *Pham v Home Secretary* [2015] UKSC 15 at paras. 72-92, 111, 112. (*Rottmann* concerned *deprivation of German nationality* on the ground that it had been acquired by fraud, with consequent statelessness unless Austria restored to R. the citizenship he lost by acquiring German citizenship.) But even if *Rottmann* is erroneous, it does genuinely concern loss of (enjoyment of) the status of EU citizen, whereas the cases of adult rights derived from citizen children are a far remove from this, since the deportation of the adult will not affect the child's nationality or EU citizenship, but only the loss of some years of under-age residence in the EU.

> the independent and impartial domestic courts, in a full and careful manner, in conformity with the well-established principles of the Court's case-law. … *The approach adopted by the Court in the present case*

[the approach which, because of the loyalty of national authorities, tribunals and courts to unsatisfactory decisions such as the majority's in *Jeunesse*, is unlikely to yield the same kind of outcome]

> *in effect involves giving to those prospective immigrants who enter or remain in the country illegally and who do not properly and honestly comply with the prescribed conditions for seeking residence a special premium, in terms of Convention protection, over those who do respect the applicable immigration law by remaining in their country of origin and conscientiously complying with the procedures laid down for seeking residence. The result is liable to be to encourage illegal entry or overstaying* and refusal to comply with the prescribed immigration procedures and judicially sanctioned orders to leave the country. The right answer in hard cases is the one that fulfils the obligation of the community to treat its members in a civilised but also coherent and principled manner. In replacing the domestic balancing exercise by a strong reliance on the exceptional character of the particular circumstances, the Court is drifting away from the subsidiary role assigned to it by the Convention, perhaps being guided more by what is humane, rather than by what is right.

Their last reflection is good sense: what is right morally can depend, within the due limits of justice, on what is right legally, according to law's authentic sources taken integrally. That is, there ought to be a strong presumption that the courts should stick to enforcing the properly enacted rules.

C. Long-term residence: font of rights to stay for ever

As Daniel Thym put it, "academic observers soon identified", with approval of course, "a 'hidden agenda' of the Court to protect the long-term residence status of second-generation immigrants" – the non-citizen children (minors or adults) of non-citizen immigrants.[189] The "crucial innovation" was the Court's "broadening the protective reach of Article 8 ECHR to the network of personal, social, and economic relations that make up the 'private life' of every human being."[190] Thym here understates the scope of the broadening. For "private life" since at latest 2002 is judicially conceived as not necessarily relational: one's own mental health is a matter of one's private life, and so one may well have an art. 8 right against expulsion (expulsion otherwise amply justified by one's misconduct) even when "the main emphasis is not on the severance of family and social ties which the applicant has enjoyed in the expelling country but on the consequences for his mental health of removal to the receiving

189. A main category were the children and descendants of Turkish "guest-workers" in Germany.

190. "Residence as De Facto Citizenship?" (n. 41 above) at 114.

country"[191] -- even when the receiving country is as wealthy and safe as Germany was in 2004.

Still, Thym does not exaggerate when he emphasises that these new-found art. 8 rights against expulsion – even for misconduct and even to perfectly safe states – apply "to protect [the] long-term residence itself" of *illegally* resident non-citizens, and that this "human right to regularize illegal stay"[192] is "a direct challenge to the concept of state sovereignty".[193] And, writing evidently in 2012/3, he remarked how in 2012 the ECtHR issued a stream of decisions retreating from what might have seemed its movement "towards a general prohibition of the deportation of foreigners who have lived in European states for an extended period of time" – an "apparent hardening of the judicial standpoint", a "disappointment" to those "who had expected the Court to extend the human rights of illegal immigrants even further".[194] (By "human rights" here he means legal rights so labelled.) He ascribes this to "contextual factors" such as the Court's awareness of the "political pressure" arising from the "complaints of the Conservative British government" which was seeking, specifically in 2012, to "restrain the influence of the Court".

Just as in the case of the later Strasbourg standstill on art. 3 (see IV.D and E), Thym here made no comment on that judicial replacement of legal criteria by sensitivity to political winds.[195]

Looking especially to this art. 8 jurisprudence, Thym concludes that "this extension of human rights law to long-term residence status [including illegal residence] provides immigration lawyers, interest groups, and national courts with a legal tool to redesign national immigration law."[196] He speaks with approval.[197] And he means that this "redesign"– inexorably in the interests of migrants, while still falling short of judicially mandating an unconditional legal right to stay after sufficient residence -- is all rightly accomplished by the courts (often at the urging of pro-migrant or globalist interest groups) at the expense of "the legislative process" (and behind

191. *R (Razgar) v Home Secretary* [2004] UKHL 27 at para. 9, Lord Bingham for the whole Court (two Law Lords dissented, but not on the principles), relying on the ECtHR decision in *Bensaid v United Kingdom* (2001) 33 EHRR 20.

192. "Residence as De Facto Citizenship?" at 117.

193. Ibid, at 117-8. This includes cases where there was never any state permission to enter the territory: 119.

194. Ibid., 121.

195. He points yet again to the fact that EU legislation, especially Directive 2003/109/EC on third-country [non-EU] nationals who are long-term residents, has already made generous provision for these matters, provision only made more generous by the EU's supreme judicial body, the CJEU. The UK, like Ireland and Denmark, was never subject neither to this, nor to 2003/86/EC on the right to family reunification. But, as Thym notes (126), the EU has adopted "numerous legislative instruments creating an 'area of freedom, security and justice';" the reach of the EU Charter of Rights and, enforcing it, the CJEU will be practically unrestrained even in these opt-out states (as in the UK until the implementation period's end on 31 December 2020).

196. Ibid, 129. In Thym, "Respect for Private and Family Life under Article 8 ECHR in Immigration Cases: a human right to regularize illegal stay?", International & Comparative Law Quarterly 57 (2008) 87-112 at 101, the equivalent sentence ends: "...new legal tool to redesign national immigration law from a human rights perspective, since the weighing of interests under the proportionality tests is inherently no strict dogmatic undertaking and opens the law to considerations of equity" – as if those who enacted the national immigration law were not also open to considerations of equity.

197. Or so it seems. In an earlier iteration, "Respect for Private and Family Life under Article 8 ECHR in Immigration Cases: A Human Right to Regularize Illegal Stay?" International and Comparative Law Quarterly 57 (2008) 87-112 at n. 52, Thym says, in relation to *Rodriguez da Silva & Hoogkamer v Netherlands* 31 December 2006 ECtHR (Chamber) (n. 186 above), that "the Court has clearly attributed too little weight to the necessary effectiveness of immigration law, for which the sanctioning of illegal entry and stay are important foundations to maintain the credibility of the overall system." His later essay (n. 41 above) gives a citation to his own "earlier comments on the case", but does not endorse them.

that the citizenry as electors) and of the responsible decision-making of elected legislators and ministers for the public interest".[198]

Under the "living" interpretation which makes art. 8 extend to immigration matters, the wording of art. 8 – certainly drafted without thought of immigration or deportation – entails that laws and decisions relating to such matters, and to borders, have to be defended largely if not solely by reference to "the economic wellbeing of the country".[199] Yet, as everyone knows, the public interest really at stake *in these matters* is as much political and cultural as economic: the maintenance of a community of trust and shared social capital, and of democracy and the rule of law itself. And not everyone knows why, at a late stage in the drafting of art. 8, the phrase "economic wellbeing" was introduced. The reason is one that indicates both the true meaning of art. 8(1), and the absurdity of its extension to immigration (and all the consequent scrabbling about to find in art. 8(2) something to uphold a fair and firm system of migration control):

> 13.On that occasion [meeting of 3 August 1950 of the Committee of Ministers of the Council of Europe] the United Kingdom delegation maintained, with regard to Article 8, that:
>
> > In its present form this Article does not provide either for the rules under which the party to a civil action may be compelled to give disclosure of his documents to the other party or for the powers of inspection (for example the opening of letters which are suspected of attempting to export currency in breach of Exchange Control Regulations) which may be necessary in order to safeguard the economic well-being of the country. H.M. Government, therefore, propose an amendment to paragraph 2 of this Article to read: "…in the interests of national security, public safety or the economic well-being of the country, for the provision of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

198. "Residence as De Facto Citizenship?" (n. 41 above), 129-30.

199. Occasionally a court in an immigration entry-leave context will allude also to prevention of disorder and crime and protection of the rights of others as factors that "may be relevant"; but their relevance seems restricted to special cases where the person in question is a specific menace: see *ZH (Tanzania) v Home Secretary* at paras. 18, 28. Entry control as such has to be justified for living-instrumentalised art. 8 purposes by the country's economic well-being – an inadequate statement of the real good reasons at stake even when it is treated as embracing the benign (and usefully ambiguous) aim of "facilitating integration" (of an incomer into British society), as is now standard (see e.g. *R (Bibi) v Home Secretary* [2013] EWCA Civ 322, [2014] 1 WLR 208). The Immigration Act 2014, inserting s. 117A-C into the Nationality, Immigration and Asylum Act 2002, explicated "public interest considerations" (for purposes of art. 8 ECHR) as "in particular in the interests of the economic well-being of the UK" (s. 117B(2) & (3)).

