Principles of Public Law

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Cavendish
Publishing
Limited

London • Sydney

FREEDOM OF MOVEMENT

27.1 Introduction

Freedom of movement within the territory of a Nation State is a fundamental right in a democracy; without such a freedom, we cannot be said to be truly free to make independent choices. Restrictions on individuals' movement across international boundaries are more generally accepted, partly due to historical circumstance, partly due to the need for controls to deal with advances in global travel. This chapter deals with the ability of people to move within and across State frontiers.

The law on freedom of movement has developed in three main areas: immigration; the rights of asylum seekers; and the rights of citizens of the European Union to move across inter-State boundaries.

There is no right to be free of border controls when moving into and out of the UK. This level of restriction on the freedom of movement of non-nationals and, to a certain extent, of nationals as well is due in part to the geography of the UK. In March 1992, the then Home Secretary suggested that this could have the effect of liberating residents of the UK from other controls common in landlocked countries:

> Our island geography enables us to place the main weight of our immigration control at ports of entry. For us, that is by far the most effective way of doing it. It also means that we can avoid the need for intrusive in-country controls such as sanctions on employers who employ illegal immigrants or identity cards or random police checks, which other countries without effective means of controlling their borders find necessary [(1992) HC Deb Vol 73 col 31].

The Secretary of State's speech does not give the whole picture; in fact, employers who disregard the visa status of their employees may be subject to sanctions if it comes to light that the employee in question has overstayed or did not have right of entry in the first place.

Immigration control is one of the most controversial areas of government policy. Feldman suggests that if we take as the litmus test of a democracy the mood of the general public, it may be that, in the field of immigration control, 'rights' (of free movement) tend in one direction, 'democracy' in another (Feldman, D, *Civil Liberties and Human Rights in England and Wales*, 1993, Oxford: OUP, p 349). On the other hand, a generous spirited approach towards the admission of foreigners has allowed into the country people such as Marx, Engels, Garibaldi and Lenin. As Robertson has observed, some of their modern counterparts would today be deported as undesirable aliens

(Robertson, G, *Freedom, the Individual and the Law*, 7th edn, 1993, London: Penguin, p 387).

As far as asylum seekers are concerned, the UK is bound in international law by the provisions of the United Nations Convention relating to the Status of Refugees 1951. It has been said that they enjoy a right 'to humanity', 'anterior to all law'. So basic are the human rights here at issue that it cannot be necessary to resort to the European Convention on Human Rights (ECHR) to take note of their violation (*R v Secretary of State for Social Security ex p Joint Council for the Welfare of Immigrants* (1997)). International law on the rights of asylum seekers falls outside the scope of this book, though the recognition of these basic rights in the procedures governing asylum decisions are discussed in this chapter (see below, 27.5).

Freedom of movement has been given a much more significant role to play in the hierarchy of rights in the UK by accession to the EU. Free movement of persons is one of the fundamental freedoms protected by EC law (see above, Chapter 7). The UK's obligation under these provisions of Community law has not yet had a significant impact on rights of entry to non-EC nationals to the UK. In fact, it has been argued that British immigration law and practice have signally failed to reflect Community law since joining the Community (see Vincenzi, C, 'European citizenship and free movement rights in the UK' [1995] PL 259). The European Court of Justice has found the UK to be in breach of its obligations on several occasions, particularly where the Home Office purports to deport someone on grounds of public policy. Advocate General Jacobs said in an opinion in 1992 that a Community national who goes to another State is entitled:

> ... to assume that, wherever he goes to earn his living in the European Community, he will be treated in accordance with a common code of fundamental values, in particular, those laid down in the ECHR. In other words, he is entitled to say *civis europus sum*, and to invoke that status in order to oppose any violation of his fundamental rights [Case C-168/91 *Konstantinidis v Stadt Altensteig* (1993)].

It is, therefore, to Community law that we will have to turn to find a developed jurisprudence regarding the right to free movement and it may be that Community law in the future will prove the source of that right in respect of the movement of people who do not qualify for EU citizenship now. As Vincenzi says:

> In a State without a written constitution, and without a constitutional court, the burden of giving effect to the rights of an estimated eight million EU citizens who annually visit this country falls entirely on those individuals in the ordinary courts and tribunals, usually without the assistance of legal aid. The fact that other Member States have a similarly undistinguished record in this field cannot justify this country's failure [p 274].

27.1.1 The scope of freedom of movement

Although there is no absolute right of non-nationals to enter the country, the laws on immigration and citizenship do not draw a clear line between nationals and aliens. At any given time, there are large numbers of people in this country with limited rights of entry and abode who fall between these two categories. It is the manner in which these limited rights are granted which gives rise to most litigation in this area, challenging the Home Office's standards of fairness and observation of procedural rights. Several other rights are often taken into consideration in this litigation, such as the right to life or privacy. Although the ECHR does not impose obligations on signatory States to allow entry to non-nationals (*Abdulaziz, Cabalas and Balkandali v UK* (1985)), the rights set out in the ECHR may be enjoyed by nationals and non-nationals alike. This provides certain important safeguards to aliens who face deportation or whose asylum applications are turned down. There is a Protocol to the ECHR – not yet ratified by the UK – which guarantees freedom of movement of lawful residents and the rights of entry of nationals into their own country (Protocol 4 to the ECHR). This Protocol also prohibits expulsion of nationals and the collective expulsion of aliens.

The government also has a limited power to curb the movement of its own nationals by restricting them to one part or other of the UK. The following sections will explore the extent to which the power to make exclusion orders under prevention of terrorism legislation infringes basic rights of movement. In addition, the movement of nationals and lawful residents alike are restricted by a range of restrictions imposed by the civil and criminal law, in particular, trespass.

