Neutral Citation Number: [2005] EWCA Civ 105
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE IMMIGRATION APPEAL TRIBUNAL

Royal Courts of Justice
Strand, London, WC2A 2LL

Tuesday, 1 March 2005

Before :

LORD JUSTICE JUDGE
LORD JUSTICE LAWS
and
LORD JUSTICE LATHAM

- -

Between :

HUANG **ABU-QULBAIN** **KASHMIRI**	**Appellants**
- and -	
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

- -

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

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Mr Nicholas Blake QC and Mr Raza Husain (instructed by **T R P Solicitors**) for the **1st Appellant**
Mr Nicholas Blake QC and Mr James Collins (instructed by **Messrs Sheikh & Co**) for the **2nd Appellant**
Mr Nicholas Blake QC and Mr Ranjiv Khubber (instructed by **Messrs Luqmani Thompson & Partners**) for the **3rd Appellant**
Ms Monica Carss-Frisk QC and Mr Adam Robb (instructed by **Treasury Solicitor**) for the **The Secretary of State for the Home Department**

- -

Judgment

Lord Justice Laws:

This is the judgment of the court

INTRODUCTORY

1. These three appeals against decisions of the Immigration Appeal Tribunal ("the IAT") were heard together pursuant to directions given by Tuckey LJ on 3 September 2004, when they were selected by him as appropriate lead cases for the determination by this court of what has been called "the *M*(Croatia)* issue", named from the starred

IAT decision[1] whose reasoning has given rise to it. The issue concerns the proper approach to be taken by an adjudicator in an appeal where he is called upon to determine whether the Secretary of State's decision to remove the appellant from the United Kingdom (or, it may be, to refuse him leave to enter) is a disproportionate, and therefore unlawful, interference with the appellant's right to respect for his private and family life pursuant to Article 8 of the European Convention on Human Rights ("ECHR"). By s.6 of the Human Rights Act 1998 ("the HRA") public authorities, which include the Secretary of State, the adjudicators and the IAT, and this court, must not "act in a way which is incompatible with a Convention right".

2. As is well known ECHR Article 8 provides:

> "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 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."

3. At this stage we will set out paragraph 29 from the judgment in *M* (delivered by the President of the IAT, Ouseley J). It contains the pith of the IAT's reasoning, and serves well to introduce the issue. As will become clear, however, this reasoning is closely related to earlier decisions of this court, and one of the questions we must confront is whether, or to what extent, we are free to depart from those decisions should we think it right to do so. But that lies ahead. It is stated in paragraph 29 of *M*:

> "The starting point should be that if in the circumstances the removal could reasonably be regarded as proportionate, whether or not the Secretary of State has actually said so or applied his mind to the issue, it is lawful. The Tribunal and adjudicators… should normally hold that a decision to remove is unlawful only when the disproportion is so great that no reasonable Secretary of State could remove in those circumstances. However, where the Secretary of State, eg through a consistent decision-making pattern or through decisions in relation to members of the same family, has clearly shown where within the range of reasonable responses his own assessment would lie, it would be inappropriate to assess proportionality by reference to a wider range of possible responses than he in fact uses. It would otherwise have to be a truly exceptional case, identified and reasoned, which would justify the conclusion that the removal decision was unlawful

[1] *M*(Croatia)* [2004] INLR 327. We will refer to it simply as *M*.

> by reference to an assessment that removal was within the range of reasonable assessments of proportionality…"

4. It is trite Convention law, for which we need cite no authority, that if on the face of it action by the State interferes with the individual's right to respect for his private and family life (so that ECHR Article 8(1) is engaged) a condition of the action's justification pursuant to Article 8(2) is that it should be proportionate to a legitimate aim for whose purpose the action is undertaken. Here the legitimate aim is the maintenance of the integrity of the State's immigration policies, given by statute and by Immigration Rules. The action in question (in the standard case) is of course the decision to remove the immigrant. The "*M*(Croatia)* issue" may at this stage be crudely stated thus: upon a statutory appeal to the adjudicator in which the immigrant claims that on the facts his removal would be disproportionate and therefore unlawful, is the adjudicator's assessment of proportionality limited to a review of the Secretary of State's decision (is the decision "within the range of reasonable assessments of proportionality"?) or must the adjudicator decide for himself, on the merits, whether the removal would be proportionate or not? Our consideration of this issue has raised, not for the first time, broad questions as to the assignment of responsibility between the courts (here in particular the adjudicator) and the executive in the administration of fundamental rights.

5. Permission to appeal was granted on the papers by Tuckey LJ in *Kashmiri* at the time of the directions hearing on 3 September 2004. Sedley LJ had earlier granted permission in *Haung* on 4 July and in Abu-*Qulbain* on 6 July 2004.

THE FACTS AND THE DECISIONS OF THE IMMIGRATION APPELLATE AUTHORITIES

HUANG

6. Mrs Huang is a citizen of China, born on 29 March 1942. She is married to Dr Qing Yun Yao, though they are estranged in circumstances we will briefly describe. They are both medical practitioners and have specialised in the field of cancer research. Two children, now grown up, were born to the marriage. The daughter, Mrs Hong Yao, is married to Mr Bruce Phenix. They have two children with whom they live in the United Kingdom where they are lawfully settled. So does Mrs Huang's husband. Mrs Huang's other child, Mr Shao Ning Yao, works in Gibraltar but as we understand it has a base (again in perfectly legitimate circumstances) here in the United Kingdom. Mrs Huang also has an elderly mother and two younger brothers living in Shantou in China. It takes about eleven hours journey time to visit them from Mrs Huang's home in China. There is a third brother, who lives in Hong Kong.

7. Mrs Huang's husband seems first to have come to the United Kingdom as long ago as 1981. He has not been continuously present in this country but at length became settled here. The son, Shao Ning, joined his father in the United Kingdom in 1987. Mrs Huang and her daughter first arrived here in 1993 to join the husband and son. On 1 April 1993 she applied for indefinite leave to remain on the basis of her marriage to a person settled in the United Kingdom. That was refused by the Secretary of State on 11 June 1993, but Mrs Huang was granted limited leave until 9 March 1994. However, she left the United Kingdom and returned to China in order to look after her father who was ill. She returned here in 1998 and obtained leave to

enter for six months as a visitor. At this time she stayed with her husband. During this period her daughter gave birth to her first child. She returned to China, and next returned to the United Kingdom on 27 June 2000 when she was again given a six months visitor's leave. On 24 November 2000, when she was 58 (her age is relevant to the operative Immigration Rule, to which we will come in due course), she applied for indefinite leave to remain as a dependant of her daughter who was and is settled here. That was refused by the Secretary of State on 5 March 2001, and Mrs Huang appealed against that refusal to the adjudicator.

8. Mrs Huang told the adjudicator that she had separated from her husband in June 2000. It was as we have said in that month that she last returned to the United Kingdom. As we understand it there have been no proceedings between Mrs Huang and her husband. It seems that he is unwilling for her to live in his household, nor would he support her former application to remain here as a spouse. Her case under ECHR Article 8 is based, certainly primarily based, on the bond between herself and her daughter and her daughter's own family. She has lived in her daughter's household since returning here in 2000. In his determination promulgated on 13 January 2003 the adjudicator was to observe wryly[2]:

> "It is rather unfortunate that this case has reached the appeal stage because if the Appellant had not returned to China in 1994 due to her father being ill it is highly probable that she would have been granted indefinite leave to remain as a spouse of a person settled in the United Kingdom. Furthermore, if the Appellant had not been separated from her husband and he had supported her application as his spouse then again the matter would probably not have reached the appeal stage."

9. The Secretary of State had not been satisfied on the facts that Mrs Huang enjoyed any claim to indefinite leave under the provisions of the Immigration Rules which might potentially have been engaged, namely paragraph 317(i)(e) and (v) of HC (that is, House of Commons Paper) 395. We must return to the Rules in due course[3]. At this point it is enough to say that the Secretary of State was plainly right. Mrs Huang had no claim under the Rules. Her real case, which the adjudicator accepted, was that her removal to China would nevertheless violate her rights under ECHR Article 8. The adjudicator held that she enjoyed a substantial family life in the United Kingdom with her daughter, son-in-law and grandchildren, and that her removal would be disproportionate to the legitimate aim of maintaining immigration control. His reasoning on the proportionality issue was as follows[4]:

> "The Appellant is approximately 60 years of age and cannot be expected to make long journeys to the United Kingdom in order to visit her family. The Appellant's family in the United Kingdom cannot be expected to move to China or make regular expensive trips in order to visit her. Both the Appellant's daughter and son-in-law are in employment and her grandchildren attend school. I note from the financial evidence

[2] Paragraph 18 of his determination.
[3] The relevant provisions of paragraph 317 of HC 395 are set out later.
[4] Paragraph 17.

> produced that both the Appellant's daughter and son-in-law are of modest means… and therefore cannot be expected to finance expensive trips to China for the whole family or for the Appellant to visit them in the United Kingdom. In short, the Appellant has formed a strong family life in the United Kingdom and her removal cannot be justified and would be disproportionate."