> The Sub-Committee on Human Rights accordingly amended the second paragraph of Article 8 [to its present form].[200]

It is, at bottom, illegitimate to use art. 8 – conceived and adopted with a public meaning of the kind and scope just indicated – as a ground for judicial invalidation of enacted legislation and otherwise lawful ministerial orders refusing or terminating leave to enter or remain in the country. This illegitimacy damages the constitution. And by generating multiple incentives to unlawful immigration – and to evasion of measures for keeping immigration lawful – the judicially inflated ("living") art. 8 damages the multi-ethnic and multi-communal nation itself, and works injustice to its lawful citizens.

Constant repetition that the Strasbourg Court acknowledges the state's right to control migration does little indeed to diminish these incentives. For the mantra is so often followed by "But…". And the requirement[201] that every case be weighed on its individual merits (with no specifiable weights for the "balance") gives all illegal entrants and over-stayers and their NGO advisers an ever-present encouragement to stall and prevaricate until a system overwhelmed by numbers, complexity, expense, tall stories, a sense of mission-failure – and relentless denunciation by those for whom anything short of Free Movement is bigoted inhumanity – loses sight of them.

Part VII takes this up in more detail. And most of it concerns art. 8, which in day to day practice is more important than art. 3.

200. Council of Europe, European Commission of Human Rights, *Preparatory Work on Article 8*..., Information Document DH (56) 12, prepared by the Secretariat of the Commission, Strasbourg 9 August 1956, p. 8 (of 9 pages): http://www.echr.coe.int/LibraryDocs/Travaux/ECHRTravaux-ART8-CDH(67)5-BIL1338891.pdf. This was the last change made to art. 8, which passed through the subsequent Consultative Assembly debate of 25 August 1950 without mention, and was adopted along with the rest of the ECHR on 4 November 1950.

201. Cemented into procedure as well as doctrine by unanimous Law Lords in *Huang* (2007), at n. 204 ff below. Foundational to *Huang* are (i) the statutory provisions of 1998 and 1999 for bringing ECHR considerations to bear on immigration decisions, (ii) the ECtHR "living" doctrine in *Abdulziz* (1985), n. 171 above, that art. 8 controls such decisions, and (iii) a questionable assertion by the Law Lords that the Immigration Rules, not being enacted by Parliament [though they are overseen by it], lack "the imprimatur of democratic approval" (para. 17).

VII. "No bright lines": retaining judicial control

No one doubts that, like all administrative decisions, Home Office decisions about entry and stay must be open to judicial review on the normal grounds, grounds which, despite debatable modern expansions, still fall well short of judicializing administration. Immigration decisions, however, have become something different. Since 1970, Home Office immigration decisions have been subject to appeals to two tiers of special adjudication tribunals, but the foundation of a new, radically judicialized structure was laid by the Human Rights Act 1998, which on 2 October 2000 introduced into our law, government, and legal proceedings most of the ECHR in its living-instrumentalised form, in continuous creation since 1975 by the ECtHR's "evolutive" reading of the original text (Part II above).

The new appeals structure was created by the same Parliament and Government, by section 65 and Schedule 4 of the Immigration and Asylum Act 1999. Section 65 authorised appeal from the relevant Home Office decision (e.g. to grant or refuse leave to enter), on the ground that the decision-maker "acted in breach of the appellant's human rights" (and the decision therefore was "made unlawful by s. 6(1) of the Human Rights Act 1998"). Appeal lies first to an adjudicator (now the First-tier Tribunal) and from there to the Upper Tribunal, Immigration and Asylum Chamber.

A. Adjudicators of proportionality

For about five years, adjudicators in each of these appellate tiers (with the approval of the Court of Appeal) treated their role as a secondary, reviewing function, to establish – along the lines of conventional judicial review -- whether or not primary decision-makers had misdirected themselves or acted irrationally or with procedural impropriety. Specifically, these tribunals asked themselves whether the decision "*could reasonably be regarded as* proportionate and as striking a fair balance between the competing interests in play".[202] But in *Huang v Home Secretary* both the Court of Appeal

202. *Edore v Home Secretary* [2003] EWCA Civ 716.

in 2005[203] and a unanimous House of Lords in 2007[204] rejected this restraining doctrine:

> the appellate immigration authority… is not reviewing the decision of another decision-maker. It is deciding whether or not it is unlawful to refuse leave to enter or remain, and it is doing so on the basis of up to date facts. ……the [appellate] authority will be much better placed to investigate the facts, test the evidence, assess the sincerity of the applicant's evidence and the genuineness of his or her concerns and evaluate the nature and strength of the family bond in the particular case.[205]

Any idea that in the appeal(s) there should be deference to the Secretary of State's opinions about the public interest was brushed aside; the appellate tribunal(s) will doubtless give attention to those opinions, along with many other general factors favouring removal,[206] and give them appropriate weight. On the other side are all the many factors that come into play in considering what is called for by the duties identified by the constantly expanding judicial interpretation of art. 8. Those factors or

203.[2005] EWCA Civ 105, [2006] QB 1.

204. *Huang* [2007] UKHL 11, [2007] 2 AC 167. The single Opinion says (para. 11) that it gives effect to s. 65 "read purposively and in context". In *R (MM) Lebanon)) v Home Secretary* [2017] UKSC 10 at para. 64, it is insisted that *Huang* –

> was a decision about the relationship of the Secretary of State [not with the courts but] with the specialist appellate system set up by Parliament to hear appeals by disappointed applicants. It was Parliament which had laid down the rules governing that system. In particular, it was Parliament, not the courts, which had required separate consideration by the tribunal of issues under article 8, and had placed no express restriction on the scope of that consideration. The House in *Huang* was simply giving effect to Parliament's intention.

Sec. 65 was replaced in 2002 and again in 2014 but, in relation to asylum and humanitarian protection (human rights) issues, the structure regulated by *Huang* remains substantially in place. Mark Ockelton (see n. 182 above) suggests at 222-4 of his essay that the position (which is more generous to claimants than the ECtHR requires under its interpretation of art. 6 ECHR) survives because it leaves to judges rather than politicians the opprobrium attached by some parts of media and public opinion to lenient or seemingly lenient decisions.

205. *Huang* paras. 13, 15. Appeal from the lower to the upper tribunal is now (like any further appeal to the Court of Appeal and beyond) by leave and for material error of law (though where error is found the upper tribunal may well remake the decision on the evidence and, by leave, new evidence).

206. The "general considerations to bear in mind" mentioned here, *Huang* para. 16, are:

> – the general administrative desirability of applying known rules if a system of immigration control is to be workable, predictable, consistent and fair as between one applicant and another;
>
> – the damage to good administration and effective control if a system is perceived by applicants internationally to be unduly porous, unpredictable or perfunctory;
>
> – the need to discourage non-nationals admitted to the country temporarily from believing that they can commit serious crimes and yet be allowed to remain;
>
> – the need to discourage fraud, deception and deliberate breaches of the law, and so on.

This is a good list, but it tends to be taken for granted as a kind of almost undifferentiated lump of abstract goods while the tribunal focusses on the *applicant's* particular needs, interests and ECHR "rights" – scare quotes because a right declared in art. 8(1) is not properly speaking a right until it has been specified by taking into account the countervailing interests and rights of others as protected by or under laws made within the ambit of art. 8(2). See at nn. 44-46 above.

criteria[207] are supposed to concern duties, opaquely and half-heartedly divided into the "negative duty" to refrain from unjustified interference with a person's right to respect for his or her private life" (in its various aspects), or his or her family life (in its various aspects), and the "positive duty" to show respect for that private life and/or family life.[208]

Within a few years of *Huang*'s ruling that tribunals – and therefore in their wake the courts – must consider the question what is a fair balance of public and private interests/rights, and consider it outside or beyond the balance struck in the Immigration Rules, Parliament intervened to give courts and tribunals explicit guidance, in statutory form, as to its legislative judgment about how the public policy and public interests are to be weighed against individual family and private life interests/rights in the application of art. 8 doctrine. The Immigration Act 2014, by s. 19, inserts into the Nationality, Immigration and Asylum Act 2002 ss. 117B and 117C. Lord Brown, the retired Supreme Court Justice, said in the debate on this in the House of Lords:

> In the past, courts have rather too often tended to thwart the attempts of the Government to control immigration and deport foreign criminals on the basis of art. 8 interests. On occasion they have carried the reach of this article beyond even the lengths to which the Strasbourg court itself has gone,

207. An early list, much used for some years, is the set of nine criteria articulated in *Boultif v Switzerland* 54273/00, 2 August 2001 (Second Section), para. 48 in the context of deportation for criminality:

> i. the nature and seriousness of the offence committed by the applicant;
>
> ii. the duration of the applicant's stay in the country from which he is going to be expelled;
>
> iii. the time which has elapsed since the commission of the offence and
>
> iv. the applicant's conduct during that period;
>
> v. the nationalities of the various persons concerned;
>
> vi. the applicant's family situation, such as the length of the marriage;
>
> vii. other factors revealing whether the couple lead a real and genuine family life;
>
> viii. whether the spouse knew about the offence at the time when he or she entered into a family relationship; and
>
> ix. whether there are children in the marriage and, if so, their age.
>
> Not least, the Court will also consider the seriousness of the difficulties which the spouse would be likely to encounter in the applicant's country of origin, although the mere fact that a person might face certain difficulties in accompanying her or his spouse cannot in itself preclude expulsion.

