CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

Immigration and human rights in the case law of the ECHR

Speech to Inner Temple, 23 March 2009

Ladies and Gentlemen,

I shall begin my speech this evening with words of thanks to my hosts for making it possible for me to come to Inner Temple today. As you know, I am an honorary Bencher of Inner Temple. I am very proud of this honour. I try not to forget my duties – even if the busy function which is mine prevents me from coming frequently to the Inn, even less from lecturing!

The high reputation of the English Bar stretches all around the world. English advocacy – and we have seen much of it in Strasbourg – is of the very highest intellectual and rhetorical quality. Now it is the turn of the European judge to appear before the lawyers, and I hope that I will be informative, persuasive and not over-long.

The year 2009 sees the 50th anniversary of the Court, as well as the 60th anniversary of the Council of Europe. They are institutions that have served, loyally and well, the noble purposes for which they were created – protecting and advancing human rights, nurturing and consolidating democracy and the rule of law. The European Convention on Human Rights remains the crowning achievement of the member States of the Council of Europe, standing at the heart of an expanding web of international treaties dedicated to the protection of human beings. As you are surely aware, the problem for the European Court is that success rhymes with excess – the institution is faced with a disproportionate workload that threatens its effectiveness and credibility. It is a situation that cannot continue, and in 2010 the Court will try to bring about a consensus between the 47 Contracting States on how to ensure the long-term survival of this European landmark. I am ready to answer questions about the current situation and the future of the Court.

I will turn now to the theme of my talk – immigration and human rights in the case law of the European Court of Human Rights.

The starting point in any discussion of this subject is the broad personal scope of the Convention. Its authors chose to cover all persons within the jurisdiction of the

Contracting States, rather than just the nationals of those States, or those lawfully resident within them. I think one can safely say that nationals of virtually every country on earth are to be found in the territory that is covered by the Convention. This broad coverage is fully consistent with – indeed compelled by – the very essence of human rights. The Convention serves to protect human beings, safeguarding their life, their integrity, their liberty and their dignity. The approach of the Court over the 50 years of its existence has been to ensure that these safeguards are concrete and effective. It has therefore been more concerned with the individual's actual situation rather than their formal status in domestic law.

There are, however, two provisions of the Convention that differentiate the position of non-nationals:

- Article 16 provides that nothing in Article 10 (freedom of expression), Article 11 (freedom of assembly and association) or Article 14 (non-discrimination) may prevent States from imposing restrictions on the political activities of aliens. In reality, this provision has had no impact at all on the case law of the Convention organs. There is, to my knowledge, no case in which Article 16 forms part of the decision.

- The other provision that deals explicitly with non-nationals is Article 5 § 1(f), which allows for the arrest or detention of a foreigner to prevent him/her gaining unauthorised access to the State, or for the purpose of deportation or extradition.

Additional guarantees for foreigners are to be found in the Protocols to the Convention. Article 4 of Protocol No. 4 forbids their collective expulsion. Article 1 of Protocol No. 7 lays down procedural guarantees for foreigners facing expulsion from the host State. The United Kingdom is not party to either of these treaties.

I would add that Protocol No. 12, setting out a general prohibition on discrimination, is clearly important for non-nationals, allowing them to test the validity of a nationality criterion attached to the exercise of any legal right.

I should also recall what is not in the Convention. None of the classic rights that may be exercised by foreigners in different circumstances – e.g. asylum, establishment, family reunification, access to the labour market – is to be found in the Convention or its Protocols. Therefore, as has been stated on numerous occasions, States have an "undeniable sovereign right to control aliens' entry into and residence in their territory". But it is clear from the well-established case law of the Court that the traditional sovereign power of the State has to be exercised in a manner compatible with the rights that are guaranteed in the Convention. These rights imply procedural and substantive obligations for the Contracting Party. The duty to respect Convention rights will, in justified cases, override the immigration powers of the State.