10. And so the adjudicator allowed the appeal on Article 8 grounds. On 24 February 2003 the Secretary of State obtained leave to appeal to the IAT. In its decision notified on 25 September 2003 the IAT observed[5] that when Mrs Huang applied for leave to enter as a visitor (the reference must be to her entry in June 2000) "she was intending to return to China in order to continue her life there as it had been before". They proceeded[6] to criticise the adjudicator for failing to reason out his conclusion on proportionality. The decision ends thus:

> "We have considered her position on the basis that all the Adjudicator accepted of the factual situation is correct but, taking everything at its highest from her point of view, it seems to us that *the Secretary of State is entitled to say that it is not disproportionate to remove her in the public interest.* For those reasons the appeal of the Secretary of State is allowed." (our emphasis)

KASHMIRI

11. Mr Kashmiri is a citizen of Iran, born on 4 July 1981. Until June 2000 he lived in that country with his parents and two younger brothers. However in June 2000 the rest of the family travelled to the United Kingdom. The father claimed asylum on 31 July 2000. His wife and the two younger sons claimed as his dependants. The Secretary of State at first refused the father's claim, but by a decision promulgated on 16 October 2001 the adjudicator allowed his appeal and he was formally granted indefinite leave to remain as a refugee by letter dated 7 January 2002.

12. It is we think not disputed that Mr Kashmiri (the present appellant) made a conscious decision to remain behind in Iran when his family left for the United Kingdom in June 2000, and did so out of a desire to complete his education in that country. At the time he was just short of nineteen years of age. At length he travelled to this country, arriving on 6 December 2001. He claimed asylum. That was refused by the Secretary of State on 11 January 2002. Mr Kashmiri appealed to the adjudicator on grounds both of asylum and ECHR Articles 3 (which of course prohibits torture or other inhuman or degrading treatment) and 8. He claimed to fear persecution, if he were returned to Iran, because he had been targeted on account of his father's activities as an artist and sculptor. He said he had been dismissed from the university because of his association with a female classmate, had been arrested and detained for 48 hours (when he was slapped in the face) for walking in the street with a girlfriend, and stopped and searched on suspicion of possessing drugs. In his determination promulgated on 30 April 2003 the adjudicator accepted some parts of Mr Kashmiri's

[5] Paragraph 4.
[6] Paragraph 8.

account but found him to be of "low credibility". He dismissed the asylum appeal, and held also that there was nothing in the human rights appeal based on ECHR Article 3.

13. In interview Mr Kashmiri had made it entirely clear that his main purpose in coming to the United Kingdom was to join his parents and brothers. The adjudicator proceeded to consider the Article 8 appeal. In summarising the facts he said[7]:

> "He has girl friends in Iran. He has not been persecuted by the Iranian authority. He has close relatives in Iran, including his father's elder brother and five cousins. He has a family life in the UK with his parents and siblings but it only commenced after his arrival in the UK at the end of 2001… He is now aged 22 and a mature young man who can be expected to continue to pursue his own private life in Iran."

And so the adjudicator held that Mr Kashmiri's removal, so far as it would interfere with his family life in the United Kingdom, would nonetheless be proportionate to the legitimate policy aim of immigration control; and he dismissed the Article 8 appeal.

14. Mr Kashmiri's appeal to the IAT was limited to the Article 8 ground. A major element in his case was, as the IAT accepted, that there were "insurmountable obstacles to the continuation of a family life, as it now exists, in Iran where the parents and siblings could not be expected to return having regard to their accepted status [sc. as refugees] in this country"[8]. He also put forward a new case to support his Article 8 appeal. In a written statement he claimed to be bisexual and to have had relationships with men and women, a fact which (so he said) he had concealed from his parents. The IAT were concerned as to how to deal with this late claim, about which Mr Kashmiri had not given evidence or been cross-examined. In the court they proceeded on the assumption that it was true.

15. The IAT held[9] that Mr Kashmiri's new case "inevitably calls into question the nature and intensity of the current claimed family relationship", since that relationship was now to be taken as "based on a concealment of his sexuality from his parents and it is clear from what he says that he expects it, if ever known to them, to have a serious effect on that relationship". Then after considering authority, and setting out paragraph 29[10] of *M*, the IAT concluded thus:

> "17… Although the Secretary of State was not seized of all the detail which is now before us, he was… aware of the broad basis of the claim and was not prepared to accept it. *We consider that, unless such a view can be categorized as plainly wrong, it should be accorded appropriate deference by us.* (our emphasis)
>
> 18. If we are wrong, however, in the view that the Secretary of State had sufficient information before him to make his own

[7] Paragraph 28 of his determination.
[8] IAT decision, paragraph 11.
[9] Paragraph 14.
[10] Wrongly referred to as paragraph 28.

> informed decision, it does not seem to us that the Appellant makes out his grounds of appeal that the Adjudicator has clearly erred in law in reaching the views as to proportionality of removal which he had expressed. *The most that the Appellant could successfully submit in that respect is… that the Adjudicator could have arrived at a different conclusion. But that is wholly different from saying that his conclusion was plainly wrong and therefore unlawful on the totality of the evidence (see M(Croatia)* above).*" (our emphasis)

Finally[11] the IAT dismissed the late claim about Mr Kashmiri's sexuality as having no bearing on the result.

ABU-QULBAIN

16. Mr Abu-Qulbain was born in Jordan on 11 January 1981. He is by parentage a Palestinian, but his country of habitual residence was the Lebanon. He was to give details of ill-treatment suffered by him at a refugee camp in the Lebanon to which he had moved with his grandmother in 1994, but given the issues in the case as they were at length refined we need not take time with that. He left the camp on 28 November 1999. He arrived in the United Kingdom, *via* Turkey and France, on 30 November 1999 without any travel document. He applied for asylum on arrival but – lamentably – was not required to attend for interview until 16 October 2002. He was refused asylum the same month.

17. Mr Abu-Qulbain put forward like grounds of appeal to the adjudicator as did Mr Kashmiri: asylum, and ECHR Articles 3 and 8. The adjudicator found that the core of the account he gave was credible, but held that his appeal on asylum and Article 3 grounds was not made out. Thus again the sole remaining issue arose under Article 8. As to that, Mr Abu-Qulbain's case was that in the three years and more in which he had been in the United Kingdom he had worked hard to obtain further educational qualifications at his own expense (he had obtained a place at Nottingham University), and had become engaged to a young woman who was a British citizen: she had been only sixteen when they met in August 2000. The adjudicator held[12] that his getting further education at his own expense in this country had been a "considerable achievement"; that he could not continue his education if returned to the Lebanon, which would be an "unduly harsh" outcome: "[h]e could well face economic destitution and economic disadvantage"; and it would be impossible for his fiancée to accompany him to the Lebanon: "[s]he has never lived in an Arab nation and would not be allowed by her family to go there. The Appellant would not be in a position to offer her accommodation or financial support and she would be unable to continue her education".

18. Accordingly the adjudicator held that Mr Abu-Qulbain's removal to the Lebanon would be disproportionate to the pursuit of the legitimate aim of the maintenance of immigration control, and allowed his appeal under ECHR Article 8.

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[11] Paragraph 19.
[12] Paragraph 25 of his determination.

19. The Secretary of State appealed with leave to the IAT. The IAT accepted that Mr Abu-Qulbain's removal to the Lebanon would interfere with his family and private life established here, but found that it would not be disproportionate. They held[13] (in contrast to the adjudicator's finding) that the difficulties in the way of the fiancée travelling with Mr Abu-Qulbain were not insurmountable. However an additional major factor which moved the IAT's decision was their view[14] that Mr Abu-Qulbain could return to the Lebanon and there, with little delay, seek entry clearance to come to the UK as a fiancé of a person settled here. So it was that they allowed the Secretary of State's appeal.

20. In this court Mr Blake QC for Mr Abu-Qulbain sought to put in fresh evidence which had been served on the Secretary of State as late as 30 November 2004. We may deal with this aspect very shortly. The evidence, whose details we need not describe, was intended to demonstrate that contrary to the IAT's conclusion Mr Abu-Qulbain would face very substantial difficulty, as an "undocumented" Palestinian, in seeking to obtain an entry clearance for the United Kingdom from the Lebanon. And it is said that the IAT acted unfairly by introducing this issue without warning to Mr Abu-Qulbain. Miss Carss-Frisk QC for the Secretary of State objected to this evidence being adduced. It had plainly been the Secretary of State's case before the IAT that Mr Abu-Qulbain might return to the Lebanon and there seek an entry clearance. Thus there was no unfairness. His representatives before the IAT never sought to raise the difficulties now contended for, nor did they find any place in the grounds of appeal to this court. The fresh evidence is sought to be relied on to support a new case on the facts which the Secretary of State, by the date of the hearing before us, had had no reasonable opportunity to investigate. We indicated in the course of argument that we considered Miss Carss-Frisk's objection to be well-founded. Accordingly we have not taken this new evidence into account in preparing our judgment.