27.2 Movement out of the UK

British people think of their freedom of movement in and out of the UK as dependent on having a valid passport. In fact, the grant of a passport is an exercise of prerogative power (see above, 2.4.3) which was based originally on the need to protect British subjects abroad; far from being a condition of travel out of the country, it was a document issued to those who wished to leave the country (freely) to ensure their safety. In fact, the right to leave the country is one of the rare breed of rights that were protected in statutory form in English law long before the Human Rights Act 1998; the Magna Carta guaranteed the right of individuals to travel abroad as early as 1215. The only measure that prevented movement out of the country was the writ of *ne exeat regno*, under which the Crown could prevent someone from leaving the realm when the interests of the State demanded it. Although the writ (a formal order of the court) still exists, its significance has been reduced by modern practicalities of travel. Since all countries require possession of a valid passport before allowing entry to a traveller, it is not in the carriers' interests to allow a

passenger to embark without a passport. Indeed, one commentator has observed that the most effective method of limiting asylum applications is through imposing heavy fines (£2,000 per passenger) on the airlines and shipping companies which carry fugitives whose entry documents are not correct:

> The government has in effect 'contracted out' immigration control of refugees to the airlines, which have avoided financial penalties by refusing to fly refugees and in several cases by removing them from passenger planes by tricks or force [Robertson, G, *Freedom, the Individual and the Law*, 7th edn, 1993, London: Penguin, p 412].

Although carriers are legally obliged to ensure that they bring into the UK only passengers with valid identity and entry clearance documents, there is still no legal requirement for a passenger to possess a passport before leaving the country. In the light of this it ironic that national law obliges people to be in possession of a British passport in order to prove British citizenship *within* the UK. There is no statutory appeal against a decision by the Home Office to refuse or revoke a passport but, in judicial review proceedings, an applicant may challenge a decision on the basis that no reasons have been given (*R v Foreign Secretary ex p Everett* (1989)). There is, on the other hand, no legal entitlement to a passport (see Finlay CJ in *Attorney General v X* (1992)).

27.3 Movement into the UK

As was noted above, the majority of cases in this area are taken by non-nationals who wish to challenge immigration officers' decisions to refuse entry, or the Home Office's decision to deport. Before considering the case law, it is first necessary to set out in a very basic form the complex distinctions laid down by UK law between different types of nationals and non-nationals, or aliens.

27.3.1 Nationals

Under the British Nationality Act 1981, the right of abode in the UK is primarily enjoyed by British citizens and their offspring, grandchildren or parents. Entry and residence are also allowed to some Commonwealth citizens. There are other complex categories of British citizenship in the Act which do not entail an automatic right of abode, including the following:

- British protected persons;
- citizens of the Republic of Ireland;
- British dependent territories citizens: these are people who were citizens of the UK and colonies before the British Nationality Act came into force but only had a connection with a British dependent territory, such as Gibraltar;

- British overseas citizens;
- residents of Hong Kong who became British nationals (overseas) citizens at the end of British rule in 1997;
- those born in an independent Commonwealth country before 1949: these are British subjects without citizenship.

The rules and procedures governing the entry of citizens of EC Member States are dealt with below, 27.4.

27.3.2 Non-nationals

The category of the British Nationality Act 1981 which most clearly excludes citizenship and with it the right of entry and abode is the residual provision referring to 'aliens'. Even without any prospect of achieving British citizenship by naturalisation or other means, some non-nationals may qualify for limited entry under the Immigration Rules 1994 which allow in students, patients seeking private medical treatment, people with work permits and people wishing to establish themselves as investors (the present minimum is £1 m).

However they seek entry into this country, non-nationals have to comply with procedures and qualifications laid down by the immigration legislation, not all of which is subject to judicial control. Short term visitors and students, for example, may find that they have no redress from a refusal of an immigration officer to grant entry on the basis of misinformation. Some decisions made by immigration authorities to refuse entry, impose conditions or curtail leave to enter have to be accepted without further hearing. Those decisions that are appealable fall broadly into the following four categories:

(a) refusal of entry;

(b) decisions on deportation and removal (see below, 27.5);

(c) refusals to extend leave, the imposition of conditions and admission and the curtailment of leave;

(d) asylum decisions (these are appealable to a Special Adjudicator (see below, 27.9)).

Appeals against these are heard in the first instance by a board of Home Office 'Adjudicators'. It is possible to appeal with leave from the Adjudicator to the Immigration Appeal Tribunal and, from there, on a point of law, to the High Court. In most instances, applicants can only pursue their appeals from abroad, and even asylum seekers may be removed from the country to pursue their claims if they can be sent to a safe third country (see below, 27.8). Judicial review is available of the Home Secretary's decisions in these cases but permission will be refused if the applicant has not exhausted all their avenues of appeal (*R v Secretary of State for the Home Office ex p Swati* (1986)). As with all judicial review challenges, applicants complaining about deportation or

removal decisions have to base their challenge on the three grounds for judicial review: legality; rationality; and procedural fairness (see above, Chapter 11). The courts have, however, reserved their power to apply a stricter level of scrutiny to judicial review applications in asylum decisions where the applicant's life is at stake (*R v Secretary of State for the Home Department ex p Bugdaycay* (1987), see above, 15.5.1).