The best example of this is **Article 3 of the Convention**. The prohibition on torture and inhuman or degrading punishment or treatment stands at the inner core of the Convention. It is formulated in absolute terms and admits of no derogation, exception or qualification. The responsibility of the Contracting State may be engaged if the ill-treatment occurs – or risks occurring – abroad.

Last year the Court delivered a significant judgment under this provision in the case *N.A. v. United Kingdom* (17 July 2008). The applicant was an ethnic Tamil who had

entered the UK in 1999 and claimed asylum. In support of his claim he stated that he had been arrested and detained by the army on a number of occasions in the 1990s on suspicion of being a member of the LTTE – the Tamil Tigers. The claim was rejected, and the appeal was unsuccessful – his fear of ill-treatment was unjustified. Moreover, the ceasefire then in place in Sri Lanka had diminished the risk of ill-treatment. The applicant took further proceedings, applying for judicial review several times, but without success. The deteriorating situation in Sri Lanka was noted but did not justify a fresh determination of the claim for asylum. At that point (June 2007) the applicant made a successful Rule 39 application to the ECHR, and the deportation procedure was stayed.

I should briefly explain that Rule 39 of the Rules of Court provides that the Court may indicate any interim measure in the interests of the parties or the proper conduct of the proceedings. In a case of deportation or extradition, this would mean deferring the intended action until the Court has been able to deal with the case. Each year, many hundreds of applicants request the Court to apply Rule 39. The Court adopts a careful attitude. It will normally only consider an interim measure in the most serious cases, where the applicant's rights under Article 2 or Article 3 are at stake, where the harm they might suffer would be grave and irrevocable. Most requests are denied, but each request receives prompt and careful judicial scrutiny.

In its *Mamatkulov* judgment in 2005, the Court established that failure by a State to respect an interim measure amounts to a violation the Convention – Article 34, the right of individual application. This is very rare in practice, though. A recent example is the Grand Chamber case of *Paladi v. Moldova*, which did not deal with aliens' rights, but with the state of health of a detainee.

N.A.'s application was one of hundreds that reached the Court in 2007-2008, taken by Tamils seeking to avoid deportation. The Court decided as a precautionary measure that it would accept all Rule 39 applications similar to the applicant's. By the time the *N.A.* judgment was delivered, interim measures had been applied in 342 cases – a completely unprecedented situation at Strasbourg.

N.A. is a long and detailed judgment. This is not unusual for Article 3 cases, which generally call for close scrutiny of the applicant's personal circumstances. But it is a leading judgment as well, in which the Court went to considerable length to show how this type of case should be dealt with. The type of claim that the applicant made – combining particular personal facts, his ethnicity and the general situation in his country – is a common one across Europe. Given Britain's strong links to Africa and Asia, many such claims have been dealt with by the immigration authorities and the courts in this country (and, of course, by the legal profession). Their handling of asylum claims and Article 3 claims is, as noted in the *N.A.* judgment, marked by "serious and anxious consideration" of each individual case. The Strasbourg Court approved the very thorough analysis of the Appeals Immigration Tribunal in its own *LP* decision, which guided the Court's assessment of N.A.'s case. It concluded that the test laid down in its case law – substantial grounds for finding that there would be a real risk to the person if returned – was satisfied on the facts, and ruled in favour of the applicant.

I note that this important judgment was followed very faithfully by the European Court of Justice in its own important ruling last month in the *Elgafaji* case, in which it determined the scope of the protection offered by the relevant EC Directive. The two

European Courts, it should be said, are particularly attentive to each other's case law. This bodes well for the day when the EU itself becomes a Contracting Party to the Convention, which implies the entry into force of the Lisbon Treaty.

A second judgment that deserves mention today is that of the Grand Chamber in the case of *A and Others v. the United Kingdom*. The facts of the case are well and widely known, and I need not summarise them here. After the House of Lords ruled in favour of the eleven men in December 2004, they applied to Strasbourg complaining principally under Article 5 of the Convention. The Court agreed that their detention was not permitted by Article 5 § 1(f), since, given the real risk of ill-treatment in their home countries, there was no realistic prospect of deportation. The Government argued that their right to liberty should be weighed against the requirements of national security, but the Court did not accept this. The list of grounds in Article 5 on which a person's liberty may be restricted is exhaustive – no other justification is possible.