THE M(CROATIA) ISSUE: RIVAL CONTENTIONS*

21. This issue involves a kaleidoscope of different facets, and it is necessary to proceed step by step. We will first repeat the outline of the issue we have already[15] given. Here is the question: upon a statutory appeal to the adjudicator in which the immigrant claims that on the facts his removal would amount to a disproportionate and therefore unlawful interference with his rights under ECHR Article 8, is the adjudicator's assessment of proportionality limited to a review of the Secretary of State's decision (is the decision "within the range of reasonable assessments of proportionality"?) or must the adjudicator decide for himself, on the merits, whether the removal would be proportionate or not? Mr Blake for all three appellants contends for the latter answer, Miss Carss-Frisk for the former. Her distinct submission was that if in any given case it was legitimate for the Secretary of State to strike the balance as he did, the adjudicator cannot for his part conclude that the decision was incompatible with the Convention even though he would himself have struck the balance differently; and by "legitimate" she meant that the decision was indeed "within the range of reasonable assessments of proportionality".

A NON SEQUITUR

[13] Determination paragraph 21.
[14] Paragraph 22.
[15] Paragraph 4 above.

22. On one view of her submissions, Miss Carss-Frisk's argument is flawed by a logical mistake. It may be supportable on grounds which are independent of this mistake, but it is convenient to expose the error at this stage. At the hearing we understood her to reason from the premise that in any given case there may be a range of reasonable responses open to the decision maker upon an issue of proportionality, to the conclusion that the adjudicator's duty is only to see whether the removal decision is within the range. But the conclusion does not follow from the premise. We certainly accept that the issue of proportionality, arising in any particular case, may often admit of a range of possible reasonable answers. But this does not entail the proposition that the adjudicator is not obliged to decide which answer in his view is the right one. There are many situations in the law where the issue under consideration might be resolved in a number of ways, all of them perfectly reasonable; but it will be the court's task to decide which solution to adopt. This is true in cases as diverse as a libel jury's assessment of a claimant's reputation and a family judge's assessment of the interests of a child. Generally where the court's duty is to decide the merits of an issue, it must form its own view of the merits and give judgment accordingly: notwithstanding the existence of a range of reasonable solutions.

23. Of course, if the adjudicator's duty were by law confined to a review by which he would determine whether the Secretary of State's proportionality decision was within the range of reasonable conclusions, Miss Carss-Frisk's case would be good. But that would not be so because the proportionality question may admit of a range of possible reasonable answers. It would be because the adjudicator's task falls as a matter of law to be treated as a form of review rather than a merits appeal. This is closer to the true substance of Miss Carss-Frisk's argument. The court's duty on these appeals is to explain precisely what is the nature of the adjudicator's task in such cases as these.

THE STATUTORY SOURCE OF THE ADJUDICATOR'S JURISDICTION

24. Where a question arises as to the scope of an appellate jurisdiction, the statute by which the jurisdiction is conferred must ordinarily be the court's first port of call; and will very often be the last. But here, the statute's imperatives are elusive, and it is fair to say that its terms played little part in the substance of counsel's arguments; but plainly they must be considered. The relevant provisions are to be found in s.65 and paragraph 21 of Schedule 4 to the Immigration and Asylum Act 1999 ("the 1999 Act")[16]. S.65 (which is contained in Part IV) provides in part:

> "(1) A person who alleges that an authority [sc. including the Secretary of State] has, in taking any decision under the Immigration Acts relating to that person's entitlement to enter or remain in the United Kingdom,… acted in breach of his human rights may appeal to an adjudicator against that decision…
>
> (2) For the purposes of this Part –
>
> …"

[16] These are the provisions which were effective at times material to these appeals. Appeals to the IAT from adjudicators' decisions promulgated since 9 June 2003 are now on a point of law only: Nationality, Immigration and Asylum Act 2002 s.101(1).

> (b) an authority acts in breach of a person's human rights if he acts, or fails to act, in relation to that other person in a way which is made unlawful by section 6(1) of the Human Rights Act 1998.."

Schedule 4 paragraph 21 provides in part:

> "(1) On an appeal to him under Part IV, an adjudicator must allow the appeal if he considers –
>
> > (a) that the decision or action against which the appeal is brought was not in accordance with the law or with any immigration rules applicable to the case, or
> >
> > (b) if the decision or action involved the exercise of a discretion by the Secretary of State or an officer, that the discretion should have been exercised differently,
>
> but otherwise must dismiss the appeal.
>
> …
>
> (3) For the purposes of sub-paragraph (1), the adjudicator may review any determination of a question of fact on which the decision or action was based."

Appeals from the adjudicator to the IAT are dealt with in paragraph 22 of Schedule 4 which we need not set out. The right of appeal to this court (with permission) is conferred by paragraph 23 "on a question of law material to [the IAT's] determination".

25. What is the bite of these provisions on counsel's rival contentions? The distinction between a right of appeal on a question of law only, and a general right of appeal on the merits, is a familiar one. It is a commonplace that some empowering statutes provide for the former, some for the latter. But in this case, in our judgment, the words of the statute do not on their face settle the scope of the appeal rights thereby conferred. The reason is that the material provisions of the 1999 Act appear to collapse the difference between fact and law. On the one hand, the right of appeal on human rights grounds given by s.65(1) surely requires the court to consider whether in substance there has been a violation of the appellant's Convention rights (see s.65(2)(b)), and at least in part that must be a factual question. On the other hand, the relevant provision of paragraph 21(1) of Schedule 4 (conferring the adjudicator's jurisdiction) requires the adjudicator to allow the appeal if he considers that "the decision or action against which the appeal is brought was not in accordance with the law"; otherwise he must dismiss the appeal.

26. The tension (if it be such) between s.65 and paragraph 21 may well be due to the fact that the language of paragraph 21 has been lifted from s.19 of the Immigration Act 1971. The Act of 1971 of course contained no analogue to s.65; at that time the incorporation of ECHR was nearly thirty years off. We apprehend that the phrase "not in accordance with the law or with any immigration rules applicable to the case"

may have been chosen, not to limit the adjudicator's jurisdiction to one akin to judicial review, but to rule out appeals based on grounds outside the Immigration Rules. However that may be, we have to confront the 1999 Act as it is. We prefer the view that the language of s.65 is not confined or restricted by the language of paragraph 21. If that is right, the adjudicator must on the face of it decide in substance whether the action appealed against involves a violation of the appellant's Convention rights. Any other approach would in our judgment perpetrate an abdication of his duty and ours, as public authorities, to vindicate and uphold the Convention rights[17]. We should add two qualifications. First, Miss Carss-Frisk would say that this interpretation of the 1999 Act is implicitly barred by binding authority of this court which we have yet to discuss. Secondly, for reasons we will give, such an approach by no means requires the adjudicator to ignore, or even to pass judgment upon, government policies on immigration as they are articulated in the Immigration Rules. But all this is yet to come.

WEDNESBURY?

27. It is central to Mr Blake's case that Miss Carss-Frisk's position restricts the adjudicator's role to a minimalist form of judicial supervision which is in principle inapt in the context of the Convention rights: that is to say, it confines the adjudicator to review on conventional *Wednesbury*[18] grounds. Miss Carss-Frisk does not accept that her argument should be so categorised, and we will have to consider whether it can be understood in some different signification and perhaps prevail accordingly. But it will make for clarity if we first address the objection at face value.

28. We are sure we need take little time describing the conventional *Wednesbury* test of public law error. Very shortly, the court would ask itself whether the decision in question was so unreasonable that no reasonable public decision maker could have arrived at it. As is well known the test was re-stated by Lord Diplock in the *GCHQ* case[19] as condemning "irrational" decisions. However precisely stated, the test imposed on the decision maker a duty to make his decision in good faith, to have regard to all and only relevant considerations, and to bring a rational mind to bear on whatever was the issue. This approach informed a judicial review jurisdiction which was largely remote from the merits of the decision under review. The judge might violently disagree with the merits decision; but applying the *Wednesbury* test he could only strike it down if he were satisfied that it failed to meet the test's relatively undemanding standards.

29. Mr Blake's case is that where the court's duty under the HRA and ECHR Article 8 is to decide whether the impugned decision is proportionate to the legitimate aim pursued (here immigration control), it is well established in the cases that a test altogether more intrusive than *Wednesbury* is to be applied. There are many authorities, of these courts and from Strasbourg. A leading English case is the decision of their Lordships' House in *Daly*[20], which we shall cite when we have addressed the learning in this court which bears on the *M*(Croatia)* issue and which,

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[17] See HRA s.6, which we will not set out.
[18] *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.
[19] *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 410.
[20] *R (Daly) v Secretary of State* [2001] 2 AC 532. As we shall show *Daly* was not an immigration case, but their Lordships' statements of principle touch the core of the *M*(Croatia)* issue.

as will appear, may be said in particular to favour a *Wednesbury* approach to be taken by the adjudicator to questions of proportionality in Article 8 cases.