Clearly, there is a range of decisions on residence permits and citizenship that remains outside these categories. This does not mean to say that the court's supervisory jurisdiction is excluded altogether. Under the British Nationality Act 1981, the Home Secretary used to refuse the issue of a naturalisation certificate without giving reasons. The Act also states that his decision should not be reviewable in any court of law. However, in *R v Secretary of State for the Home Department ex p Fayed* (1997), the Court of Appeal held that the Home Secretary had a duty to act fairly by affording applicants who have been refused citizenship an opportunity to make representations on any matters of concern relating to their application. The Government has indicated in its White Paper (*Fairer, Faster and Firmer: A Modern Approach to Immigration and Asylum*, Cm 4018, 1998) that applicants for British citizenship will now always be told why their application was rejected. The existence of statutory rights of access to some forms of personal data (see above, 23.2.7), coupled with increased computerisation of immigration and nationality casework will also increase the availability of information to applicants.

27.4 Involuntary removal from the UK

The government has wide discretion under the Immigration Act 1971 to deport individuals with no or limited rights of residence. Grounds for deportation are:

(a) breach of residence conditions;

(b) entry obtained by deception;

(c) family member subject to a deportation order;

(d) commission of a criminal offence;

(e) if the Home Secretary deems that a deportation order would be conducive to the public good.

Such decisions have been made in relation to persons threatening national security, or where the individuals concerned are members of cults or religious groups which are generally disapproved of in this country (there is a long line of decisions either refusing entry to or deporting members of the Church of Scientology on 'public good' grounds, see, for example, *Van Duyn v Home Office* (1974)). It was mentioned above that appeals against deportation orders on national security grounds are now heard by a special Immigration Appeals

Commission and there is a right of appeal on a point of law to the Court of Appeal.

On occasion, deportation has been challenged on the basis that the authorities have used it as a form of disguised extradition. If, for example, the person in question has committed an offence which could be described as 'political', he or she may not be extradited. In *R v Brixton Prison Governor ex p Soblen* (1963), the decision of the Home Secretary to deport S for public good reasons was challenged on the basis that the deportation order was issued for another purpose – to comply with the US's request for the applicant's return. The Court of Appeal rejected this argument on the basis that this purpose did not undermine the validity of the Home Secretary's order. The Court held that the Home Secretary could act for a plurality of purposes.

There is no specific provision in the main body of the ECHR dealing with the right to freedom of movement. However, the right not to be subject to inhuman or degrading treatment under Art 3 has often been relied upon either to prevent deportation or to seek compensation for the deportation, without a proper hearing, of refugees to their State of origin where they face persecution. As early as 1978, the European Commission of Human Rights ruled that the refusal of entry to Asians fleeing persecution in Uganda amounted to inhuman and degrading treatment. In the Commission's view, the immigration rules in operation at that time were racially motivated, since they targeted, in particular, people in the applicants' position, despite the fact that they held British passports:

> ... differential treatment of a group of persons on the basis of race might be capable of constituting degrading treatment in circumstances where differential treatment on some other ground, such as language, would raise no such question [*East African Asians* case (1973)].

The *Chahal* judgment (discussed further below, 27.8) limits the ability of States to rely on national security considerations when deporting an asylum applicant who faces a well founded risk of persecution in the State of destination. Chahal was a prominent Indian Sikh who had been arrested for suspected involvement in Sikh terrorism in the UK. The Home Secretary decided that there were sufficient grounds to justify a deportation order. Chahal argued that there was a strong probability that he would be exposed to persecution in India due to his high profile position in the Sikh separatist movement; nevertheless, his application for asylum was turned down since the Secretary of State held that that the question whether he qualified for refugee status became irrelevant once the decision to deport him had been made. The European Court of Human Rights ruled that, in view of the potential risk he faced in the destination State, any deportation order issued against him would breach his rights under Art 3 not to be subject to torture or inhuman treatment.

Deportation of someone suffering from a terminal illness to a country where there is insufficient medical care may also amount to inhuman and degrading treatment in breach of Art 3 (*D v UK* (1997)). The applicant, a convicted drugs smuggler who was in the final stages of AIDS, was to be deported to St Kitts where there was no adequate medical treatment, shelter or family support. The court held that the duty to secure to the applicant the guarantees contained in Art 3 engaged the liability of the State in this case. Application of Art 3 is, therefore, no longer confined to situations where the individual to be expelled faces a real risk of being exposed to forms of treatment which are intentionally inflicted by the receiving State (see, also, the Commission's admissibility decision in *BB v France* (1998)).

The threshold for inhuman and degrading treatment is high. Breaking up a family will not breach Art 3, but it may amount to an infringement of the right to family life under Art 8. In order to rely on Art 8, non-nationals must satisfy the court that they have established family connections over a long period of time in the deporting State (*Beldjoudi v France* (1992)). Even before incorporation of the ECHR the rights of entry in this country were altered to include unmarried partners in a relationship akin to marriage.

27.5 Movement within the UK

The most important restriction on this freedom of movement is the ability of the Home Secretary to issue exclusion orders under the Prevention of Terrorism (Temporary Provisions) Act 1989 against anyone suspected of being involved in terrorist activities. This means that a person may be prevented from entering Great Britain (see above, 2.4) and vice versa if it appears expedient to the Home Secretary for the prevention of acts of terrorism connected with Northern Ireland. These orders are not subject to any form of independent review by a judicial body and the very situation which gave rise to this legislation is fraught with sensitive security issues. This allows the Home Secretary to impose exclusion orders without giving reasons (for fear that important sources of information might be betrayed). It is possible to seek judicial review of a decision to impose an order, but national courts tend to accept the government's defence that it is necessary on grounds of national security. In *R v Secretary of State for the Home Department ex p McQuillan* (1995), the applicant challenged an exclusion order against him because the Home Secretary had failed to provide reasons justifying the order. The application for judicial review was based on breach of the principle of procedural fairness. The court, although sympathetic to this argument, had to accept as conclusive the Home Secretary's statement that national security prevented the disclosure of reasons. The exclusion order could not, therefore, be ruled to be unlawful on that basis.