This raised the question of the UK's derogation. In an unusual move, the Government argued that the House of Lords was wrong in finding that the derogation was invalid. The Court stressed the wide margin of appreciation that goes with Article 15, and accepted the assessment of the Government, Parliament and the judiciary that the threat from Al-Qaeda and its associate groups gave rise to an emergency threatening the life of the nation. However, the Court agreed with the Law Lords that the measures adopted were not strictly required, as they were disproportionate and discriminatory.

The Court then considered their complaint that the procedures before the Special Immigration Appeals Commission had not been fair, as it had relied on closed evidence against them. This is a classic dilemma for national authorities, and adjudicating such cases is no easy task. Powerful legal values compete against one another. On the one hand, national security and public safety; Governments have a strong duty to guard the public against terrorist attack. It is even a positive obligation of the State under Articles 2 and 3 of the Convention.

On the other, there is the right to basic procedural fairness. This is not an absolute or rigid concept, though. There may be good reason to impose a degree of secrecy for the sake of national security, but the detriment to the detainee must be counter-balanced in some way. He must be able to effectively meet the case against him. Looking at each applicant's situation, the Court ruled that for 4 of them, the procedure followed did not meet the standard of fairness set by Article 5 § 4.

The final issue to determine in the *A.* case was the level of compensation for the applicants. A finding of a violation of Article 5 often means a large payout to the victim. In this case, though, the Court reasoned that a substantially lower award should be made in light of the following factors:
- the existence at the material time of an emergency in the UK;
- the good faith attempt of the Government to reconcile the Article 3 rights of terrorist sympathisers with the protection of potential victims;
- the fact that following their release from detention in March 2005 the applicants were made subject to very strict control orders.

It is scarcely necessary to remark that the years since September 11 have seen great pressure on fundamental human rights – and some flagrant violations in certain

countries. Issues that seemed beyond question became the subject of heated debate and controversy, both nationally and internationally. But I believe that the courts in this country have done their duty under law and the Convention. And it has at all times been the European Court's intention to stand firm by the principles and standards it has derived over many years from the text of the Convention.

There is another aspect to Article 3 that I will touch briefly upon. As its purpose is to guard human beings against great suffering, it can very exceptionally be invoked on health grounds, to prevent the return or expulsion of an extremely ill non-national. This limited dimension to Article 3 was first identified in the case *D. v. United Kingdom* (1997), in which the Court held that to return the applicant – who was close to death - to St Kitts would be inhuman. The truly exceptional character of this approach is shown by the fact that in the years since the D. judgment, no other applicant has succeeded with this argument. Last May the Grand Chamber reviewed and affirmed this approach in the case *N. v. UK*. The applicant, suffering from HIV, was resisting return to Uganda.

In its reasoning, the Grand Chamber referred to the fair balance that should be struck in such circumstances. There should be some residual flexibility to grant Article 3 protection in the most urgent individual cases. But the Convention does not oblige European States to provide free and unlimited medical care to non-nationals who have not been granted permission to remain – that would be too great a burden to impose on Contracting States. In the case of N, the UK authorities had provided treatment and medication for the 9 years it took her asylum claim to be determined. As her condition at that time was not as grave as that of D, there was no obligation under Article 3 on the State to continue treatment.

This decision brings to light two important limitations of the Convention. First, that it is an instrument that deals expressly and primarily with civil and political rights, although these can in certain cases imply entitlements and duties of a humanitarian or socio-economic nature. Second, that the Convention is regional in scope, offering only specific, limited coverage to persons from other parts of the world.

* * * * *

The other Convention provision often relied on by foreigners is **Article 8**, which guarantees respect for one's private and family life, one's home and one's correspondence.