30. At this stage we will merely state a bald conclusion: if the matter were free from authority we would regard it as plain that the *Wednesbury* test is inapt to the adjudicator's task. In discussing the material provisions of the 1999 Act we have already expressed the view that the adjudicator must on the face of it decide in substance whether the action appealed against involves a violation of the appellant's Convention rights, since any other approach would perpetrate an abdication of his duty and ours, as public authorities, to vindicate and uphold these rights. If this is correct, there are further issues which we must consider in due course. Is there a position open to Miss Carss-Frisk which has more blood in it than *Wednesbury* but less than a full merits appeal? If there are constraints on the adjudicator's role, are they to be expressed in terms of "deference" to the democratic decision maker, or is some other analysis to be preferred which may be more apt to provide an objective demarcation of the respective legal responsibilities of the Secretary of State and the adjudicator? First we must turn to the earlier learning material to the *M*(Croatia)* issue.

THE AUTHORITIES AND THE FORCE OF PRECEDENT

31. Miss Carss-Frisk submits that she has the solid support of authority of this court in favour of her position (however that position is exactly articulated). We will start, however, with the High Court case of *R(Ala) v Secretary of State*[21], which as we shall show has been distinctly approved in this court. Moses J said:

> "44. It is the Convention itself and, in particular, the concept of proportionality which confers upon the decision maker a margin of discretion in deciding where the balance should be struck between the interests of an individual and the interests of the community. A decision maker may fairly reach one of two opposite conclusions, one in favour of a claimant the other in favour of his removal. Of neither could it be said that the balance had been struck unfairly. In such circumstances, the mere fact that an alternative but favourable decision could reasonably have been reached will not lead to the conclusion that the decision maker has acted in breach of the claimant's human rights. Such a breach will only occur where the decision is outwith the range of reasonable responses to the question as to where a fair balance lies between the conflicting interests. Once it is accepted that the balance could be struck fairly either way, the Secretary of State cannot be regarded as having infringed the claimant's Article 8 rights in concluding that he should be removed.
>
> 45. So to conclude is not to categorise the adjudicator's appellate function as limited to review. It merely recognises that the decision of the Secretary of State in relation to Article 8 cannot be said to have infringed the claimant's rights merely

[21] [2003] EWHC Admin 521.

> because a different view as to where the balance should fairly be struck might have been reached."

Ala was in fact a judicial review case, in which the claimant sought an order to quash the Secretary of State's certificate, given pursuant to s.72(2)(a) of the 1999 Act, that his human rights claim was "manifestly unfounded". The statutory effect of the certificate, if it survived challenge, was to deprive the claimant of his right of appeal to the adjudicator against the Secretary of State's substantive decision to remove him from the United Kingdom. However it was common ground[22] that the validity of the certificate depended on the nature of the adjudicator's task on an appeal to him. If he was only to police the "range of reasonable responses", the certificate was good; but if he was to decide the proportionality issue (arising under Article 8) for himself, the certificate was bad, since it was at least arguable that the claimant's Article 8 rights had been violated.

32. *Edore v Secretary of State*[23], upon which Miss Carss-Frisk placed particular reliance, was not a certification case. It directly engaged the statutory appeal process. The appellant was a Nigerian woman who had entered the United Kingdom illegally. In this country she bore two children to a married man who already had three children by his wife. The Secretary of State resolved to remove her and her two children to Nigeria. The adjudicator allowed her appeal under s.65 of the 1999 Act, holding that removal would violate her and her children's rights under Article 8. The IAT allowed the Secretary of State's appeal. This court overturned the IAT. Simon Brown LJ as he then was said[24]:

> "For our part we find Moses J's analysis in *R(Ala) v Secretary of State*… entirely convincing and in the result conclude that, in cases like the present where the essential facts are not in doubt or dispute, the adjudicator's task on a human rights appeal under s.65 is to determine whether the decision under appeal (ex hypothesi a decision unfavourable to the appellant) was properly one within the decision maker's discretion, ie, was a decision which could reasonably be regarded as proportionate and as striking a fair balance between the competing interests in play. If it was, then the adjudicator cannot characterise it as a decision 'not in accordance with the law' and so, even if he personally would have preferred the balance to have been struck differently (ie in the appellant's favour), he cannot substitute his preference for the decision in fact taken."

33. However the approach thus taken in *Edore*, endorsing the reasoning of Moses J in *Ala*, contained the seeds of a problem. What if the Secretary of State had made his decision to remove the applicant without considering any proportionality issue arising under Article 8 because it had not been put to him? Such an issue sometimes only surfaces when the applicant's case is prepared for appeal to the adjudicator. In such a case there is no prior determination by the administration which the appellate authorities might adjudicate to be or not to be "a decision which could reasonably be

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[22] See paragraph 1 of Moses J's judgment.
[23] [2003] INLR 361.
[24] Paragraph 20.

regarded as proportionate and as striking a fair balance between the competing interests in play". Equally, where the adjudicator makes findings of fact at variance from the factual premises on which the Secretary of State's conclusions were arrived at, there is no prior decision to be scrutinised for the virtues or vices of the balance which it struck: the adjudicator is faced with a new set of facts.

34. There is thus a dichotomy between cases where the adjudicator proceeds on the same factual assumptions or findings as did the Secretary of State, and cases where he proceeds on different findings. The approach taken in *Ala* and *Edore* to the adjudication of proportionality issues in the context of Article 8 is plainly available only in the first class of case. What is to be done with the second class? This court confronted the question in *R(Razgar) v Secretary of State*[25]. Like *Ala*, *Razgar* was a certification case. The court held that the Secretary of State's certificate was only good if an appeal to the adjudicator against the substantive decision was bound to fail[26]. Again, therefore, the case depended upon the nature of the adjudicator's jurisdiction under s.65 and paragraph 21 of Schedule 4 to the 1999 Act. Giving the judgment of the court Dyson LJ said this:

> "40. We note that both Moses J and Simon Brown LJ were careful to limit what they said to cases where there is 'no issue of fact' (Moses J) and 'the essential facts are not in doubt or dispute' (Simon Brown LJ). We recognise that, if the adjudicator finds the facts to be essentially the same as those which formed the basis of the Secretary of State's decision, there will be no difficulty in adopting the approach enunciated by Moses J and Simon Brown LJ. But what if the adjudicator finds the facts to be materially different? In such a case, the adjudicator will have concluded that the Secretary of State carried out the balancing exercise on a materially incorrect and/or incomplete factual basis. There is no power in the adjudicator to remit the case to the Secretary of State for a reconsideration of the balancing exercise on the facts as found by the adjudicator. There will, therefore, be cases where it is not meaningful to ask whether the decision of the Secretary of State was within the range of reasonable responses open to him because his determination was based on an accurate analysis of the facts. But even if the adjudicator were to conclude that the Secretary of State's analysis was wrong, it would not necessarily follow that the Secretary of State acted in breach of a claimant's Human Rights Convention rights in such a case. It would remain open to the adjudicator to decide that the conclusion reached by the Secretary of State was lawful (and did not breach the claimant's human rights) because it was, in fact, a proportionate response even on the facts as determined by the adjudicator.

[25] [2003] INLR 543.
[26] See paragraph 28 of the judgment of the court, citing the decision of the House of Lords in *Yogathas* [2003] 1 AC 920.

> 41. Where the essential facts found by the adjudicator are so fundamentally different from those determined by the Secretary of State as substantially to undermine the factual basis of the balancing exercise performed by him, it may be impossible for the adjudicator to determine whether the decision is proportionate otherwise than by carrying out the balancing exercise himself. Even in such a case, when it comes to deciding how much weight to give to the policy of maintaining an effective immigration policy, the adjudicator should pay very considerable deference to the view of the Secretary of State as to the importance of maintaining such a policy. There is obviously a conceptual difference between (a) deciding whether the decision of the Secretary of State was within the range of reasonable responses; and (b) deciding whether the decision was proportionate (paying deference to the Secretary of State so far as is possible). In the light of *Edore…* we would hold that the correct approach is (a) in all cases except where this is impossible because the factual basis of the decision of the Secretary of State has been substantially undermined by the findings of the adjudicator. Where (a) is impossible, then the correct approach is (b). But we doubt whether, in practice, the application of the two approaches will often lead to different outcomes."

35. Thus Miss Carss-Frisk submits there is clear authority of this court for the essence of her argument, that the task of the adjudicator is to decide in any given Article 8 case whether the Secretary of State's conclusion on proportionality was "within the range of reasonable responses" open to him. In the case where the Secretary of State has arrived at no such conclusion or has done so on facts found by the adjudicator to be wrong, she submits that the adjudicator (faced with the proportionality issue) should still ask and answer the question whether the decision to remove was "within the range of reasonable responses" against the backdrop, of course, of the adjudicator's own findings of fact.

36. We are driven to say, with great respect, that we are much troubled by the learning in the High Court and this court on which Miss Carss-Frisk relies, and we entertain very considerable misgivings as to the dual approach described in this court's judgment in *Razgar*. Whether the case falls within (a) or (b) (as those categories are described in *Razgar*), the adjudicator is exercising the selfsame statutory jurisdiction. We find it extremely difficult to see how the quality of that single jurisdiction can shift between policing reasonable responses on the one hand and deciding the merits on the other, depending only on whether the adjudicator is operating on the same set of facts as the Secretary of State.