27.6 Freedom of movement in the European Union

One of the original purposes of the EC Treaty was to ensure that all obstacles to the free movement of economic actors, such as employees and service providers and their goods and capital, were removed. The purposes have now broadened beyond these economic aims and citizenship of the European Union has been created:

> *Article 17 [formerly Art 8]*
>
> 1 Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall complement and not replace national citizenship.
>
> 2 Citizens of the Union shall enjoy the rights conferred by this Treaty and shall be subject to the duties imposed thereby.
>
> *Article 18 [formerly Art 8a]*
>
> 1 Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect.
>
> 2 The Council may adopt provisions with a view to facilitating the exercise of the rights referred to in paragraph 1; save as otherwise provided in this Treaty, the Council shall act in accordance with the procedure referred to in Art 251. The Council shall act unanimously throughout this procedure.

As we have noted before, rights and freedoms under Community law only apply to EC nationals and those third country nationals with recognised links to citizens of EU Member States, such as spouses. Even these applicants have to satisfy certain conditions before they can claim the protection of Community law; individuals who are not engaged in some economic activity and who do not qualify under one of the limited directives on residence discussed below are not able to bring claims under Community law. In addition, it is necessary for applicants to establish a 'jurisdictional link' between their case and Community law. The Court of Justice will not make preliminary rulings on questions which are internal to Member States (Case C-175/78 *R v Saunders* (1979)). For this reason, claims have been made to the recently adopted right to citizenship in the EC Treaty in matters relating to restrictions on movement within the borders of a Member State (see below, 27.7).

EC nationals and their spouses are not the only ones to be affected by developments at a Community level. One of the consequences of the Schengen Agreement, signed in 1985, was that, once a non-EC national is lawfully resident within one Member State, he or she may travel unobstructed by border controls within the EU (with the exception of the UK and Ireland,

which have reserved the right to operate their own border checks). However, a side effect of this arrangement is that asylum seekers are passed from one country to the other with no evenhanded determination of their claims. The hardships caused by what has come to be known as 'fortress Europe' were illustrated vividly in the case of Kenyan asylum seekers who arrived in the UK in early 1998 having been given 'notices to quit' by the Belgian authorities, where they had arrived ((1998) *The Times*, 26 March). They were the latest apparent victims of 'dumping' which the Home Office claimed had happened to more than 900 asylum seekers from Kenya and the former Yugoslavia since the beginning of 1998. The proposals for harmonisation of Member States' rules on asylum under the Amsterdam Treaty will be discussed below.

27.6.1 Economic actors

Community law protects free movement in a number of ways. Article 12 of the EC Treaty (formerly 6) prohibits discrimination on the basis of nationality. Articles 39 (formerly 48) protects the freedom of movement of workers. This includes the right to travel to find work. Article 43 (formerly 52) protects the right of EC nationals to establish their business in other Member States. This right applies to self-employed persons and to companies, and Art 49 (formerly 59) applies to services; individuals and companies are free to provide services across EC borders and EC nationals have the right under this Article to travel to receive services.

Articles 43 and 49 have been followed by various forms of secondary legislation (Directives 89/48 and 92/51) requiring Member States to recognise the qualifications of other EC nationals and restricting the imposition of re-qualification rules.

EC nationals claiming lawful entry and abode under Arts 39, 43 and 49 may avail themselves of the provisions of Directive 68/1612 which entitles them to 'family reunion'; in other words, they may be joined by their spouse, dependent children, parents, grandparents and, in certain circumstances, anyone who was living under the same roof as them in their State of origin. This is an important accessory to the right to freedom of movement because there must be no major disincentives that would prevent, say, a German national from taking a job in France because members of his family would lose out on valuable benefits in their new place of residence.

27.6.2 Other European Community nationals

Family members of EC workers may avail themselves of the same benefits and educational facilities available to nationals of the host State (Regulation 68/1612, Art 12: rights of workers' dependants to education on the same terms of children of host State nationals).

Article 18 (formerly 8a) of the EC Treaty enshrines the concept of European citizenship (see above). Since this Article refers to 'citizens', rather than workers, the freedom of movement it bestows is no longer restricted to economic actors. The implications of this provision are considered below, 17.7.

In addition to the Treaty provisions and Regulation 68/1612, the Council has passed three directives which guarantee the freedom of movement (that is, granting of residence permits) of non-workers and their families. Directive 90/366 grants rights to students undergoing vocational training; Directive 90/365 entitles self-employed people who have ceased to work certain rights of residence; and Directive 90/364, a catch-all piece of legislation governing all those persons who do not already enjoy a right in EC law, guarantees a right of residence for EC nationals who are of independent means and have private medical insurance. This Directive is designed to ensure free movement of individuals within the Community who will not present a financial burden to the host State.

The freedom of EC nationals under Art 50 to move in order to provide services also covers the freedom to receive services. This has the consequence of extending the application of Community law to many areas which would not appear to be within the commercial framework of the original Treaty objectives. In Case C-286/82 *Luisi and Carbone v Ministerio del Tesoro* (1984), L and C were fined for exporting excessive amounts of capital out of Italy. They invoked Art 60 (now 50), claiming that they would have been protected by EC law if they had wanted this money to pay for services. The Court of Justice held that that the freedom to go to the State where the service provider is established is a corollary of the express freedom in Art 60 (now 50) of the service provider to move to the recipient's State. This freedom to receive services, therefore, applies to a wide range of people, such as tourists, persons receiving medical treatment and persons travelling for the purposes of education or business, although even these wide categories have been further extended by the recent ruling on this issue in *Bickel v Italy* (1998). Here, the court ruled that the scope of the provisions on freedom of services could cover situations where the applicants 'intend or are likely to receive services', a definition which arguably applies to such a wide variety of situations that the original link with the Treaty freedoms has been eroded away.