In the same sort of criminal deportation context, see now *Maslov v Austria* , in which the Grand Chamber repeats these and then adds (para. 58):

> The Court would wish to make explicit two criteria which may already be implicit in those identified in the *Boultif* judgment:
>
> – 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.

208. *See Huang* [2007] UKHL 11 para. 18, summarizing the "Convention jurisprudence on article 8" which courts and tribunals must follow ("in the absence of special circumstances") where it is "clear and consistent". *Comment*: There are genuine differences between negative and positive duties, but this is not a real (more than verbal) example of them. And the courts, while not repudiating this dubious, indeed illusory, distinction – between (a) interfering with the duty to respect the right to private life and (b) failing to show respect for private life – as a matter of principle (as they should), treat it as of no practical importance. Their task, at least since *Huang*, is to "strike" or "find" a "fair or proportionate balance" between what would be better described as the interests (in "private life") of the applicant and the interests of society in immigration control, suppression of crime, etc.: see *Jeunesse* para. 104; *Hesham Ali (Iraq) v Home Secretary* [2016] UKSC 60 at paras. 47-48; *R (MM) (Lebanon) v Home Secretary* [2017] UKSC 10 at para. 40.

> and that court is no mean exponent of the art of dynamic and creative interpretation of the Convention.[209]

Generally our courts remain reluctant, and with exceptions unwilling, to get ahead of Strasbourg. A recent and relevant example of such reluctance is the Court of Appeal's firm rejection, in 2017, of attempts by tribunal judges to recognise an art. 8 right to enter the country in order to develop "private life" relationships with persons inside the country (with whom the applicant, though related to them, did not share a *family* life).[210] To recognise such a right would – like recognising a right to make art. 3 claims from outside the country – result in very large numbers of persons making claims of right to enter, even though art. 8 rights unlike art 3 rights are qualified. It would be a step change that the ECtHR itself has not yet made. Thus the Court of Appeal in *Abbas*. And perhaps it is reasonable to hazard the prediction that, in the wake of the "standstill" in *MN v Belgium* (which found support in the same 2014 ECtHR precedent[211] as the Court of Appeal had in *Abbas*), it seems unlikely that this step change will be made soon.

But 2017 also saw the UK Supreme Court, in *MM (Lebanon) v Home Secretary*[212]– while rejecting a general challenge to the Immigration Rules themselves, and holding that they did not themselves violate art. 8 or constitute unlawful discrimination (say, indirect discrimination on ethnic grounds) – hold nonetheless that "art. 8 considerations" *cannot* –

> be fitted into a rigid template provided by the rules, so as in effect to exclude consideration by the tribunal of special cases outside the rules. As is now common ground, this would be a negation of the evaluative exercise required in assessing the proportionality of a measure under article 8 of the Convention which excludes any "hard-edged or bright-line rule to be applied to the generality of cases".[213]

And in November 2020, the ECtHR, radicalising this rejection of rules restraining or channelling such "evaluative exercises" of judicial power, struck hard at the balance that seemed to have been achieved, albeit precariously, between Parliament (and statutorily specified rules) and the courts of tribunals (with their post-*Huang* authority to use multi-factorial art. 8 "assessments" to find "compelling" reasons for not treating those rues as decisive).

The context was one that, despite its prominence in public and Parliamentary discussion, has not been central to this paper: deportation

209. HL Deb. 1 April 2014 col. 945. The constitutional propriety of the 2014 innovation is explained, along with some illustrations of the lengths to which the courts had gone in thwarting deportation of foreign criminals, in Adam Tomkins, "The Guardianship of the Public Interest: A British Tale of Contestable Administrative Law" (2017) 24(2) *George Mason Law Review* 417-451.

210. *Home Secretary v Abbas* [2017] EWCA Civ 1393.

211. *Khan v. United Kingdom*, 11987/11, 28 January 2014; (2014) 58 EHRR SE 15 ECtHR Fourth Section). For *MN v Belgium* see IV. E and n. 140 above.

212. [2017] UKSC 10., concerning minimum income requirements for non-national family members to joint their family (e.g. spouse) in the UK.

213. Para. 66, quoting Lord Bingham in *EB (Kosovo) v Secretary of State for the Home Department* [2008] UKHL 41, [2009] AC 1159, para 12.

of "foreign criminals" on completion of their sentence.

In *Unuane v UK* (2020)[214] the ECtHR approved the dissenting judgment of Lord Kerr in *Hesham Ali* (2016).[215] Both cases concern deportation of foreign criminals. But though heard and decided in 2016, *Hesham Ali* focussed on non-statutory rules (Immigration Rules) in operation from 2012 to 2014, and in the latter year Parliament intervened with new statutory rules. These were and are intended to specify, to the uttermost extent compatible with art. 8, *how* – that is, by what standards, guidelines and rules – *the United Kingdom's margin of appreciation under art. 8 will be used* in determining when the removal of non-national offenders is "necessary in a democratic society" – that is, proportionate – as a limitation of such an offender's art 8 rights. That had hitherto (notably in 2012) been laid down in the non-statutory Immigration Rules about how ministers *must* deal with the continued UK residence of non-citizen offenders sentenced to imprisonment, and (where the sentence exceeds, for example, four years) must, save in "very compelling circumstances" terminate – and be permitted by tribunals and courts to terminate – that residence by deportation. The dissenting judgment in *Hesham Ali* attacked not only the judgment of the other six Supreme Court Justices concerning the 2012 Rules, but also (visibly) condemned the 2014 Rules and (invisibly but by clearly intended entailment) the 2014 statutory provisions. In adopting the core of this position, the ECtHR in *Unuane* likewise professes to be concerned with the Rules and mutes to scarcely a whisper its unquestionably entailed and intended rejection of Parliament's 2014 statutory provisions (merely mirrored in the Rules).

The long and passionate dissent in *Hesham Ali*, unpersuasive to the other six Justices but adopted by the ECtHR, has a dignity lacking in the ECtHR's judgment: it offers reasons and arguments for its conclusions. But they are arguments quite insufficient to justify those conclusions, for they amount to a rejection of the rule of law and the constitutional distribution of responsibilities. Determinations of the scope and effect of art. 8 rights must not, the dissent asserts, be guided by rules or even by defeasible presumptions. Instead they must proceed by considering long lists of factors telling for and against, say, a deportation that, in the particular case in question, would or might be disruptive of private or family life – and then each factor must be given the weight "it deserves"!

The determination of this "deserved" or "appropriate" weight must be "open-textured" in the sense of completely "open-ended": *free from all standards* saying (like the standards enacted by Parliament in 2014) that where an offence was of sufficient gravity (say, punished by more than 4 years imprisonment) deportation *is required – except* in very compelling

214. *Unuane v UK* (8034/17), Fourth Section, 24 November 2020. The British Judge joined in the unanimous Judgment.

215. The ECtHR erroneously said, when giving its own summary of the law (para. 46), that Lord Kerr had joined in the judgment of Lord Reed (in which, in truth, five other Justices including Lady Hale and Lord Thomas concurred). It then said (para. 48) that he (like Lord Thomas) gave a "separate opinion" (quoted from extensively in paras. 48-50). Only when summarising the arguments of the applicant does it, as if accidentally, state (para. 59) the fact of the matter: Lord Kerr's was from end to end a dissenting judgment (*Hesham Ali (Iraq) v Home Secretary* [2016] UKSC 60, paras. 85-177).

circumstances.[216] As the ECtHR approvingly summarised the dissenting judgment in *Hesham Ali*:

> As Lord Kerr observed, such a requirement would appear to run directly counter to a proper assessment of whether an interference with the right to respect for family or private life on the part of those who do not come within one of the [statutory] exemptions is justified.[217]

For "proper assessment" must consider the lists of factors mentioned in ECtHR art. 8 judgments, *and in considering them* give them the weight "they deserve", not the weight given them by Parliament *when Parliament considered those factors*.