The crux of the European case law was first expressed by the Commission in the *Abdulaziz* case: to exclude a person from the country where the members of his family live may raise an issue under Article 8. I will briefly comment on two recent judgments of the Grand Chamber that can be viewed as judgments of principle, or leading judgments, in this area.

The first, *Uner v. The Netherlands*, raised the issue of the double punishment of settled immigrants who commit serious criminal offences. In addition to serving a custodial sentence, their residence permit is cancelled, they are returned to their country of origin and forbidden to return to the host State for a certain period of time (5 years, 10 years). Uner came to the Netherlands from Turkey at the age of 12. In his early 20s he was convicted of manslaughter and was deported to Turkey upon completion of sentence, leaving his Dutch partner and their two children behind him.

This type of measure has attracted much attention in Europe in recent years. The Parliamentary Assembly of the Council of Europe, whose resolutions sometimes serve to establish an emerging consensus in Europe, considers that settled immigrants should not be subject to expulsion. France abolished *la double peine* some years ago, for very simple, humanitarian reasons with which I sympathise.

But the Court in *Uner* made it clear that Article 8 does not require States to treat settled immigrants in the same way as their own nationals in this respect. An immigrant who has engaged in criminal behaviour may be expelled as a preventive measure, although this must still meet the criteria set out in Article 8 § 2: legality – including adequate procedural safeguards – and proportionality.

The *Uner* judgment also clarified the existing case law criteria for testing the compatibility of deportation in such with circumstances with Article 8. It gave greater prominence to the best interests of any children affected by such an interference. It also emphasised the solidity of the individual's social, cultural and family ties with the two countries concerned, in other words, the totality of the individual's social ties. This is a broader consideration than just family bonds, and reflects the wider notion of private life. Having identified the relevant elements, a balancing exercise must be conducted on the facts of each case. In Mr Uner's case, the balance was found not to be in his favour.

The second case I will briefly mention is *Maslov v. Austria*, delivered last June. This too was a case in which a settled immigrant was deported from the host State to his country of origin because of criminal behaviour. But it differed in two important ways. Maslov spent most of his childhood and youth in Austria, where he arrived at the age of 6. And the offences that led to his expulsion were mainly non-violent, and committed as a teenager. In other words, acts of juvenile delinquency.

The Grand Chamber adopted a strong position on both points. Only "very serious reasons" can justify the expulsion of a foreigner who is so well settled in the State. This mirrors the position under the relevant EC legislation, which stresses the need to demonstrate that a settled third-country national poses a specific, individual threat before they can be removed. For juvenile offenders, their interests will be best served by rehabilitation and reintegration in their community, not by deportation. There had therefore been a violation of the applicant's right to respect for his private and family life.

These cases are among the many examples of the evolutionary approach taken by the European Court. That process is at times cautious, at other times very dynamic, driven by the need to answer new questions of law that may cast doubt over previous answers.

I would like to raise another point. In matters such as respect for private and family life (which encompass aliens' rights) the Court is compelled by the very text of the Convention (in this case Article 8) to conduct a proportionality review. In other words, the interference with the right is compatible with the Convention if, and only if, it is "necessary in a democratic society". Such control explains that the factual circumstances of the cases are very important for the Court's assessment. This explains why, for example, *Uner* and *Maslov* have a very different outcome.

To conclude, this evening I have tried to convey both the essence and the limits of the human rights protection that the Convention affords to immigrants, using the most frequent types of case taken to Strasbourg. The concern of the Court is to ensure that the persons in this group, some of whom are in vulnerable and even distressing circumstances, enjoy concrete and effective protection of their most fundamental rights. This concern is shared by the courts of this country, which have been very assiduous in their application of Convention standards thanks to the Human Rights Act. This is how the Convention system was intended to function. Indeed, it is the only way that it can function properly. It is the key to the future of human rights protection in Europe, for all of its peoples.

Thank you.