The broad principle of non-discrimination has also been responsible for the extension of Community law into areas unrelated to employment or services. France used to have compensation laws which limited payments for criminal injury to victims who were resident in France or who held French nationality. In Case C-186/87 *Cowan v French Treasury* (1989), C, a visitor to France, was denied State compensation for injuries incurred in a criminal assault. The Court of Justice, referring to Art 6 (now 12), observed:

> When EC law guarantees a natural person the freedom to go to another Member State, the protection of that person from harm in the Member State in question, on the same basis as that of nationals and persons residing there, is a corollary of that freedom of movement.

Thus, it is not only lawful residence as a citizen of a Member State, but lawful presence as a visitor which furnishes the basis for a claim under the non-discrimination provisions of Community law. In *Bickel*, the court allowed a claim under Art 6 of the EC Treaty by two EC nationals who faced criminal proceedings in northern Italy. There was a local regulation which permitted German speaking residents to be tried in German, but they did not qualify since they were not lawfully resident in the area. They complained that this violated the principle of non-discrimination on the basis of nationality. The Court upheld their claim. It considered that their presence in the host State indicated that they were intending or likely to receive services; this then brought them within the personal scope of the EC Treaty and entitled them to rely on Art 6 to challenge the discriminatory measure in question. A similar position was taken by the Court in Case C-85/96 *Martinez Sala v Germany* (1998).

27.6.3 Derogations from rights of free movement

The rights outlined above are, as always, not absolute. They are subject to the ability of Member States to refuse entry or restrict the issue of residence permits on the basis of public policy and health grounds. States may also refuse permits to those wishing to seek work in sensitive areas of the public sector which it is permissible to reserve to nationals. However, these limitations are very strictly policed by the Court of Justice. There is also a Council Directive (64/221) which specifies the grounds upon which entry and residence for workers may be restricted. These grounds are similar to those referred to in the EC Treaty, but they are much more detailed and, therefore, it is difficult for a Member State to rely on them if the case in question does not fit into the provision.

In Case 36/95 *Rutili v Minister for the Interior* (1975), R, an Italian married to a French national, had his temporary residence permit in France endorsed so that he was only able to travel to certain parts of the country. He suspected that this was because of his role as a trades union activist and he applied to the Court of Justice, claiming this was a violation of his right under Art 48 (now 43) of the EC Treaty to travel freely in the Community as a worker. The Court upheld the claim. They refused to accept the defendant State's argument that the order was justified on the basis of public policy. Such a derogation from a fundamental EC Treaty right, they said, would only be permissible if it was necessary in a democratic society, applying the same reasoning to State derogations under the EC Treaty as the Court of Human Rights applies to the permitted derogations under Arts 8–11 of the ECHR.

Since the Court of Human Rights has taken the position that the provisions of the ECHR are relevant considerations in assessing the legitimacy of a Member State's derogation from a particular right in Community law, this means that the Member State's courts must consider whether a restriction on an individual's movement, such as the imposition of a deportation order, would be in breach of any of the rights listed in the ECHR, such as the right of free association under Art 11, or the right to privacy under Art 8, or the right not to be subject to degrading treatment under Art 3. If there is a risk of such a breach, the derogation may not be permissible, even if it is based on one of the grounds for derogation listed in the EC Treaty or in a directive.

In addition to this strict scrutiny of derogations from the right of freedom of movement, Community law requires that the power to restrict movement of EC nationals may only be justified on the basis of personal unacceptability; past membership to a proscribed organisation or a spent offence will not justify any derogation on public policy grounds (Case C-41/74 *Van Duyn v Home Office* (1974)). It was established in Case C-30/77 *R v Pierre Bouchereau* (1977) that a national authority may only rely on the public policy exception if the applicant presents a genuine and sufficiently serious threat affecting one of the fundamental interests of society.

This reasoning applies, of course, only if the case involves a point of Community law; the individual concerned must be an EC national, or the spouse of an EC national, who is a member of one of the protected classes outlined above. Neither the Treaty nor the Convention would be relevant if the case concerns a non-EC citizen (an illegal entrant of Indian nationality could not rely on Art 8, via Community law, to prevent the Home Office from refusing him leave to stay in the UK (*R v Secretary of State for the Home Department ex p Tejinder Singh* (1993)).

27.7 'An ever closer union': rights of movement for European Union citizens

The extent and scope of the rights under Art 18 (formerly 8a) of the EC Treaty – set out above – have been considered by national courts and the Court of Justice. The question is whether this EC Treaty provision confers any new rights in addition to those available under pre-existing EC Treaty provisions and directives. The issue is central to any discussion on free movement because, if Art 18 is a freestanding right, the applicant who wishes to claim the protection of EC law need no longer qualify as an economic actor or bring himself within the scope of one of the limited directives on residence rights discussed above, 27.6. Nor would it be necessary to establish a jurisdictional link with Community law; in other words, the claim to citizenship under Art 18 could exist irrespective of any inter-State element in the State action complained of.