Here the remarkable nature of the Kerr-ECtHR position emerges. All the passive verbs in the preceding paragraphs about the weight "to be given "to the relevant factors must at some point give way to active verbs with *a subject who is doing the weighing*. The Kerr-ECtHR position amounts to saying that only judges – *and ultimately*[218] *only in particular cases, one by one* – can settle what is or is not compatible with art. 8; and in deciding, the

216. These exceptional exempting circumstances are described in Immigration Act 2014 s. 19 (inserting new s. 117C in Immigration Act 2002) as "very compelling circumstances not falling within Exceptions 1 or 2", that is, C has been lawfully resident in the United Kingdom for most of C's life, *and* is socially and culturally integrated in the United Kingdom, *and* there would be very significant obstacles to C's integration into the country to which C is proposed to be deported; *or* C has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, and the effect of C's deportation on the partner or child would be unduly harsh.

Since *NA (Pakistan) v Home Secretary* [2016] EWCA Civ 662, para. 30, the phrase "not falling within" is taken not to exclude *compelling* instances of circumstances of a *kind* falling within Exceptions 1 or 2 (that is, cases "going well beyond what would be necessary to make out a bare case of the kind described in Exceptions 1 or 2").

217. *Unuane* at para. 80. The first sentence of this paragraph (which is at the heart of the Chamber's assessment) states what "the applicant argues". But the rest of the paragraph, including the sentence quoted, is manifestly the Chamber's own opinion, ratifying the proposition it correctly ascribes to Lord Kerr.

218. Our judges regard themselves as entitled to make, in advance, general rulings on the true priority of or among the aims, values, and aspects of the public interest in relation to deportation of non-national offenders. A prime example is *Kairie and Byndloss* (2016), where the Supreme Court neutered Parliament's "deport first, appeal later" provisions, the majority proceeding on the basis of its personal ranking of selected elements of the public interest relating to deportation of offenders:

> one aspect of this public interest is said to be a concern that, if permitted to remain in the UK pending his appeal, a foreign criminal might seek to delay its determination in order to strengthen his personal and family connections here. But the tribunal will be alert not to allow objectively unwarranted delay.

[This seems, incidentally, a very surprising over-estimate of the tribunal's ability, in practice, to forestall such delay – and nothing short of forestalling would suffice to override the art. 8 rights (interests) accumulated during the delay; they are not lost by unmeritorious originating circumstances.]

> A *somewhat stronger aspect* of the public interest is the risk that, if permitted to remain pending his appeal, the foreign criminal would, however prejudicially to its success, take that opportunity to re-offend. To that extent there is a public interest in his removal in advance of the appeal. But *in my view that public interest may be outweighed by a wider public interest* which runs the other way. I refer to the public interest that, when we are afforded a right of appeal, our appeal should be effective.

R (Kairie and Byndloss) v Home Secretary [2017] UKSC 42, para. 35 (Lord Wilson for three other Justices). Lord Carnwarth at para. 86, criticising para. 35, said:

> No-one disputed that the appeal mechanism needed to be effective. On the other hand, the objectives of the new provision, indicated by the Ministerial statements..., were directed, not specifically to the risk of offending in the interim period, but rather to *speeding up the process of deportation both as an end in itself*, and for the purpose of reducing what was seen as abuse by building up further claims to a settled life. (emphasis added)

"As an end in itself" here does not capture the true legislative motivation for speeding up deportation, a motivation better (though not completely) reflected (in advance) by the observations of the Law Lords in *Huang* (quoted in n. 206 above and at n. 228 below), when they referred to "the damage to good administration and effective control if a system is perceived by applicants internationally to be unduly porous, unpredictable or perfunctory; [and] *the need to discourage non-nationals admitted to the country temporarily from believing that they can commit serious crimes and yet be allowed to remain.*" Any system in which three, four or five years go by between release from prison and actual deportation is likely to be perceived by those concerned as porous and perfunctory.

judges must treat themselves as free from standards purporting to "pre-determine" weight. But it is self-evident that no system of admission to or removal from the national territory can be justly administered without standards whose application does not differ widely from administrator to administrator, from tribunal to tribunal, or from judge to judge. Such standards must be communicable, and if they can be communicated from judge to judge they could in principle – with exactly the same content – be communicated from legislature to judge. The dissent in *Hesham Ali* was a dissent from our constitution. The ECtHR's position on art. 8 is a direct – but not frankly acknowledged – challenge to our constitutional democracy.

And judgments such as the dissent in *Hesham Ali* give effect to personal, indeed, idiosyncratic moral opinions: for example, that it is not just to deport a convicted non-national serious criminal who is, unlikely, for whatever reason, to offend seriously again. Rejected by this moral opinion is the moral thought, adopted by Parliament and by the Lords in *Huang*, that deterrence of others is a legitimate aim for a system of deportation of serious criminals after they have served[219] their sentence, The ECtHR, in following the *Hesham Ali* dissent, quietly rejected the idea that upholding the immigration system and its integrity is a justly weighty reason for exemplary deportation of offenders whose crime was to profit from corrupting the system. The judgment in *Unuane v UK* nowhere acknowledges the public fact[220] that Mr Unuane's 32 offences against immigration law consisted not of 32 repeated attempts to gain residence rights for himself and his Nigerian ex-wife, but rather of arranging sham marriages (besides his own sham marriage and her two sham marriages) for dozens of *other* fraudulent immigrants at £3,000 per head, reaping for the Unuane husband-wife crime-partnership about £100,000; and that these corruptions of the immigration system began within three months of his arrival in the UK and persisted until interrupted by the authorities after eight or nine years. The ECtHR, though accepting that they were "undoubtedly serious", admitted neither that Mr Unuane's offences were "at the more serious end of the spectrum" nor that it is relevant that they were offences designed to subvert the UK's immigration system.

Much graver is *Unuane*'s rejection of the UK's democratic decision, by Act of Parliament, to establish pre-announced and known standards for assessing the *comparative weighting* among the dozen "factors" that Strasbourg recognises as relevant in determining what art. 8 permits and forbids in relation to controlling residence rights. Parliament specifies that these weight-assigning rules can be overridden in "very compelling circumstances" (provided these are not merely standard or "bare" instances[221] of the pre-defined[222] exempting circumstances). But even with

219. All the more so when it is the case, as with Mr Unuane, that offenders serve, like most others, only half their just sentence.

220. Recorded by the Court of Appeal Criminal Division in *R v Unuane* 2010 WL 1990707 (2010).

221. Referred to as "bare cases" in para. 30 of the Court of Appeal's judgment in *NA (Pakistan) v Home Secretary* [2016] EWCA Civ 662, as distinct from cases "going well beyond what would be necessary to make out a bare case of the kind described in [the pre-defined exceptions]". See n. 216 above.

222. See n. 216 above.

this statutorily provided opportunity for *equitable override*, Parliament's rules for giving effect to the public interest – in view of *several* legitimate and art. 8-compatible aims – in deportation of serious non-national offenders were declared unacceptable to the lone dissenting Justice in *Hesham Ali* and, following him, to Strasbourg,[223] Indeed, it was the very idea of having such non-judicially defined standards that was found intolerable.

This doctrine that the *ad hoc* moral intuitions of judges should, in privacy-related or analogous immigration and other issues, be unhampered by statutory rules – even rules incorporating calibrated opportunity for equitable override – was rejected in our Supreme Court 6:1 in *Hesham Ali* (2016), by 3:2 in *Tigere* (2015), and by 4:1 in *Gallagher* [2019] UKSC 3.

Unuane concerned a special topic: deportation of non-national offenders. But there are very many other Immigration rules (and accompanying directives or instructions) that pre-determine categories and provide lines which are more or less approximate to "bright lines". As has been seen, the Strasbourg-engineered doctrine is that, across a vast proportion of the whole field of immigration, these rules can constitute only the starting point. That Strasbourg jurisprudence has been diligently followed by the UK courts from *Razgar* in 2004 down to *MM (Lebanon)* in 2017, and today. If the first decision-maker has not complied with the rules, the appeal must be upheld. But if the rules have been fully complied with – rules which embody the assessments of "fair balance" between public and private interests made by Parliament itself or by elected ministers (usually one after the other, over many years) and subject always to parliamentary scrutiny -- the appeal against applying them in *this* case then begins in earnest. The tribunal will redo the balancing, by employing for itself the multiple incommensurable criteria involved in the "fair balance" between private interests (prematurely[224] styled *rights*) and public interests.[225] Claimants can succeed even though there is nothing exceptional about

223. The judgment in *Unuane* says (para. 83) that "the Court does not consider that the Immigration Rules necessarily preclude the domestic courts and tribunals from employing the *Boultif* criteria...". But this statement (deliberately ignoring the statutory provisions mirrored by the Immigration Rules) does not mean that the ECtHR will allow the UK courts to follow the *weighting* of *Boultif* factors that is specified and made mandatory (subject to equitable override) primarily by s. 117C of the Immigration Act 2002 as amended in 2014, and secondarily by the corresponding Rules. The Upper Tribunal decision upheld by the Court of Appeal but overturned by Strasbourg followed the Rules (and s. 117C) in the way approved in *NA (Pakistan)* and the 6:1 majority in *Hesham Ali*. For doing so, the Upper Tribunal was treated by Strasbourg – entirely contrary to the fact of the matter – as having "[not] conducted a separate balancing exercise as required by the Court's case law under Article 8". That is the cutting edge demonstration of the practical meaning ECtHR's approval of Lord Kerr's radical dissenting judgment, rejecting all rules in favour of intuitions of the "deserved weight" of the *Boultif* factors (misdescribed by Lord Kerr, and Strasbourg dicta, as "principles").