37. In this court the claimant succeeded on the facts in *Razgar*, as he had before Richards J at first instance. The Secretary of State appealed to the House of Lords. *Edore*, *Ala* and *M*(Croatia)* were all cited to the House by counsel for the Secretary of State[27], though none of them is referred to in their Lordships' opinions. Lord Bingham said this:

[27] [2004] 2 AC 368, 374F - 375B.

"17. In considering whether a challenge to the Secretary of State's decision to remove a person must clearly fail, the reviewing court must, as it seems to me, consider how an appeal would be likely to fare before an adjudicator, as the tribunal responsible for deciding the appeal if there were an appeal. This means that the reviewing court must ask itself essentially the questions which would have to be answered by an adjudicator. In a case where removal is resisted in reliance on article 8, these questions are likely to be:

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

18. If the reviewing court is satisfied in any case, on consideration of all the materials which are before it and would be before an adjudicator, that the answer to question (1) clearly would or should be negative, there can be no ground at all for challenging the certificate of the Secretary of State. Question (2) reflects the consistent case law of the Strasbourg court, holding that conduct must attain a minimum level of severity to engage the operation of the Convention: see, for example, *Costello-Roberts v United Kingdom* (1993) 19 EHRR 112. If the reviewing court is satisfied that the answer to this question clearly would or should be negative, there can again be no ground for challenging the certificate. If question (3) is reached, it is likely to permit of an affirmative answer only.

19. Where removal is proposed in pursuance of a lawful immigration policy, question (4) will almost always fall to be answered affirmatively. This is because the right of sovereign states, subject to treaty obligations, to regulate the entry and expulsion of aliens is recognised in the Strasbourg

> jurisprudence (see *Ullah* and *Do*, para 6) and implementation of a firm and orderly immigration policy is an important function of government in a modern democratic state. In the absence of bad faith, ulterior motive or deliberate abuse of power it is hard to imagine an adjudicator answering this question other than affirmatively.
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> 20. The answering of question (5), where that question is reached, must 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. The severity and consequences of the interference will call for careful assessment at this stage. The Secretary of State must exercise his judgment in the first instance. On appeal the adjudicator must exercise his or her own judgment, taking account of any material which may not have been before the Secretary of State. A reviewing court must assess the judgment which would or might be made by an adjudicator on appeal. In *Secretary of State for the Home Department v Kacaj* [2002] Imm AR 213, paragraph 25, the Immigration Appeal Tribunal (Collins J, Mr C M G Ockelton and Mr J Freeman) observed that:
>
> > 'although the [Convention] rights may be engaged, legitimate immigration control will almost certainly mean that derogation from the rights will be proper and will not be disproportionate.'
>
> In the present case, the Court of Appeal had no doubt (paragraph 26 of its judgment) that this overstated the position. I respectfully consider the element of overstatement to be small. Decisions taken pursuant to the lawful operation of immigration control will be proportionate in all save a small minority of exceptional cases, identifiable only on a case by case basis."

Although Lord Walker and Lady Hale dissented in the result, we conceive that the House was unanimous as to the correctness of this reasoning.

38. Where does the approach taken in their Lordships' House in *Razgar* leave the position? The opinions, notably that of Lord Bingham which we have cited, do not in express terms address either the scope of jurisdiction question (range of responses or merits?) or the dual approach question ((a) and (b) in this court's judgment in *Razgar*). We are obliged to consider whether the effect of their Lordships' reasoning in *Razgar* is to displace the force of *Edore*, and of *Razgar* in this court, as binding precedent for the purposes of our determination of these appeals.

39. The question is whether the earlier decisions of this court "cannot stand"[28] with what was said in the House of Lords in *Razgar*. In our judgment they cannot. First, it

[28] *Young v Bristol Aeroplane* [1944] 1 KB 718, 725-726, 729.

seems to us that the dual approach taken in *Razgar* in this court is frankly inconsistent with paragraph 20 of Lord Bingham's reasoning. If the very nature of the adjudicator's task differed according to the kind of case he was dealing with, that would have been a conspicuous feature of "the questions which would have to be answered by an adjudicator" which Lord Bingham precisely describes. As it happens counsel agree that the dual approach falls to be abandoned in light of *Razgar* in their Lordships' House. But there remains a lively contest as to the nature of the unitary task which it is then the adjudicator's function to perform. In a written note put in after the hearing (the *stare decisis* issue surfaced somewhat late in the day) Miss Carss-Frisk submits that had their Lordships intended to depart from the statement of principle found in *Edore* it is extremely surprising that the fact finds no mention in Lord Bingham's observations.

40. It is, we think, worth noticing that the primary issue before their Lordships in *Razgar* did not require any adumbration of the *Edore* approach. It was whether "the rights protected by article 8 [can] be engaged by the foreseeable consequences for health or welfare of removal from the United Kingdom pursuant to an immigration decision, where such removal does not violate article 3"[29]. Moreover Mr Razgar's case on the facts fell within category (b) as formulated in this court. Lord Bingham said this:

> "24. I have no doubt but that an adjudicator would, and could only, answer questions (3) and (4) in the affirmative. Question (5), being more judgmental, is more difficult and… the Secretary of State and the judge did not consider it. The Secretary of State, moreover, failed to direct himself that article 8 could in principle apply in a case such as this. Question (5) is a question which, on considering all the evidence, before him, an adjudicator might well decide against Mr Razgar…"

We think it plain from this passage, read with paragraph 20 which is cast in general terms, that Lord Bingham contemplated that an adjudicator would properly have arrived at his own decision on the merits in *Razgar*, had he been called on to answer question (5).

41. What follows? Since we are clear that (a) their Lordships' opinions entail an abandonment of the dual approach and (b) the House contemplated that an adjudicator would have decided the merits of the proportionality issue in *Razgar*, it might well be urged that the decision of the House implies a merits approach on the adjudicator's part in all cases; and in that event it remains only to declare that the *M*(Croatia)* issue has been resolved by the *Razgar* judgment in the appellants' favour. But we do not think it would be right to adopt so summary a course. Their Lordships have addressed no express reasoning to the approach taken in *Edore*, or the basis for it set out by Moses J in *Ala*. We have heard substantial argument on the issue in these appeals. And the proposition that the adjudicator is to take a merits approach in all cases is itself not free of subtlety, as will become clear. We consider that we ought to revisit *Edore* and decide the *M*(Croatia)* issue for ourselves. We are satisfied that in light of their Lordships' opinions in *Razgar* this court is at least entitled to take that course. In fact the approach adopted in *Edore* and Miss Carss-Frisk's argument built upon it face other difficulties, as it seems to us, as regards the law of precedent by reason of

[29] Per Lord Bingham at paragraph 1.

the earlier decision of their Lordships' House in *Daly* to which we have referred in passing and which we will cite in due course.

THE M(CROATIA) ISSUE FURTHER CONSIDERED AND CONCLUDED*

42. There is nothing more to say about the *non sequitur* which we earlier laid at Miss Carss-Frisk's door. As for the construction of the provisions of the 1999 Act which confer the adjudicator's jurisdiction, we have already said that the words of the statute do not on their face settle the scope of the appeal rights thereby created. We have seen no reasoning in the authorities which colours this view. Whether s.65(1) ("acted in breach of his human rights") is taken to prevail so as to require the adjudicator to reach a merits decision, or the primary provision is taken to be paragraph 21(1) of Schedule 4 ("the decision or action against which the appeal is brought was not in accordance with the law"), cannot be decided merely by reference to the statute itself. We must look elsewhere, and find autonomous reasons upon which to base a conclusion as to the true nature of the adjudicator's task.

NO WEDNESBURY

43. First, as we have foreshadowed, we think it is at least clear that the adjudicator is obliged to do more than conduct a *Wednesbury* review of the Secretary of State's decision on the proportionality issue. Here we will cite the case of *Daly*[30] in their Lordships' House. It concerned the legality of policy arrangements under which a prisoner's privileged correspondence with his solicitor might be examined in the prisoner's absence. Lord Steyn, with all of whose reasoning Lord Bingham and Lord Cooke of Thorndon agreed, said this:

> "27. The contours of the principle of proportionality are familiar. In *de Freitas v Permanent Secretary…* [1999] 1 AC 69 the Privy Council adopted a three-stage test. Lord Clyde observed, at p 80, that in determining whether a limitation (by an act, rule or decision) is arbitrary or excessive the court should ask itself:
>
> > 'whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective.'
>
> Clearly, these criteria are more precise and more sophisticated than the traditional grounds of review. What is the difference for the disposal of concrete cases?… The starting point is that there is an overlap between the traditional grounds of review and the approach of proportionality. Most cases would be decided in the same way whichever approach is adopted. But the intensity of review is somewhat greater under the proportionality approach. Making due allowance for important

[30] [2001] 2 AC 532.

structural differences between various convention rights… a few generalisations are perhaps permissible. We would mention three concrete differences without suggesting that my statement is exhaustive. First, the doctrine of proportionality may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions. Secondly, the proportionality test may go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations. Thirdly, even the heightened scrutiny test developed in *R v Ministry of Defence, Ex p Smith* [1996] QB 517, 554 is not necessarily appropriate to the protection of human rights. It will be recalled that in *Smith* the Court of Appeal reluctantly felt compelled to reject a limitation on homosexuals in the army. The challenge based on article 8 of the Convention… foundered on the threshold required even by the anxious scrutiny test. The European Court of Human Rights came to the opposite conclusion: *Smith and Grady v United Kingdom* (1999) 29 EHRR 493. The court concluded, at p 543, para 138:

> 'the threshold at which the High Court and the Court of Appeal could find the Ministry of Defence policy irrational was placed so high that it effectively excluded any consideration by the domestic courts of the question of whether the interference with the applicants' rights answered a pressing social need or was proportionate to the national security and public order aims pursued, principles which lie at the heart of the court's analysis of complaints under article 8 of the Convention.'