The question first arose in the national courts in relation to exclusion orders, since they involve restrictions on the movement of EC citizens within the borders of a Member State, the UK. When EU citizenship was first created after the Maastricht treaty revisions, the leader of Sinn Fein, a political party in Northern Ireland with an association with the IRA, challenged an exclusion order preventing him from coming to Great Britain to attend a political meeting at the House of Commons (*Secretary of State for the Home Department ex p Adams* (1995)). However, the reference to the Court of Justice for a preliminary ruling was withdrawn after the Home Secretary revoked the exclusion order, so the court did not consider the applicability of Art 18 to wholly internal situations. In *R v Secretary of State for the Home Department ex p Vitale* (1996), the national court took the position that this Article does not create any new rights of free movement, but simply takes the existing rights created by the EC Treaty in its original form, together with all the implementing legislation and related qualifications, as the basis for the new citizenship. This has been borne out to an extent by comments of the Court of Justice to the effect that citizenship of the Union, established by Art 18, was not intended to extend the scope of the EC Treaty to internal situations which have no link with Community law (Case C-64/96 *Ücker v Germany* (1997); and see Vincenzi, C, 'European citizenship and free movement rights' [1995] PL 261).

Another application has been made under Art 7a of the EC Treaty (now Art 14), to the effect that the expressed aim of the Treaty, the abolition of internal frontiers, had been disregarded by the UK who had maintained border controls. The provision states:

> *Article 14 [formerly Art 7a]*
>
> 1 The Community shall adopt measures with the aim of progressively establishing the internal market over a period expiring on 31 December 1992, in accordance with the provisions of this Article and of Arts 15, 26, 47(2), 49, 80, 93 and 95 and without prejudice to the other provisions of this Treaty.
>
> 2 The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty.
>
> 3 The Council, acting by a qualified majority on a proposal from the Commission, shall determine the guidelines and conditions necessary to ensure balanced progress in all the sectors concerned.

The national court ruled that the Article was insufficiently clear and unconditional to produce direct effects between Member States and their subjects (*R v Secretary of State for the Home Department ex p Flynn* (1995)).

Earlier in this chapter, the byzantine provisions of domestic law for the determination of British citizenship were considered. Because of the

implications of Community law for immigration, the UK, on entry into the Community in 1972, took the precaution of limiting the definition of a UK national for the purpose of Community law to two categories within the British Nationality Act 1981: British citizens (who have the right of abode in the UK) and Gibraltarians (who come within the category of British dependent territories citizens, who do not necessarily have the right of abode in the UK).

However, if the right of EU citizenship is set to expand, such unilateral action by Member States may soon become a thing of the past. Exclusive competence of Member States in this area is bound to come under pressure, since Member State citizenship is determinative of EU citizenship. The Court of Justice has observed recently that this determination must be carried out with respect for and in accordance with Community law (*Ücker v Germany*), and the question of the competence of Member States to determine citizenship is presently under consideration by the Court after a referral was made in relation to the status of British overseas citizens in *R v Secretary of State for the Home Department ex p Kaur* (1998).

27.8 Asylum

The final part of our inquiry into the right to freedom of movement concerns the assertion of that right by those *in extremis*. The 1999 NATO bombing raids on Yugoslavia following Serbia's attempt to 'clear' the province of Kosovo of ethnic Albanians was only the most recent crisis precipitating the mass movement of people from their homes, seeking safety and protection elsewhere. Not all such disasters are so cataclysmic; asylum seekers may constitute only small groups or individuals, fleeing persecution from countries which have not made it to the front pages of the Western press. The urgent nature of the refugee problem after the end of the Second World War brought about the ratification of the International Convention Relating to the Status of Refugees 1951 (the Refugee Convention). This Convention defines a refugee as one who, 'owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion', is outside his or her country of nationality and because of such fear is unwilling to return to it.

The Refugee Convention has been adopted into national law by the Asylum and Immigration Appeals Act 1993 and the Asylum and Immigration Act 1996. There is no right to asylum, even by genuine refugees; however, the Refugee Convention obliges signatory States not to subject genuine refugees to refoulement, in other words exposing them to the danger of persecution by returning them to their State of embarkation. In order to qualify for refugee status under the Refugee Convention, an applicant for asylum must satisfy the immigration authorities that there is objective justification for their fear of persecution in their country of nationality.

Even if they are able to cross this threshold by supplying objective evidence to satisfy the authorities that their fear of prosecution is well-founded, applications for asylum often fail to meet the legal criterion for 'membership of a particular social group'. The unifying characteristics of gender, for example, do not, on the whole, go to constitute a 'particular social group' and, therefore, persecution on grounds of sex does not qualify applicants for refugee status, although, if there is some specific consequence of being of a particular gender – women, for example, threatened with flogging on suspicion of adultery – it might be possible to qualify as belonging to a 'particular social group' (*R v Immigration Appeal Tribunal ex p Shah* (1999)).

The Home Office decides upon the merits of asylum applications and the decision of the Home Secretary is appealable to Special Adjudicators whose decision in turn may be reviewed by the Immigration Appeal Tribunal on a point of law. The lawfulness of the detention of immigrants depends, to an extent, on the opportunity of the detainee to have the legality of his detention assessed by an independent tribunal (see above, 21.4.1). The Special Adjudicator, who usually sits in a panel of three ('three wise men') has been said by the European Court of Human Rights to be insufficiently independent of the executive to afford asylum applicants properly independent scrutiny of their claims as required by Art 5(4) of the ECHR (*Chahal v UK* (1997)). The European Court of Human Rights decided in this case that Chahal, a deportee claiming asylum, had not been afforded this opportunity, even though he could have challenged the decision of the Special Adjudicator by way of judicial review. Such a challenge did not, in the view of the Court, provide proper consideration of the merits of the decision. In response to this ruling, the UK has passed legislation under which an independent Commission, including a judge and at least one lawyer, has been appointed to hear appeals in cases of deportation on the grounds of national security (Special Immigration Appeals Commission Act 1997).