224. See part III around n. 44 above.

225. The present state of play is indicated by the Upper Tribunal in *ZAT v SSHD (Article 8 ECHR – Dublin Regulation – Interface – Proportionality)* IJR [2016] UKUT 61 (IAC), after [57]:

> Lesser weight is to be accorded to the Secretary of State's assessment to the balance to be struck between the public interest and the rights of the individual in circumstances where the Secretary of State's insistence upon full adherence to the [immigration rule in question] embodies a generalised assessment, a broad brush, to be contrasted with a specific, considered response and decision on a case by case basis.

their situation.[226]

Yet these are doctrines and rights introduced by Strasbourg on the basis – repeated mantra-like – that they were exceptional!

And now, in *Unuane*, Strasbourg has found the UK courts' efforts to be faithful both to Strasbourg and to Parliament to be in vain. It has sided with the most radical judicial critic of those efforts. And it has adopted this doctrine under the influence of a political ideology clearly manifested in the dissenting judgment in *Hesham Ali*: that the state has little or no right to deport non-citizen criminals except to protect against future offences by that individual.[227] The other reasons, outlined authoritatively in *Huang*[228] as *good and valid* reasons to be kept always in mind, are – on this now dominant doctrine – not legitimate aims capable of having any significant weight or influence in decision-making:

- the general administrative desirability of applying known rules if a system of immigration control is to be workable, predictable, *consistent and fair as between one applicant and another*;
- the damage to good administration and effective control if a system is perceived by applicants internationally to be unduly porous, unpredictable or perfunctory;
- *the need to discourage non-nationals admitted to the country temporarily from believing that they can commit serious crimes and yet be allowed to remain*;
- *the need to discourage fraud, deception and deliberate breaches of the law, and so on.*

And we should not fail to notice that a primary part of the case for rules is to avert the likelihood that *individual* official and judicial decision-makers will be willing to give effect to *private* political opinions authoritatively rejected by Parliament and other judges – such as Lord Kerr's evident opinion that the "needs" or "aims" articulated in the parts of *Huang* here italicised are not genuine or legitimate or substantial in a context of the right to private and family life.

In a reflective essay written after decades as an immigration appeal judge, Mark Ockelton has said that adjudication under the *Huang* doctrine is judging "in a void" where, moreover, "the void itself is in a vacuum".[229] Each of the five hundred adjudicators is removed from systemic awareness

226. In *Razgar* (2004) n, 189 at para. 20 the Law Lords – and in *Hesham Ali (Iraq) v Home Secretary* [2016] UKSC 60 at para. 38 the Supreme Court – said that only in "a very small minority" of cases would the art. 8 scrutiny depart from the Rules and directives or result in the public interest in deportation being outweighed. But this (said the Law Lords in *Huang* (2007) para. 20) only stated an expectation in the sense of a prediction, and not a legal test. To use exceptionality as a criterion would "flout" the ECtHR jurisprudence: *R (Akpinar) v Home Secretary* [2014] EWCA Civ 937 at paras. 53-4.. Such cases "need not necessarily involve any circumstance which is exceptional in the sense of being extraordinary...": *Hesham Ali* at para. 38; but "only a claim which is very strong indeed – very compelling, as it was put in *MF (Nigeria)* – will succeed"): *Hesham Ali* at para. 50; likewise *R (Agyarko) v Home Secretary* [2017] UKSC 11 at paras. 56-57.

227. "If an individual is unlikely to commit crime or be involved in disorder, how can his expulsion on that ground be said to be rationally connected to the stated aim?" (*Hesham Ali*, para. 96, selectively relying on an ECtHR dictum in 2012 that Strasbourg has "consistently considered that the legitimate aim [in this type of case] was the 'prevention of disorder and crime'" (para. 95)). Besides the *Huang* reasons just quoted, consider also the acceptance that even in the absence of a propensity to commit further offences, deportation of offenders can be proportionate as a response to the requirements of public policy in relation to public revulsion at serious offences: *Robinson (Jamaica) v Home Secretary* [2020] UKSC 53 at 19, 25, 61.

228. As quoted at n. 207 above

229. As quoted at n. 207 above at 219, 220.

of the way in which similar and dissimilar cases have been dealt with by the Home Office, removed from adequately detached and established facts about the applicants, and removed from knowledge of trends in the wider world. And the vacuum is art. 8 itself (in its living interpretation):

> The jurisprudence on Article 8 is about actual or potential breaches of the Convention, overwhelmingly in the context of immigration removals. There is almost no authoritative statement on the positive content of Article 8 when it is not under stress. Even more to the point, there is almost no treatment of the extent to which interference with the rights protected by Article 8 is permitted outside the context of immigration removals. Sending someone to a prison for a long time may separate him from his family more comprehensively than deporting him, because of the limitations on electronic communications with prisoners; but we see no multitude of challenges to prison sentences on that ground.[230]

The judges have little or no knowledge of the many executive decisions in favour of applicants, and so have little sense of proportion or anomaly in relation to the run of decisions. They have little or no knowledge of the numbers of people in each of the classes of persons their decisions concern.[231] Their relevant knowledge base is inferior to the executive's, and they can have no responsibility for the policy decisions involved in upholding an immigration policy as a whole with fairness in individual cases. Ockelton's informed assessment of the *Huang* regime – as distinct from classic non-appellate judicial review for illegality and indisputable unreasonableness -- is bleak, and persuasive.[232]

B. An illustration: unaccompanied minors

In the published decisions carrying out these exercises in would-be balancing, it is not hard to find manifestations of the ineptness of even conscientious and careful judicial processes, and the inadequacy of legal learning to take proper account of incentives which operate to shape the decisions of millions of people near and far (with significant effects on the country's future.

In March 2016, for example, the Upper Tribunal (Immigration and Asylum Chamber) in *AT (Article 8 ECHR – Child Refugee – Family Reunification) Eritrea v Home Secretary*[233] reminded itself more than once that "this Tribunal is the arbiter of proportionality" in the weighing of "the rights of the individual and the interests of the community". It held that a 19-year old

230. Ibid, 220.

231. Someone might say that those numbers could be supplied to tribunals by the Home Office. But that would be to misunderstand the thrust of the Strasbourg/*Huang* insistence on "no bright lines" and "exceptionality is not a criterion". That insistence on an "intense focus on particular facts" which, by that intensity and particularity, is expected to yield an intuition that a human right has been violated, implicitly denies that there are classes such that their members could be counted by some government office and the numbers laid as facts before the tribunal and used to shape its judgment..

232. And is substantially confirmed by the reflections of another very experienced immigration judge, James Hanratty, *The Making of an Immigration Judge* (London: Quartet, 2016), 139-84.

233. [2016] UKUT 227 (IAC).

who had come to this country aged about 16, and been given 5 years leave to stay as a teenage refugee, had the right to bring his family from Eritrea, though they spoke no English and would be dependent on UK taxpayers "for the foreseeable future". The Tribunal nominally accepted that the balance and balancing of public interests is meant to be "objective" – it is not merely a scrutiny of the *way* the primary decision-makers (here the Home Secretary) reached their decisions – here (a) the important, far-reaching inherently political decision to make no rule allowing unaccompanied child refugees to bring their families, and then (b) the particular decision to make no discretionary exception for this now-adult child. But the Tribunal was able to point to judicial dicta discounting such decisions when they are "broad brush", or "blanket" – that is, concerned with the need for rules and for adherence to them lest incentives be given to people smugglers, pro-immigration and open-borders NGOs, and indeed to needy persons everywhere, to try their luck.

The mass migration of 2015 - 16 was marked by considerable numbers of unaccompanied minors.[234] It seemed clear that many or most of these had been "sent ahead" in the belief that they would, at least probably, gain asylum and before too long be able to claim and secure the right to have their whole family admitted for permanent residence. The Upper Tribunal in *AT* found nothing exceptional to distinguish AT's circumstances, or his family's, from those of millions of others in Africa, Asia, the Middle East or Albania and Kosovo. But the Tribunal went outside the rules and admitted the family with a complacency of tone and substance that hardly matches the cumulative implications of such judgments for the country.