In other words, the intensity of the review, in similar cases, is guaranteed by the twin requirements that the limitation of the right was necessary in a democratic society, in the sense of meeting a pressing social need, and the question whether the interference was really proportionate to the legitimate aim being pursued.

28. The differences in approach between the traditional grounds of review and the proportionality approach may therefore sometimes yield different results. It is therefore important that cases involving Convention rights must be analysed in the correct way. That does not mean that there has been a shift to merits review. On the contrary, as Professor Jowell [2000] PL 671, 681 has pointed out the respective roles of judges and administrators are fundamentally distinct and will remain so. To this extent the general tenor of the observations in *Mahmood* [2001] 1 WLR 840 are correct. And Laws LJ rightly emphasised in *Mahmood*, at p 847, para 18, 'that the intensity of review in a public law case will depend on the

> subject matter in hand'. That is so even in cases involving Convention rights. In law context is everything."

Lord Cooke of Thorndon said this:

> "32… Lord Steyn illuminates the distinctions between 'traditional' (that is to say in terms of English case law, *Wednesbury*) standards of judicial review and higher standards under the European Convention or the common law of human rights. As he indicates, often the results are the same. But the view that the standards are substantially the same appears to have received its quietus in *Smith and Grady v United Kingdom* (1999) 29 EHRR 493 and *Lustig-Prean and Beckett v United Kingdom* (1999) 29 EHRR 548. And we think that the day will come when it will be more widely recognised that *Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223 was an unfortunately retrogressive decision in English administrative law, in so far as it suggested that there are degrees of unreasonableness and that only a very extreme degree can bring an administrative decision within the legitimate scope of judicial invalidation. The depth of judicial review and the deference due to administrative discretion vary with the subject matter. It may well be, however, that the law can never be satisfied in any administrative field merely by a finding that the decision under review is not capricious or absurd."

44. *Daly* was a judicial review case. Here, we are dealing with a statutory appeal, but we have already said more than once that the words of the 1999 Act do not on their face settle the scope of the appeal rights conferred. For the purposes of the question in hand – must the adjudicator provide his own autonomous answer upon the proportionality issue? – nothing turns on the distinction between review and appeal save that the right of appeal (as opposed to review only) may be apt to require the adjudicator to conduct a judicial exercise which is not merely more intrusive than *Wednesbury*, but involves a full-blown merits judgment, which is yet more than *Daly* requires on a judicial review where the court has to decide a proportionality issue.

45. It is thus in our judgment plain that where the *Daly* approach applies (as all parties say it does here), something more than the conventional *Wednesbury* test must be brought to bear on the decision in question. Miss Carss-Frisk as we understand it accepts as much. But she would repudiate the *Wednesbury* test as being inherent in her argument. However there remains the question whether her case in fact commits her to it. Let us recall her distinct submission: it was that if in any given case it was legitimate for the Secretary of State to strike the balance as he did, the adjudicator cannot conclude that the decision was incompatible with the Convention even though he would himself have struck the balance differently; and by "legitimate" she meant that the decision was "within the range of reasonable assessments of proportionality". But if the submission means what it says this argument cannot stand with *Daly*. One has only to recall the words of Lord Steyn at paragraph 27: "the doctrine of proportionality may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or

reasonable decisions". The very language of Miss Carss-Frisk's argument – "the range of rational or reasonable decisions" – is here *contrasted* with what proportionality will require.

46. Accordingly, to the extent that it is formulated so as to propound a *Wednesbury* test for the adjudicator, Miss Carss-Frisk's case must in our judgment be rejected. Strasbourg authority supports this conclusion. As is well known the European Court of Human Rights entertains a doctrine by which, as an international tribunal, it accords a margin of appreciation upon human rights questions to the State authorities out of respect for their closer knowledge of national conditions. Despite this there is authority to show that, at least in some Article 8 contexts, the European Court of Human Rights may adopt a thoroughgoing merits approach. In *Boultif v Switzerland*[31] the court was concerned with a refusal by the Swiss authorities to renew an Algerian national's residence permit because of his conviction and sentence for offences of robbery and damage to property. The court was satisfied that the decision was taken "for the prevention of disorder [and] crime" within ECHR Article 8(2), and proceeded to consider whether it was proportionate to the fulfilment of this legitimate aim. At paragraph 47 the court stated its task as being to ascertain whether the decision struck a fair balance between the applicant's Article 8 right and the legitimate aim in question. In paragraph 48 it stated that it was called on to establish guiding principles. The court proceeded to list a whole series of factual matters which it was obliged to consider. It then addressed[32] "the extent to which the offence committed by the applicant served to assume a danger for public order and security", and[33] "the possibility of the applicant and his wife establishing family life elsewhere". After going into these matters and passing judgment upon them, the court concluded[34] that the Swiss State's interference with the applicant's Article 8 right was not proportionate to the aim pursued.

47. The decision in *Boultif* is striking. There is no mention of the margin of appreciation. The court determined the case by reference to its own view of the merits. It adopted a similar course on very different facts in another Article 8 case to which we were referred, namely *Sen v Netherlands*[35]. We need not with respect take time with the details.

A MIDDLE WAY?

48. *Boultif* and *Sen*, however, provide in our judgment an insufficient basis for concluding without more that the adjudicator's task in our municipal jurisdiction is to conduct a full merits appeal. The judgments contain no patent reasoning to support that approach, although the court adopted it in practice. And it has to be remembered that the Strasbourg court has often stated that Article 8 imposes no general obligation on States to respect the choice of residence of a married couple or to accept the non-national spouse for settlement in the other's country[36]. Further, our own human rights jurisprudence is familiar with the notion that in measuring what justifies (under

[31] (2001) 33 EHRR 50.
[32] Paragraph 50.
[33] Paragraph 52.
[34] Paragraph 55.
[35] (2003) 36 EHRR 7.
[36] The leading case is *Abdulaziz, Cabales and Balkandali* (1985) 7 EHRR 471 (paragraph 68). See also, for example, the Commission decision in *Poku* (1996) 22 EHRR CD 94.

a provision such as Article 8(2)) an interference with the Convention rights, the court will recognise a margin of discretion[37], or discretionary area of judgment, enjoyed by the democratic decision maker. Something of this kind appears, moreover, to be contemplated by the reasoning in *Daly*. Could Miss Carss-Frisk's position be modified, so as to propose an approach that somehow lies between a *Wednesbury* review and a merits appeal, and recognises a degree of respect due to the Secretary of State as the primary decision maker? If so, it may be thought not too generous a reading of the language deployed in *M*(Croatia)*, *Ala*, *Edore*, and *Razgar* in this court, despite its affinity with the *Wednesbury* test, to conclude that those cases after all do no more than acknowledge and verify just such an approach. In that case they would involve no error of law. Nor would the IAT decisions in these cases, and the appeals would fall to be dismissed.

49. However, quite apart from the language of *Edore* and the other cases, there is we think great difficulty in taking such an approach. *Daly* does not directly tell us where this middle ground might lie. Lord Steyn makes it clear that the reviewing court is to "assess the balance which the decision maker has struck", pay "attention…to the relative weight accorded to interests and considerations", and "[consider]… whether the interference with the applicants' rights answered a pressing social need"[38]. These injunctions appear to commend something close to an autonomous merits decision. But Lord Steyn states also[39] that "[t]hat does not mean that there has been a shift to merits review. On the contrary… the respective roles of judges and administrators are fundamentally distinct and will remain so." There seems, with great respect, to be something of a tension here. It shows at least that the nature and quality of the court's task in deciding whether an executive decision is proportionate to the aim it seeks to serve is more conceptually elusive than has perhaps been generally recognised.

INTENSITY OF REVIEW

50. The degree of intensity with which the courts will expose any given administrative decision to the demands of fundamental rights vouchsafed in our domestic law by the HRA has not so far been susceptible to principles with sharp edges. We apprehend it never will, and that is by no means of necessity a bad thing; a prime virtue of the common law is its flexibility. But we need to have certainty as well; indeed the law of Luxembourg and of Strasbourg prompts us to insist upon it. Here, our law has not progressed far beyond very general propositions. We know that "[t]he depth of judicial review and the deference due to administrative discretion vary with the subject matter"[40]. Can we find a principled approach to give this proposition concrete effect in cases such as these appeals?[41] In *BBC v ProLife Alliance*[42] Lord Hoffmann said:

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[37] Not to be confused with the Strasbourg doctrine of margin of appreciation, which as we have indicated recognises that the Strasbourg court, as an international tribunal, is often not the best judge of the impact of local conditions on the merits of human rights claims.