Obstacles for asylum seekers

The applicant for asylum faces severe practical as well as legal difficulties. In 1996, a pressure group acting on behalf of asylum seekers challenged social security regulations which deprived such applicants of income support while waiting for their claims and appeals to be decided (*R v Secretary of State for Social Security ex p Joint Council for the Welfare of Immigrants* (1996)). This, said the court, was a breach of their (common law) right to a fair hearing, since it made it impossible for them to stay in the country until their claims were determined and so it was, in practice, unrealistic that they would be able to appeal at all. In response to this judgment, the Government introduced the Asylum and Immigration Act 1996, which effectively deprives asylum seekers of the right to receive various social benefits if they claim asylum after entering the country and not at the port of entry. The courts' reaction to this manoeuvre was to move the burden onto local authorities and ratepayers

when, in October 1996, they ruled that s 21 of the National Assistance Act 1948 meant that local authorities had a duty to provide the resources for care and accommodation to asylum seekers who were without other means of support (*R v Hammersmith and Fulham LBC ex p M* (1997)). In its White Paper, *Asylum and Immigration* (Cm 4018, 1998), the Government signalled its intention to resolve this problem by removing cash benefits for asylum seekers and replacing them with benefits in kind – such as food and accommodation – the idea being to remove the main incentives for economic refugees.

The 'third country' rule

The 1996 Act also expedites asylum claims by introducing a procedure whereby an asylum seeker may be returned to a safe third country without the authorities in this country having to investigate the merits of his claim. In *R v Secretary of State for the Home Department ex p Canbolat* (1997), C, an asylum seeker from Turkey, applied for judicial review of the immigration officer's refusal to grant her entry and the decision of the Home Secretary to remove her to France, arguing that the Home Secretary did not properly evaluate the material that suggested there might be a risk that this third country would send her back to Turkey. This material was the finding of Special Adjudicators in a number of other cases that France was not a third country from which asylum applicants could continue their appeal. The Court of Appeal rejected the challenge, holding that the Secretary of State could grant a removal certificate if he was satisfied that the third country's system for dealing with asylum applications would, in general, provide the required standard of protection. This case demonstrates the difference between the function of the judicial review court and that of the Special Adjudicators. The former was unable to interfere with an administrative decision that was not Wednesbury unreasonable; whereas the Special Adjudicators, who could have examined her argument on its merits, may have come to a different conclusion (as, indeed, they had done in other cases).

The 'safe third country' rule in the Refugee Convention has particular significance for the handling of refugee claims across the EU. The Dublin Convention, which came into force in 1997, governs arrangements for safe third country cases in Europe. The basic rule is that asylum claims should be examined just once in the EU and that the Member State 'responsible' for the presence of the asylum seeker in the EU should be responsible for examining their claim. Whilst the aim of this Convention was to prevent asylum seekers from being passed between Member States without anybody taking responsibility for examining their claim, the effect has been rather the opposite, with a certain amount of buck-passing on who had responsibility in the first place. Where an asylum seeker has no documentation and is unwilling or unable to provide information as to where he or she has just been, it is practically impossible to establish which Member State was 'responsible' for their arrival.

Future proposals for asylum law

At the intergovernmental conference leading up to the Amsterdam revisions to the EC Treaty and Treaty of EU (see above, Chapter 7), Member States expressed concern that differing asylum rules across the EU afforded an opportunity for terrorist suspects to escape extradition by taking advantage of asylum procedures in other Member States. So a Protocol to the Amsterdam Treaty was drawn up which provides that Member States should regard each other as safe countries of origin for all legal and practical purposes relating to asylum applications from EC nationals. It will be remembered that the 'third country rule' is a relevant consideration in the Refugee Convention. This Protocol, in effect, provides an opportunity for Member States to reject asylum applications on the basis of a presumption that other Member States are safe, which suggests that Member States will not apply the level of scrutiny required by the 1951 Refugee Convention.

Decisions on asylum and immigration have now been brought within the 'European Community pillar' (see above, 7.2.1). Thus, they are subject for the first time to interpretation and review by the Court of Justice. Article 63 of the EC Treaty now provides for measures to be taken by the Council harmonising asylum policy, laying down minimum standards on the reception of asylum seekers and uniform procedures in Member States for granting or withdrawing refugee status. The aim of this is less to promote the rights of asylum as to ensure that the burden of dealing with refugees is equally shared between Member States ('balance of effort'); however, it is to be hoped that, once consistent asylum procedures are adopted under the EC Treaty, the tendency of Member States to 'pass the buck' in this area will come to an end.

27.9 Assessment

The main shortcoming in the UK's system of immigration controls is in relation to the guarantee of due process. The fact that most immigration controls are carried out via non-justiciable rules, internal regulations, guidance notes to immigration officers and circulars gives rise to a number of variable criteria that are difficult to anticipate, comply with or challenge in appeal proceedings. The operation of this system also depends on very wide discretionary powers which, again, have proved in the past very difficult to challenge in judicial review proceedings.

Asylum seekers fare slightly better, because of the strict scrutiny approach adopted by UK courts to cases involving a possible threat to the applicant's safety. The decision by the House of Lords holding the Home Secretary in contempt for deporting a Zairean citizen in breach of a court order in *M v Home Office* (1994) illustrates this approach. As Robertson has observed:

> ... although the court exonerated Baker of personal liability, the prospect of a criminal conviction will henceforth concentrate the minds of ministers who

> may be tempted to ignore inconvenient court orders made to protect asylum seekers [*Freedom, the Individual and the Law*, 7th edn, 1993, London: Penguin].