No doubt, counsel for the Home Secretary had pitched those implications lower than is realistic, framing the public interests as [1] "the safeguarding of children… who would be at risk of trafficking and exploitation in their quest to reach the United Kingdom", and [2] concern for the public purse. But the Tribunal treated each as of scant weight: [1] because it had not been stated in any Act of Parliament; [2] because there was no evidence for it, no report or commentary:

> I recognise that evidence of this kind is not a prerequisite in the recognition of a public interest in the Article 8(2) balancing exercise. However, I cannot overlook that these public interests are advanced through the medium of counsel's written and oral submissions". Counsel had later produced some data[235] but "its potency is questionable… I reiterate

234. Thus

> As of 10 July, 77,708 persons arrived by sea in Italy in 2016…. 15% of arrivals have been unaccompanied children. The number of UASCs [unaccompanied or separated children] arriving from January to June 2016 rose to 10,524 compared to 4,410 during the same period in 2015, mainly coming from Gambia, Egypt, and Eritrea.

UNHCR, Europe, *Weekly Report* 13 July 2016, p. 1. For the same period in 2017, the UNHCR reported that 14% of the irregular arrivals in Italy by sea were UASCs, the number of UASCs arriving having risen to 11,406. For the whole of 2019, when irregular arrivals in Italy were greatly reduced by Italian government policy (now reversed), the percentage of UASCs was again about 15% of the total (in Malta 23%): UNHCR, *Refugee and Migrant Children in Europe: Accompanied, Unaccompanied and Separated: Overview of Trends January-December 2019*, 2.

235. What data was produced is not identified by the judgment.

> my analysis of the governing legal principles above … it is my conclusion that, balancing everything, the impugned decisions… interfere disproportionately with the right to respect for family life enjoyed by [the relatives of M in Eritrea] and M. As the ultimate arbiter of proportionality I decide accordingly. (paras. 41, 42, 43).

Some aspects of the reasoning and rhetoric in *AT* were criticized in the judgment of the Upper Tribunal in *KF and [five] others (entry clearance, relatives of refugees) v Home Secretary* in late 2019.[236] But not the result. Yet again, the Upper Tribunal ordered entry clearance for the sponsor's non-English-speaking parents and younger siblings – the sponsor being a very depressed nearly 20-year-old refugee from Syria who at the age of 14, having been arrested in Jordan for illegal working, and sexually assaulted there, made his way to Calais where he spent two years in the "Jungle" of informal camps near there, before being accepted into the UK (at Germany's request) for consideration of an asylum claim eventually granted in early 2018, while still a child.[237] The judgment notes the statutory requirement (since mid-2014) to treat effective maintenance of immigration controls as in the public interest, but does not visibly consider how decisions such as its own may, or do, incentivise child-led migration.

C. Judicializing proportionality

Undoubtedly those administering these rules should have, as they do, the discretion to act with compassion, and out of compassion to make exceptions to the rules. It is possible to think of the whole apparatus of human rights litigation and adjudication as simply an additional agency for exercise of discretionary compassion. Unfortunately, however, the whole apparatus operates on the basis that it is giving people, not compassion or mercy, but what they are legally and morally entitled to, in strict justice, because they have been wronged – denied their human rights – either by the rules or by those who administer them. And, operating on this legalistic basis, the apparatus systemically fails to attend to effects and implications of its own operation.

Considering the role of rules in the context of deportation for criminality, and the human rights (art. 3 and art. 8 ECHR) exceptions to them, Colin Yeo has argued:

> Some may legitimately object to these potential exceptions to deportation. But the point of human rights law has always been to provide the individual with rights that must be properly and individually weighed [against] the rights of others as a safeguard against tyranny. Laws of absolutes that

236. [2019] UKUT 00413 (IAC), Nicol J. presiding.

237. Written Evidence presented to Parliament in February 2019 by the Families Together Coalition of 24 charities and NGOs (many of them powerful and/or well-funded such as UNHCR, Oxfam, Amnesty International, etc.) https://publications.parliament.uk/pa/cm201719/cmpublic/Immigration/memo/ISSB12.pdf claimed that "children who are in the UK alone and who are recognized as refugees have no right to be reunited with even their closest family members. Because of this rule, children living in safety in the UK *must* live without their family *in perpetuity*" (para. 4.1, emphasis added). But though the Rules require the sponsor to be an adult, they also provide for grant of leave "outside the rules" and for family reunion when required by art. 8 as judicially interpreted.

brook no exception are anathema to human rights law.[238]

But, as this paper indicates, a large part of the human rights law about immigration and deportation rests squarely on a legal absolute (art. 3), and on the irrational argument that, because art. 3 is an absolute, it must be given both a loose meaning (confusing causation with intention) and a wide reach (albeit with arbitrary gaps). The rest is shaped by the unsound notion that rights can be *weighed* against rights, when in truth the judgment that someone has, in their specific circumstances, a right properly so called can only reasonably be the conclusion of one or other of two processes: (i) the application of a strict moral or legal rule, or (ii) a process of considering competing *interests*, according to criteria of fairness and conceptions of common good which fall short of achieving the commensuration of those disparate interests with each other that is suggested by the metaphor of weighing.

As for removals: the opportunities – with two or three occasions for presentation of an applicant's case – of postponing departure from the country for years and years are multiplied, even before one considers the opportunities created by "living instrument", "evolutive" legal argumentation. This all can begin at the first-tier level, proceed through the upper tier, on to the Court of Appeal and even to the Supreme Court (before heading out to the ECtHR in Strasbourg[239]). By another route, starting in the Administrative Court, applicants and their supporters can seek judicial review of an Immigration Rule itself.

In the background is the special incentive for delay created by the still fresh doctrine that one's private life – for which every decision of public authorities must have positive respect – includes not only one's own psychological and physical health (and courses of medical treatment for it) but also one's relationships of every kind with other people. Participation in the conception of a child by a citizen, or by someone with a right of residence, is an obvious route to enhancing one's chances of establishing – during the months or years between one level and the next of applications, appeals and decisions – one's legally effective right to stay. How many *citizens* accused and convicted of crime, or respondents in divorce proceedings, have so many opportunities to represent their personal life and family and other relationships in ways calculated to show why the public interest in dealing with them, as prescribed by laws made by Parliament or under its scrutiny, should be counter-balanced and outweighed by their own dignity- and relationship-based interests (persuasively but question-beggingly styled "rights")?[240] Pleas in mitigation after conviction, and appeals against sentence, certainly marshal all the personal factors, including family life, that suggest leniency,

238. Colin Yeo, "Does the Human Rights Act prevent us from deporting serious criminals?", freemovement.org, 25 May 2015.

239. This final opportunity does not always block removal: Mr Unuane was deported in 2018, four months after the failure of his proceedings in the Court of Appeal; his proceedings in the ECtHR had commenced in 2017. The deportation was well over five years after the completion of his prison sentence.

240. The point is fairly posed, though not developed, by the dissenting Judges in *Jeunesse* (2014), para. 9.

but there is in the UK no art. 8 ECHR jurisprudence of sentencing,[241] nor does a defendant in a criminal trial enjoy repeated opportunities to invite the sentencing judge to revisit the sentence in the light of developing family circumstances.

This structure of substantive and procedural rights, presided over by the courts, self-evidently works as a magnet. Its outlines are visible and the opportunities they suggest must increasingly be perceived all over the world. No doubt the perceptions will not be without exaggerations. But they will be real enough in their incentivising effects.

Various factors and persons affect these incentives. There are the more or less dire conditions of life for many hundreds of millions, indeed, billions of people worldwide – and in prospect for those threatened with removal for having come to this country illegally, or for having come legally but abused their stay. There are also the many members of non-governmental organizations devoted to providing legal and political support for actual and would-be immigrants, organizations often generously dedicated to protecting and promoting the moral rights and other interests of the needy and vulnerable. Their views on matters of public policy involving the common good of the whole political community should have no enhanced weight – consideration of the common good of the whole community in the long-run and medium or even short term is not their vocation or competence. As anyone can see from their websites, or from much of the academic publishing around migration and migration-law related issues, (i) many of those involved are antipathetic to the very idea of borders and border restrictions, and (ii) a good many also have a hatred of, or a sense of guilt about, what they take to have been our country's (our peoples') colonial oppression and "exploitation" (generations ago) of territories from which many incomers (generations later) originate. Others[242] simply judge that migrants "are coming anyway" – whatever we do – and so should be welcomed, whatever the consequences.