[38] *Daly*, per Lord Steyn at paragraph 27. The last quotation is from Lord Steyn's citation of *Smith and Grady v United Kingdom* (1999) 29 EHRR 493.

[39] Paragraph 28.

[40] Per Lord Cooke at paragraph 32 in *Daly*, already cited.

[41] There are of course other general propositions in the books concerning the intensity of review. One is that the greater the interference with a fundamental right, the more intensive the review that is required. This has been stated many times. It first very clearly appeared in the heightened scrutiny test developed in *R v Ministry of*

> "My Lords, although the word 'deference' is now very popular in describing the relationship between the judicial and the other branches of government, I do not think that its overtones of servility, or perhaps gracious concession, are appropriate to describe what is happening. In a society based upon the rule of law and the separation of powers, it is necessary to decide which branch of government has in any particular instance the decision-making power and what the legal limits of that power are. That is a question of law and must therefore be decided by the courts."

51. It seems to us that we might move some distance towards the goal of legal certainty by examining the question, whether the adjudicator must provide his own autonomous answer upon the proportionality issue, by reference to this approach. Since the statute itself does not furnish an answer, we must see whether an appeal to legal principle does so. By what *principle* should the adjudicator confine himself to scrutiny of "the range of reasonable responses"? We can see only one candidate. It is that because the first decision maker, the Secretary of State, acts for the elected government, the court should accord him that margin of discretion, or discretionary area of judgment, often said to be properly enjoyed by the democratic decision maker. The principle here is respect for the democratic powers in our constitution. Is it engaged in these adjudicators' decisions?

THE ADJUDICATION OF POLICY

52. We think not. The reason is that the adjudicator is not required to pass upon any aspect of government policy. The principle of law by which respect for the democracy requires a margin of discretion to be accorded to the democratic decision maker primarily applies where the subject of decision is the formation of policy. We accept there are other cases where the courts will (*pace* Lord Hoffmann) defer to government: cases where for practical reasons the courts are in no position to arrive at an autonomous decision. Historically, the most familiar instance arose where the question was whether the interests of national security required this or that particular action to be taken[43]. Such a case involved the application of policy, not its formulation (the policy itself – the preservation of national security – was perfectly clear). But nothing of the kind arises here.

53. Human rights challenges not infrequently involve an assault on government policy. Sometimes the policy is enshrined in legislation. The HRA recognised the prospect of review of policy so enshrined by providing for the special rule of interpretation of statutes contained in s.3, and the mechanism for declarations of incompatibility contained in s.4. Statutes articulate policy which Parliament has accepted, and the enactment of s.3 recognises that policy so articulated might itself offend the ECHR

Defence, Ex p Smith [1996] QB 517, 554 referred to by Lord Steyn at paragraph 27 in *Daly*, cited above. But we doubt whether this goes far to resolve the *M*(Croatia)* issue.

[42] [2003] UKHL 23.

[43] However the use of secret hearings and special advocates before the Special Immigration Appeals Commission under the provisions of Part 4 of the Anti-terrorism, Crime and Security Act 2001, whatever the demerits of that legislation (for which see *A(FC) & ors v Secretary of State* [2004] UKHL 56), [2005] 2 WLR 87 tend to show that, at least in a specially adapted procedural environment, the judicial process can be made apt to resolve specific practical questions arising in the national security field.

unless subjected to special interpretation. In deciding whether a policy (whether enshrined in legislation or not) of itself entails violations of the Convention rights, or whether by contrast it represents no more than a proportionate response to the problem in hand, the courts will generally recognise that the democratic powers in the State have a special responsibility. Policy making is their territory, and not that of the judges. Hence the margin of discretionary judgment accorded to the government policy-maker on democratic grounds. The courts are also likely to recognise that government is better equipped than the court to judge how needful the policy is to achieve the aim in view. So where policy is the subject-matter in hand, principle and practicality alike militate in favour of an approach in which the court's role is closer to review than appeal: where a degree of deference does no more than respect the balance to be struck between the claims of democratic power and the claims of individual rights.

54. In such cases, moreover, the court is by no means merely thrown back to *Wednesbury*. A "middle way" is readily at hand. If the policy perpetrates an apparent violation of a Convention right so that the government must demonstrate proportionality, the court will not be satisfied merely upon its being shown that a reasonable decision maker might consider the policy proportionate. It will require a substantial reasoned justification of the policy in light of the discipline inherent in this kind of case as described by Lord Steyn in *Daly*[44]:

> "…the intensity of the review…, is guaranteed by the twin requirements that the limitation of the right was necessary in a democratic society, in the sense of meeting a pressing social need, and the question whether the interference was really proportionate to the legitimate aim being pursued."

The difference between this approach and *Wednesbury* is plain to see. *Wednesbury* review consigned the relative weight to be given to any relevant factor to the discretion of the decision maker. In the new world, the decision maker is obliged to accord decisive weight to the requirements of pressing social need and proportionality. It is important to recognise that *Daly* was itself a policy case, and indeed the House of Lords struck down certain paragraphs of the material Security Manual "in so far as they provided that prisoners were always to be absent when privileged legal correspondence held by them in their cells was examined by prison officers"[45].

THE ADJUDICATION OF ISSUES OTHER THAN POLICY

55. But the adjudication of particular instances, in which the adjudicator is not in the least degree called upon to pass judgment on government policy, belongs as it seems to us to an altogether different category. The principle by which a margin of discretion is to be accorded to the primary decision maker out of respect for the democratic claims of elected government has no application. In these appeals, the adjudicators were not called on to decide whether any *policy* was proportionate to its legitimate purpose, nor, therefore, to pass judgment on government policy at all. Accordingly they were not required to enter into any field which distinctly lies within the constitutional

[44] Paragraph 27.
[45] [2001] 2 AC 532, 533B-C (headnote).

responsibility of government. On the contrary, their duty was to see to the protection of individual fundamental rights, which is the particular territory of the courts (here the adjudicator), while policy is the particular territory of the elected powers in the State.

56. Here, the material policy is given first by the statutory requirement that persons who are not British citizens require leave to enter or remain in the United Kingdom[46]; secondly and more particularly by the Immigration Rules, made by the Secretary of State subject to parliamentary approval[47]. The Rules state the detail of immigration policy, and in doing so prescribe in effect which classes of aliens will in the ordinary way be allowed to enter the United Kingdom and which will not. The adjudicator has no business whatever to question or pass judgment upon the policy given by the Rules. In our judgment his duty, when faced with an Article 8 case where the would-be immigrant has no claim under the Rules, is and is only to see whether an exceptional case has been made out such that the requirement of proportionality requires a departure from the relevant Rule in the particular circumstances. If that is right, the importance of maintaining immigration control is a prior axiom of the debate before him. It is not at all the subject of that debate. There is no basis upon which he should defer to the Secretary of State's judgment of the proportionality issue in the individual case *unless* it were somehow an open question what weight should be given to the policy on the one hand, and what weight should be given to the Article 8 right on the other. In that case, no doubt, the adjudicator would have to address their relative importance. If he had to do that, we apprehend that he would be obliged to accord a considerable degree of "deference" to the Secretary of State's view as to how the balance should be struck. But that is not the position. The adjudicator is not required to address the relative importance of the public policy and the individual right.

THE TRUE RESTRICTION OF THE ADJUDICATOR'S ROLE

57. In these cases, the Rules have themselves struck the balance between the public interest and the private right, the search for which is inherent in the ECHR as it has been interpreted by the Strasbourg court[48]. At least they have done so for the general run of cases. Now, where Parliament has itself struck the balance between public interest (constituted by a statutory policy) and private right (constituted by a claim of ECHR violation perpetrated by the policy), the court will accord very considerable respect to the balance so struck, and that approach is perfectly consonant with the court's own obligations under the HRA. So much appears from the reasoning of Lord Woolf CJ in *Poplar Housing v Donoghue*[49]. The case raised the question whether an assured shorthold tenant's Article 8 right to respect for her home was violated by the housing association's entitlement to claim possession under s.21(4) of the Housing Act 1988. The Lord Chief Justice, giving the judgment of the court, said this:

> "69. …[I]n considering whether Poplar [sc. the housing association] can rely on article 8(2), the court has to pay

[46] Though the language has changed through amendments over the years, this has in essence been a requirement of the Immigration Act 1971 since its inception. We need not set out the material provisions.
[47] See ss.1(4) and 3(2) of the Immigration Act 1971. S.3(2) provides for a negative resolution procedure in each House of Parliament.
[48] See *Sporrong* 5 EHRR 35 at 52 (paragraph 69), but there are many other references.
[49] [2002] QB 48.