This spirited approach by the courts to what they perceive to be genuine asylum seekers (see *ex p Shah*, above) will be bolstered by the provisions available to them under Arts 3, 6 and 8 of the ECHR, incorporated into national law by the Human Rights Act 1998, without the necessity to observe the margin of appreciation doctrine that has hampered the development of freedom of movement case law under these Articles in the Court of Human Rights. However, the tough approach to illegal immigration and bogus asylum seeking signalled in the Government's 1998 White Paper will bring with it a range of measures that may interfere with these rights. It remains to be seen how robust the judiciary is prepared to be in the face of primary legislation designed to combat immigration crime that overrides the rights of some genuine refugees and applicants for entry and residence.

EU citizenship, which got off to a slow start, is developing into a promising basis for claims to free movement, not only across EC boundaries, but within Member States. This will, no doubt, improve the situation for EC nationals and their families, but there may be a price to be paid by third country nationals as Member States draw in their entry requirements and clamp down on immigration criteria to compensate for the greater pressure imposed on their social welfare systems, by Community citizens within their borders.

FREEDOM OF MOVEMENT

The law on freedom of movement has developed in three main areas: immigration; the rights of asylum seekers; and the rights of EC nationals to move across inter-State boundaries. Community law has the most sophisticated case law regarding the right to free movement, although rights under Community law are only enjoyed by EC nationals and their spouses. The ECHR does not guarantee a right to non-nationals to enter and reside in the territory of signatory States, although there are Protocols annexed to the Convention (as yet unratified by the UK) which guarantee free movement for anyone lawfully within a Member State, prohibiting signatory States from refusing entry to or expelling their own nationals and prohibiting the mass expulsion of aliens.

Since there is no specific right to free movement in the ECHR, deportation and immigration decisions are considered in relation to three related rights: the prohibition on torture, degrading or inhumane treatment (Art 3); the right to family life under Art 8 and the right to an effective remedy before the national judicial authorities under Art 13.

Movement out of the UK

There are no restrictions on nationals wanting to leave the country; possession of a valid passport is not a precondition for travel abroad, although, in practice, travellers are not accepted on the main carriers without a passport.

Movement into the UK

Immigration laws and regulations determine who has the right of abode and who has only limited rights of entry. There are nine categories of nationality under the British Nationality Act 1981; out of these categories, only one, that of British citizenship, guarantees right of abode.

Persons claiming asylum can only be granted entry if they are considered to be political refugees for the purposes of the Refugee Convention. The Refugee Convention prohibits deportation of an asylum seeker to any country where his or her life is endangered ('refoulement') and the State's liability for breach of Art 3 of the ECHR is engaged in these circumstances even if the risk to which the deportee is exposed is not the direct responsibility of the State.

Article 8 may be invoked to invalidate a refusal to allow entry where family ties within the Member State territory are well established, although

there is no obligation on States to allow non-nationals in to marry people lawfully within the territory.

Determination of claims

The immigration officer's initial refusal of entry, decision on deportation and removal, refusal to extend leave, imposition of conditions on right to remain and refusal of asylum are appealable to an Adjudicator and then to the Immigration Appeal Tribunal. The Immigration Appeal Tribunal's decision may be appealed to the High Court on a point of law, otherwise, judicial review is the only available scrutiny.

A non-national may be deported on a number of grounds, most broadly, on the basis that their expulsion is conducive to the public good. Appeals against deportation on national security grounds are heard by a panel of judges selected to sit on the Special Immigration Appeals Commission.

Article 13 of the ECHR imposes an obligation on signatory States to put the substance of his or her ECHR rights to the judicial authorities of the Member State before being deported. The availability of judicial review of decisions relating to deportation and extradition in the UK has been held to fulfil this requirement. Article 13 has not been incorporated by the Human Rights Act and, therefore, may not be relied upon as an argument in national courts.

Restrictions on freedom of movement within the country

Under the Prevention of Terrorism Act 1989, a person may be excluded from the mainland or Northern Ireland if he or she is suspected of being involved with terrorist offences.

Freedom of movement in community law

Treaty provisions

The EC Treaty guarantees free movement of workers, establishment and services. The Treaty provision prohibiting discrimination on grounds of nationality also provides a general protection for the freedom of movement of EC nationals. Although the Treaty of EU grants a right of citizenship of the EU, this has not yet been successfully relied upon by individuals challenging restrictions on their freedom of movement within Member States.

The Treaty of Amsterdam revisions to the EC Treaty and Treaty of EU has improved the position of third country nationals by moving asylum and immigration policy into the Community 'pillar' of the EU, which means that the Court of Justice may scrutinise national measures with a view to harmonising Member States' laws in this area.

Secondary legislation

In addition, secondary Community legislation in the form of directives oblige host States to guarantee to family members of migrant workers, students and persons of independent means various benefits that would be available to their own nationals.

Member States may refuse entry or restrict the issue of residence permits on the basis of public policy and health. Derogations on these grounds will be assessed for their legality in the light of the provisions of the ECHR, in particular, the right to a family life and freedom of association and assembly. If the measure is deemed to have a disproportionate effect on these rights, it will be in breach of Community law. Migrant workers may also be refused permits to work in sensitive areas of the public sector.

'Third country' nationals

Non-EC citizens are not entitled to the rights to free movement guaranteed in the EC Treaty and secondary legislation. The difficulties of these 'third country' nationals arise partly out of the Schengen Agreement 1985 which, in the view of critics, has created a 'fortress Europe' in which asylum seekers are passed from one country to the other with no evenhanded determination of their claims. Article 73k of the EC Treaty provides for measures to be taken by the Council harmonising asylum policy, laying down minimum standards on the reception of asylum seekers and uniform procedures in Member States for granting or withdrawing refugee status. The aim of this is less to promote the rights of asylum than to ensure that the burden of dealing with refugees is equally shared between Member States ('balance of effort').

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