Our courts, it should be said, show little sign of any such predispositions. That is important. But the ECtHR, and our own legislators in 1998 (and later), have presented our judges with a structure of institutions, procedures and doctrines which invite an ongoing series of lawsuits, challenging particular decision after particular decision, and the whole basis of each decision. The state is constantly on the backfoot in its efforts to maintain the security of our borders and to uphold the conditions of peace and respect for law – respect which is an obligation of citizenship and of legitimate entry and residence as a non-citizen. Looked at in the aggregate, the engine created by the ECtHR qualifies and – whether

241. See Crown Prosecution Service, "Sentencing – Overview", http://www.cps.gov.uk/legal/s_to_u/sentencing_-_general_principles/#a04 (updated 10 September 2019, visited 17 March 2021); Jessica Jacobson and Mike Hough, *Mitigation: the role of personal factors in sentencing* (Prison Reform Trust, 2007).

242. See Patrick Kingsley, *The New Odyssey: The Story of Europe's Refugee Crisis* (Guardian Faber Publishing, May 2016), under motto (debatable, at best, if not simply false): "...no one puts their children in a boat unless the water is safer than the land"; and a Prologue about what he takes to be "the reality of the situation – namely that, whether they are welcomed or not, people will keep coming." The book's silent premise is *Hirsi Jamaa*.

intentionally or not – undermines the sovereign responsibility and authority that international law so recently took as fundamental and, quite reasonably, has never frankly set aside.

VIII. Migration, Security and Judicial Misjudgment: Belmarsh Prisoners' Cases (2004, 2009)

Here [243] the Law Lords, neglecting both the nature of nationality (citizenship and non-citizenship) and their own statutory duty[244] as judges, ruled that a key exercise of Parliament's undoubted power to authorise the expulsion of non-citizens was a violation of Convention rights derived from the ECHR, and "discrimination on the grounds of nationality" (a category the founders deliberately omitted from the dozen forbidden grounds of discrimination that are named in art. 14 of the ECHR). The mistaken decision[245] was greeted with nearly unanimous media and academic approval of the result, but little attention to the argumentation. Government and Parliament repealed the legislation, and accepted that a non-citizen, even one reasonably (and with court approval) suspected of terrorist intent, cannot be detained pending removal if the detention would last a long time even though a sufficiently safe state is demonstrably being actively sought to receive him – accepted, that is to say, that such a person, however great a menace to our security and other rights of our citizens and residents, can never be expelled if the process of removal would in practice necessitate long periods of detention.[246]

The general failure of politicians – and academic and practising lawyers – to investigate and understand this debacle and reflect on its implications has wounded the entire response to the problems which occasion this paper. The Government, some years after instigating the repeal of the measures condemned by the Law Lords, argued in the ECtHR, belatedly but soundly, that the Law Lords had got it all wrong. But the ECtHR

243. *A v Home Secretary* [2004] UKHL 56, [2005] 2 AC 68; upheld by the ECtHR in *A v UK* (3455/05, Grand Chamber, 19 February 2009) 49 EHRR 29, ECtHR Reports 2009-II, 137-244.

244. That is, their duty under the Human Rights Act 1998, s. 3(1):

> So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.

The Law Lords inexplicably neglected to attend to this provision and its implications for the legislation they were considering.

245. For detailed justification of this adverse opinion, see (i) Finnis, "Nationality, Alienage and Constitutional Principle", Law Quarterly Rev. 123 (2007) 417-45, parts V and VI; also at SSRN (2008), http://ssrn.com/abstract=1101495; (ii) Finnis, "Judicial Power, Past, Present and Future" (20 October 2015), in *Judicial Power and the Balance of Our Constitution* (London: Policy Exchange, 2018) at 41-47. Though there have been contestations (even at book length) of the article's moral-constitutional position, there appear to have been no published attempts to meet this critique of the reasoning of the House of Lords majority, a critique some main lines of which were submitted in argument to the ECtHR by counsel for the UK, 21 May 2008.

246. The ECtHR confirmed that detention for purposes of deportation is perfectly lawful (even if it is needed neither to prevent crime not to prevent absconding) for up to six months (a figure plucked out of the air by judges in 1984): *A v UK* (n. 243 above) paras. 164, 166.

adopted as its own the least defensible of the Law Lords' premises and conclusions, only toning down some of their questionable observations about discrimination. In the words of the ECtHR:

> 186 … the House of Lords was correct in holding that the impugned powers were not to be seen *as immigration measures*, where a distinction between nationals and non-nationals would be legitimate, but *instead as concerned with national security*. Part 4 of the 2001 Act was designed to avert a real and imminent threat of terrorist attack which, on the evidence, was posed by both nationals and non-nationals. The choice by the Government and Parliament of an immigration measure to address what was essentially a security issue had the result of failing adequately to address the problem, while imposing a disproportionate and discriminatory burden of indefinite detention on one group of suspected terrorists. (emphases added)

The contrast between *security measures* and *immigration measures* is as unsound as it looks. National security can and must be pursued by a variety of means, among them the expulsion of persons who are subject to immigration control. Ends are different from means to those ends, but are not contrasted with those means. The 2001 Act authorized the expulsion of non-citizens reasonably suspected of terrorism, and authorized their detention *pending deportation* (using the words of the Immigration Act 1971, quoted in the 2001 Act). The ECtHR doctrine in *Chahal* prevents removal to unsafe countries. So the 2001 Act – rationally interpreted so as to be consistent with art. 5(1)(f) ECHR's permission of detention "of a person against whom action is being taken with a view to deportation" – authorized detention of reasonably suspected foreign terrorists not just for the period of six months judicially imposed in 1984 as a quasi-brightline limit on deportation-detention, but rather: for as long as action was *being taken* to find a safe state to which to deport them (and they remained a security risk).

The rational and proper ruling available to the Lords and ECtHR – but never visibly considered by either of these courts – was that this deportation detention was lawful *so long as* SIAC (the Court required by the 2001 Act to consider the detention's legality *every six months*) could be satisfied that the Government was genuinely acting to find a receiving state.[247] (The ECtHR conceded that the Government had indeed been taking such action for

247. The resumé of ECtHR doctrines circling around this issue, provided in *JN v UK*, 37289/12, 19 May 2016 (First Section), shows that the Court still has provided no satisfactory response to the challenge and invitation to accept this standard. The Court's finding that automatic periodic judicial review "is not decisive" fails to address the question why it should not be decisive if it is oriented to determining whether *bona fide* efforts to deport are still being pursued (and, of course, whether the detainee's threat to national security remains material).

about a year before the Law Lords' decision.)[248]

The ECtHR's judgment added one more sentence to para. 186 to prop up its unsustainable *contrast* been the goal of national security and the means of using immigration powers of expulsion and detention-pending-expulsion against those persons lawfully subject to immigration control (non-nationals):

> As the House of Lords found, there was no significant difference in *the potential adverse impact of detention without charge on a national or on a non-national* who in practice could not leave the country because of fear of torture abroad. (emphasis added).

But this too is unsustainable. Similarity of impact is only the beginning of an analysis. There is often no difference in the potential adverse impact of deporting/exiling a non-national and exiling a citizen (say, one who has dual nationality). But under national and international law alike, citizens can never lawfully be deported or exiled to preserve their home state's national security, yet non-citizens certainly can – the radical distinction has nothing to do with impact.

Both the Law Lords and the ECtHR in this great *Belmarsh Prisoners'* case lost their grip on the importance of the constitutional principle foundational to all the international agreements outlined in part I above. Nationality counts. Statelessness is not to be imposed on anyone. Nations must put up with, and deal at home with, all the risks posed to their wellbeing by their own nationals. Nations do not need to put up with similar risks posed by the presence of non-nationals. They must treat non-nationals as bearers of civil rights, but not of rights to vote, and not of rights to stay if staying imposes serious risks to citizens (and resident non-citizens). It is fundamental that deportation of non-citizens can be used as one measure amongst others to alleviate dangers to the common good *that we must deal with without deportation* when they are posed by our own nationals. There is no "contrast" between security and immigration control. But there is a contrast between being a national of this country and being a non-national in it. That contrast is what makes immigration control conceivable.[249]

So the loss of focus on fundamentals in these *Belmarsh* judgments is considerable and concerning. These judges were neither cosmopolitans nor defeatists or appeasers. But their mistake is in synergy with the

248. *A v UK*, n. 243 above at para. 167. In August 2005 the agreements with Algeria and Jordan were sufficient for seven of the eleven ECtHR applicants to be put back in immigration (deportation) custody: para. 86. There is force in the applicants' argument (para. 141) that between July 2002 and October 2003 the Government was not taking any active steps to find safe receiving states. The appropriate judicial response to this confused neglect would have been to declare the detention unlawful during that period, not what the response actually was: to declare the legislation itself incompatible with the ECHR without interpreting it to make its authorization of detention compatible (as it plainly could have been made).