> considerable attention to the fact that Parliament intended when enacting section 21(4)… to give preference to the needs of those dependent on social housing *as a whole* over those in the position of the defendant… This is an area where, in our judgment, the courts must treat the decisions of Parliament as to what is in the public interest with particular deference. The limited role given to the court under section 21(4) is a legislative policy decision. The correctness of this decision is more appropriate for Parliament than the courts and [the HRA] does not require the courts to disregard the decisions of Parliament in relation to situations of this sort when deciding whether there has been a breach of the Convention.
>
> …
>
> 72. We are satisfied that… section 21(4) does not conflict with the defendant's right to family life. Section 21(4) is certainly necessary in a democratic society in so far as there must be a procedure for recovering possession of property at the end of a tenancy. The question is whether the restricted power of the court is legitimate and proportionate. This is the area of policy where the court should defer to the decision of Parliament. We have come to the conclusion that there was no contravention of article 8…"

This decision was passed upon by their Lordships' House in *Harrow LBC v Qazi*[50], but the reasoning we have quoted was not the subject of any criticism or qualification.

58. In the present case the policy is given and the balance struck by the Rules and not by main legislation. But the balance so struck is not in our judgment entitled to less respect or deference on that account. We would emphasise the particularity with which the Rules have prescribed which classes of aliens will in the ordinary way be allowed to enter the United Kingdom and which will not. Here are the provisions of paragraph 317 of the relevant set of Immigration Rules[51] which are material to *Huang*:

> "The requirements to be met by a person seeking indefinite leave to enter or remain in the United Kingdom as the parent, grandparent or other dependent relative of a person present and settled in the United Kingdom are that the person:
>
> (i) is related to a person present and settled in the United Kingdom in one of the following ways:
>
> (a) mother or grandmother who is a widow aged 65 years or over; or
>
> …

[50] [2004] 1 AC 983.
[51] HC 395.

(e) a parent or grandparent under the age of 65 if living alone outside the United Kingdom in the most exceptional compassionate circumstances, and mainly dependent financially on relatives settled in the United Kingdom; or

(ii) is joining or accompanying a person who is present and settled in the United Kingdom or who is on the same occasion being admitted for settlement; and

(iii) is financially wholly or mainly dependent on the relative present and settled in the United Kingdom; and

(iv) can, and will, be accommodated adequately, together with any dependants, without recourse to public funds, in accommodation which the sponsor owns or occupies exclusively; and

(iva) can, and will, be maintained adequately, together with any dependants, without recourse to public funds; and

(v) has no other close relatives in his own country to whom he could turn for financial support; and

(vi) if seeking leave to enter, holds a valid United Kingdom entry clearance for entry in this capacity."

There are also the Immigration Directorates' Instructions, which serve as guidance for the application of the Rules. Chapter 8, Section 6, Annex V of these relates to paragraph 317 of the Rules. Other paragraphs of the Rules deal, for example, with a claim to enter as a child of a refugee[52], which is in the territory of the *Kashmiri* case, and a claim to enter as a fiancé(e)[53], which is potentially material in the *Abu-Qulbain* case. Like paragraph 317 they are franked by provisions in the Immigration Directorates' Instructions. We will not set out these further materials. It is common ground that none of the appellants qualifies under the Rules.

59. It might be said that the Immigration Rules constitute for all cases the balance to be struck between private right and public interest, and this is conclusive for any judgment in an Article 8 case as to whether removal or deportation is proportionate and so justified under Article 8(2). But the Secretary of State rightly does not so contend. If that were the law, our municipal statute need do no more than confer a right of appeal to allow the immigrant to contend that on the true facts he has a good claim under the Rules. However, whatever else may be said about the relation between s.65(1) and paragraph 21(1) of Schedule 4 to the 1999 Act, it is surely plain that the legislature contemplated appeals on Convention grounds, including Article 8, which might succeed even though the appellant had no good claim under the Rules. The true position in our judgment is that the HRA and s.65(1) require the adjudicator to allow an appeal against removal or deportation brought on Article 8 grounds if, but

[52] Paragraph 352D.
[53] paragraph 290.

only if, he concludes that the case is so exceptional on its particular facts that the imperative of proportionality demands an outcome in the appellant's favour notwithstanding that he cannot succeed under the Rules.

60. In such a case the adjudicator is not ignoring or overriding the Rules. On the contrary it is a signal feature of his task that he is bound to respect the balance between public interest and private right struck by the Rules with Parliament's approval. That is why he is only entitled on Article 8 grounds to favour an appellant outside the Rules where the case is truly exceptional. This, not *Wednesbury* or any revision of *Wednesbury*, represents the real restriction which the law imposes on the scope of judgment allowed to the adjudicator. It is not a question of his deferring to the Secretary of State's judgment of proportionality in the individual case. The adjudicator's decision of the question whether the case is truly exceptional is entirely his own. He *does* defer to the Rules; for this approach recognises that the balance struck by the Rules will generally dispose of proportionality issues arising under Article 8; but they are not exhaustive of all cases. There will be a residue of truly exceptional instances. In our respectful view such an approach is also reflected in Lord Bingham's words in *Razgar*[54], which we have already cited:

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

61. We have considered whether the view we have taken of the adjudicator's task in these cases is in conflict with the reasoning of Dyson LJ in *Samaroo v Secretary of State*[55]. In that case there were two appellants whom the Secretary of State had decided to deport on the ground that their continued presence in the United Kingdom was not "conducive to the public good"[56]. The first appellant, Samaroo, sought on Article 8 grounds to challenge the Secretary of State's refusal to grant exceptional leave to remain, a deportation order having earlier been made against the appellant. His application for judicial review was dismissed, as was his appeal. In the course of giving judgment Dyson LJ said[57]:

> "The Secretary of State must show that he has struck a fair balance between the individual's right to respect for family life and the prevention of crime and disorder. How much weight he gives to each factor will be the subject of careful scrutiny by the court. The court will interfere with the weight accorded by the decision maker if, despite an allowance for the appropriate margin of discretion, it concludes that the weight accorded was unfair and unreasonable. In this respect, the level of scrutiny is undoubtedly more intense than it is when a decision is subject to review on traditional *Wednesbury* grounds…"

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[54] Paragraph 20.
[55] [2002] INLR 55.
[56] Immigration Act 1971 s.3(5)(b).
[57] paragraph 39.

Samaroo did not involve the statutory jurisdiction of the adjudicator or the IAT. As we have said the proceedings were by way of judicial review to challenge the refusal of exceptional leave to remain. An application for judicial review is categorically inapt as an arena for a full-blown merits appeal. But *Samaroo* was in any event in truth a policy case. There were no applicable Immigration Rules. The Secretary of State's position was that the gravity of the appellant's crime outweighed the compassionate circumstances. The case was therefore one in which there was an open question as to the respective weight to be given to private right and public interest. The court was in particular asked to make an assessment, in the context of the case's facts, of the importance attached by the Secretary of State to the desirability of the appellant's deportation in light of his criminal past. In those circumstances the principle of respect for the democratic powers was plainly engaged. Our conclusions in these present appeals march with the reasoning in *Samaroo*.

62. In summary, where in a human rights challenge the court is called upon in any respect to judge the weight or the merits of government policy, it will in deciding the outcome allow a margin of discretion to the policy maker. So much is required by the democratic principle: the principle of respect for the democratic powers of the State. In such a case, consistently with its obligations under the HRA, the court's decision is more intrusive than *Wednesbury*, being subject to the disciplines described by Lord Steyn in *Daly*. But there are cases, exemplified by these appeals, in which the court or adjudicator is not at all called upon to judge policy. In that case no question of respect for the democratic powers of the State arises: save in the sense, again exemplified here by the Immigration Rules, that prior decisions of the executive or legislature may have fixed, and narrowed, the territory across which the adjudicator's autonomous judgment may operate.

CONCLUSIONS FOR THESE APPEALS

63. It must follow that the decisions of the IAT in *Huang* and *Kashmiri* are legally defective, since both adopted a review approach based on deference to the Secretary of State's view of proportionality in light of the particular facts. The same is not obviously true in *Abu-Qulbain*, although the IAT in that case seems to have placed some reliance on this court's decision in *Razgar*[58]. In any event we are entirely clear that on the facts of *Kashmiri* and *Abu-Qulbain*, which we will not repeat, there is no possibility that a tribunal properly directing itself in accordance with the approach we have described could have found anything amounting to truly exceptional circumstances. We would dismiss the appeals in those cases.

64. We are persuaded that *Huang* is in a different category. On any view the case is an unusual one. We consider that a tribunal might find that in light of the whole history Mrs Huang's circumstances should be regarded as truly exceptional so as to give rise to a claim under Article 8 notwithstanding that she does not meet the Rules. We do not find it necessary to offer any further reasoning on the facts, which will no doubt have to be considered afresh by the IAT. We do not of course for a moment suggest that the Secretary of State's appeal to the IAT ought to fail. But for reasons we have given we would allow Mrs Huang's appeal in this court.

POSTSCRIPT

[58] See paragraphs 18 and 20 of the IAT determination.

65. Finally, since making the text of this judgment available to counsel in draft, we have been asked in a note from Mr Blake and his junior to consider the addition of some observations on the question, what classes of Article 8 cases (if any) are governed by a "flagrancy" threshold. It is accepted on all hands that so-called domestic Article 8 cases are not governed by such a threshold. We consider that on our approach to the law, and in particular the requirement that the Adjudicator must find a truly exceptional case if he is to allow an appeal on Article 8 grounds in instances such as these, it is not helpful to categorise the exercise he must perform in terms of "flagrancy".