249. This paragraph leaves aside the category of persons who are both nationals and (in a sense) non-nationals because they are also nationals of another country: dual citizens. There is a spectrum: in some cases, UK nationality is an add-on compared to some other nationality which is more fundamental to the person in question; in some cases the other nationality is no more than the shadow-remnant of the family's earlier, non-UK history; and there are cases elsewhere along the spectrum. The blanket power in British Nationality Act 1981, s. 40(2), (4), to deprive someone of UK nationality provided that doing so does not entail statelessness, is unattractive, as is the criterion for its exercise ("that deprivation is conducive to the public good"). It does not follow, however, that every exercise of the power is unjust or illegitimate. Nor does denial, on national security grounds, of the opportunity to appeal against deprivation of citizenship *entail* injustice or denial of ECHR or common-law rights: *R (Begum) v Home Secretary* [2021] UKSC 7.

cosmopolitan political and legal attack on the legitimacy of immigration control. The failure of democratic politicians (and/or their legal advisers) to identify and confront this judicial error – one striking at the root of a democratic politician's true responsibilities – is also concerning.

This paper's concern is with the *constitutional* (human rights) challenge presented, in varying ways, by the judicial doctrines outlined in earlier sections. For most of the legislative measures needed to maintain constitutional order in face of irregular migration are condemned in advance by those doctrines -- condemned as at least *inhuman* and *illegal*. The premise of the condemnation is that Europe's states committed themselves, with open eyes, after severe experience of such inhumanity between 1933 and 1945, to the doctrines now enforced by the Strasbourg court and courts that loyally follow it. But that premise is plainly mistaken. The judicial condemnation is largely unsound, juridically, historically and constitutionally.

IX. Ways Forward

The United Kingdom did not invite the inflation of judicially favoured interests into justiciable rights that is the meaning and effect of "living instrument" adjudication. The ECHR was largely a product of UK initiative and thought, but it does not suggest or invite living instrument "interpretation". That has been imposed upon it by judges, beginning decades after the Convention's adoption. The imposition was resisted by the UK Judge on the ECtHR, and at many stages has been resisted in argument before the ECtHR by the United Kingdom. That is especially true of immigration-related "rights"-inflation.

But the United Kingdom did invite into its own legal domain the judicially inflated ECtHR, by enacting the Human Rights Act 1998. It did so with full knowledge of the inflation, which – like the "living instrument" doctrine – was and is approved by very many who supported the introduction of the HRA. But the premises of that approval are political, not legal. They, like the premises of support for remaining in the EU, are highly disputable. Principled rejection of those premises would be more in line with our historic constitution.

What, concretely, could be done about the judicially inflated ECHR, with its judicially created *acquis* of rules and doctrines?

1. In principle, the Convention could be amended by agreement.
2. The erroneous Convention *acquis* could be overcome by tacit or open agreement to appoint enough judges willing to overrule and reverse *many* of the leading ECtHR decisions of the past 40 years. For various reasons, some of them sound, such an agreement between member states is even less feasible than amendment of the Convention's substantive provisions
3. Neither of those remedies is concretely available to this country, acting alone. Several remedies are available within the range of our right of self-determination. One is principled, open, good-faith defiance, like – but going wider than – the UK's present, successfully maintained and fully justifiable defiance of the ECtHR's indefensible decisions about prisoners' votes in *Hirst No. 2* (2005) and *Scoppola* (2012).[250] Such defiance need not start with the UK Supreme Court, but would be difficult in practice (corrective legislation to one side: see 4 below) without that Court's assent, which thus far has not been given outside a narrow though indefinite domain where the ECtHR has shown both

250. On the prisoners' voting cases in the ECtHR, Canada, South Africa, New Zealand and Australia, see John Finnis, "Prisoners' Voting and Judges' Powers", Oxford Legal Studies Research Paper 58/2015 http://ssrn.com/abstract=2687247.)

incompetence and a disregard for historic British conceptions of proper legal procedure. Vague and faint are the qualifications or limits that UK judges have suggested to living instrument doctrine as such, or to its results in such wide fields of political judgment as prisoner voting, or immigration and interminable stay under the shield of "private life" and no-torture/no inhuman treatment. The Supreme Court's provocative contemplation of the possibility of defying the Court of Justice of the European Union, in *obiter* remarks of Lord Mance and five other Justices in *Pham v Home Secretary* [2015] UKSC 19 at para. 90, has now in *Hallam* (2019)[251] been both widened and focussed in relation to departing from ECtHR case-law which over-extends art. 6(2) (presumption of innocence in criminal proceedings). But all that was corralled into the pen called "highly unusual circumstances", and not followed – as it should have been, in response to *Paposhvili* (2017) – in *AM (Zimbabwe)* (2020).[252]

4. In the search for self-determined remedies, there remains only resort to Parliament. One measure that Parliament could adopt is legislative instruction to UK courts not to apply or follow certain ECtHR doctrines or rules. This would in practice be a necessary part of any viable strategy of selective principled defiance of specified ECtHR doctrines and rules.
5. The ECHR entitles any member country to withdraw from the Convention at short notice.[253] Under the erroneous[254] interpretation of our constitution adopted by the UK Supreme Court majority in *Miller 1*,[255] notification to the European Council of such withdrawal would probably be held to require prior statutory approval, but such approval would in any case be needed for the purpose of modifying or repealing the Human Rights Act 1998.
6. Without such modification or repeal, the Human Rights Act would continue to make legally enforceable the "Convention rights" it identifies even if the UK were no longer subject to the Convention as a matter of international law. So, in the last analysis, there can be no effective remedy for the injustices and other harms to our common good that are identified in this paper without repeal of that Act.

That could be done with one or other of two broad alternative aims: **(a)** to

251. See n. 56 and text at nn. 57-58 above.
252. See n. 60 above.
253. ECHR Art.58:

> 1. A High Contracting Party may denounce the present Convention only after ... six months' notice contained in a notification addressed to the Secretary General of the Council of Europe, who shall inform the other High Contracting Parties.
>
> 2. Such a denunciation shall not have the effect of releasing the High Contracting Party concerned from its obligations under this Convention in respect of any act which, being capable of constituting a violation of such obligations, may have been performed by it before the date at which the denunciation became effective.

254. See Timothy Endicott, 'Lord Reed's Dissent in Gina Miller's Case and the Principles of Our Constitution' in Daniel Clarry (ed), *The UK Supreme Court Yearbook, Volume 8: 2016–2017 Legal Year* (Appellate Press, 2018) 259-81. See also Finnis, *Judicial Power and the Balance of Our Constitution* (Policy Exchange, 2018) 134-64, especially 157-64.
255. *R (Miller and another) v Secretary of State for Exiting the European Union (Birnie and others intervening)* [2017] UKSC 5, [2018] AC 61.

replace the Convention rights defined by the judicially inflated ECHR with a "British Bill of Rights" – obviously a futile or even counter-productive venture unless its justiciable rights were *much* better defined and thus less unjust and harmful; or **(b)** restoration of constitutional arrangements of the kind in force for hundreds of years before 1998/2000, with few if any judicially enforceable programmatically framed ("bill of rights-type") rights.

Whichever of these aims was adopted, it would be necessary to take legislative steps to head off the argument – which would be widely supported among legal elites, and deployed by them wholesale or retail (granular) – that the common law of England has now absorbed and made its own the whole (or substantially the whole) set of rights that are in force today under the judicially inflated ECtHR and HRA. Call this "the inflated common law argument".

If strategy (a) were adopted, the "British Bill of Rights" should include in the enacting statute an overriding clause to the effect that--

1. no provision in an Act of Parliament or any other enactment may be declared to be, or otherwise treated as, incompatible with this Bill of Rights, if the provision
   i. was (itself or its substantial equivalent) in force at the time the Bill of Rights was adopted or
   ii. is no more restrictive in its specification of or impact upon a right or rights than was the most restrictive comparable provision in force at that time.
2. For the avoidance of doubt, it is declared and provided that, in applying any provision of this Bill of Rights to circumstances (or kinds of circumstance) arising after its enactment, that provision is to be interpreted not as if it were, or were part of, a "living instrument" but rather according to the intent and meaning publicly ascertainable at the date of its enactment.

If strategy (b) were adopted instead – as experience since "living instrumentalisation" began c. 1985 strongly suggests is preferable on constitutional-democratic grounds – one way of heading off the inflated common law argument would be a statutory provision somewhat similar to the overriding clause just sketched. It would deem lawful anything that would have been lawful in 1998 unless subsequently made unlawful by or under a statute other than the Human Rights Act 1998 (and enactments made under it). To this restorative saving clause there could of course be as many or as few tailor-made exceptions as Parliament elected to make. These might include those common-law developments made over the last 25 years that were not made (and/or tolerated by Parliament) primarily because of ECHR-inspired judicial overreach.

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