Constitutional rights review and section 2 of the Human Rights Act 1998: a contextual dialogue of applications for appeals and judicial review on medical grounds in the United Kingdom

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Table of Contents

Abstract

I advance a contextual analysis of the relationship between the domestic UK courts and the European Court of Human Rights interpretation of European Convention on Human Rights Convention rights. Aileen Kavanagh's constitution review framework and Stephen Gardbaum's commonwealth model of constitutionalism serve as the basis of my theoretical framework to analyse the relationship between the UK judiciary and the *Human Rights Act* 1998 and the European Court of Human Rights. Specifically, I assess the intra- and inter-relational component judiciary's obligations and constitutional review powers afforded through the *Human Rights Act* 1998. I situate my argument from a contextual rights point of view to critically assess the interrelationship between the domestic and Strasbourg courts

I utilise doctrinal, empirical and theoretical methods to explore the relationship between administrative, constitutional and immigration laws in addition to the comparative aspect of domestic and Strasbourg jurisprudence. For this, I have undertaken a quantitative survey of approximately 50 cases from the First-tier and Upper Tribunals in instances where the appellants have appealed and lodged an application for judicial review on the basis of a medical ground. I assess the survey of case law from the authoritative cases prior to and after the European Court of Human Right's recent decision in Paposhvili v Belgium.

I have proposed to analyse immigration appeals and the rights of migrants from a domestic approach in light of the 20th anniversary of the *Human Rights Act* 1998 and the internal debate between the domestic common law and European constitutional review models.

Résumé

Je propose une analyse contextuelle des relations entre les tribunaux britanniques et la Cour européenne des droits de l'homme par rapport à l'interprétation des droits de la Convention européenne des droits de l'homme. Le cadre de révision de la constitution d'Aileen Kavanagh et le modèle constitutionnel du Commonwealth de Stephen Gardbaum servent de base à mon cadre théorique pour analyser la relation entre le pouvoir judiciaire britannique avec le « Human Rights Act » de 1998 et la Cour européenne des droits de l'homme. Plus précisément, j'évalue les obligations et les pouvoirs de contrôle constitutionnel conférés au pouvoir judiciaire par la « Human Rights Act » de 1998. Je situe mon argument du point de vue des droits contextuels pour évaluer de manière critique l'interdépendance des tribunaux nationaux et de Strasbourg.

J'utilise des méthodes doctrinales, empiriques et théoriques pour explorer la relation entre le droit administratif, le droit constitutionnel et le droit de l'immigration, en plus de l'aspect comparatif de la jurisprudence nationale et cela de la Cour européenne des droits de l'homme. À cet effet, j'ai entrepris une enquête quantitative d'environ 50 cas des tribunaux de première et deuxième instance dans lesquels les requérants ont interjeté un appel ou déposé une demande de recours judiciaire pour des motifs médicaux. J'évalue la jurisprudence de la part des cas autoritaires avant et après la récente décision de la Cour européenne des droits de l'homme dans *Paposhvili c. Belgique*.

J'ai proposé d'analyser les appels en matière d'immigration et les droits des migrants dans le contexte domestique à cause du 20e anniversaire de la « Human Rights Act » de 1998 et le débat interne entre les modèles de common law interne et de révision de la constitution européenne.

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I am tremendously grateful for the advice, knowledge, support and supervision of Professor Nandini Ramanujam. Her warm-hearted nature and guidance shone through from our first meeting. Her advice and insight challenged me to step outside of the immediate scope of my research to view the greater context of the social, political and legal realities in which this work is situated. Finally, her perspicacious direction had made this research period that much more enriching and I have learned a great deal more about this thesis as well as my personal affinity for the law.

I graciously acknowledge the support of Professor Ramanujam, Associate Dean Richard Gold, and the Faculty of Law for supporting my application for a Graduate Mobility Award. The financial assistance permitted me to carry out an independent research stay at the Institute of Advanced Legal Studies in London, England. During this stay, I completed a quantitative survey of cases from the First-tier and Upper Tribunals of England and Wales to incorporate an empirical analysis to this work. Furthermore, I give thanks to the extremely kind and helpful librarians at the Institute of Advanced Legal Studies who helped me narrow my search for materials and provided tips to consult other resources.

List of acronyms

COE	Council of Europe
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
HRA	Human Rights Act 1998 (United Kingdom)
FCC	Federal Court of Justice (Germany)
FtT	First-tier Tribunal (United Kingdom)
UK	United Kingdom
UT	Upper Tribunal (United Kingdom)

Chapter 1: Introduction

The Human Rights Act 1998: Twenty Years On - An Introductory Note

The judicial mechanism of rights review of constitutional and/or human rights instruments has received a vast amount of academic and legal scholarship. My interest in exploring the topic of constitutional rights review has been motivated by the 20th anniversary of the United Kingdom's *Human Rights Act* 1998 which gave domestic legal effect to the European Convention on Human Rights. Prior to engaging in an analysis of these two instruments, this work merits a brief recognition of the socio-political currents that are occurring within the UK and Europe to position the political sphere against the substantive rights framework advanced through this piece. Through a reading of Aileen Kavanagh's *Constitutional Rights Review,* I support the view that the constitutional machinery does not detach itself into separate, confined compartments of the three branches of government – as proposed by the separation of powers argument; rather an intricate dialogue, and at times forceful debate, occurs for the practical execution and implementation of constitutional rights.[1] Although rights instruments may be regarded as intangible constructions guided by aspirational policy objectives, the progressive realisation of constitutional rights is made possible through a complex machinery between the different branches of government.

In terms of purview, I will focus on the judiciary's role in the constitutional rights review mechanism as set out in the *Human Rights Act* 1998 (hereafter HRA). Human rights in the United Kingdom have benefited from the dialogical institutional relationship between the European Court of Human Rights and domestic courts and tribunals. Internally, the decision-making process of the judiciary has not always been in complete concord; much internal debate has arisen regarding the principle of parliamentary sovereignty as well as the actions and remedies afforded to the judiciary via the HRA. Throughout this work, I draw attention to the critical role of the judiciary in the substantive rights review mechanism in the UK. From an administrative law point of view, it is

[1] Aileen Kavanagh, *Constitutional Review under the UK Human Rights Act* (Cambridge: Cambridge University Press, 2009).

paramount that the judiciary are safeguarded independence in the review of public authorities' decision-making powers. The review process must be seen as part of the co-operative functions of the government in relation to the execution of constitutional rights; no single branch is entirely authoritative.[2] Within the constitutional framework, the judiciary are granted the role to interpret and apply rights as well as to review the actions of public authorities. Furthermore, the HRA strengthens the judiciary's constitutional review capacity through the powers enumerated in the act; the direct effect given to the European Convention on Human Rights (hereafter ECHR) grants the judiciary the power to apply, interpret and develop Convention rights in domestic judgments. In relation to the other branches of government, the judiciary carry out rights review in a supervisory manner. The judiciary's review role is paramount to safeguarding the rights of all, especially of the most vulnerable; in the context of this piece, I will focus on the rights of non-citizens, specifically of those individuals yielded with a deportation or removal order.[3] An independent judiciary's ability to carry out rights review of public authorities' decisions is illustrative of a substantive conception of the rule of law.[4]

In light of this group, I advance a contextual analysis of applications for appeals and judicial review in the context of individuals contesting their immigration deportation or removal order on medical grounds. From an administrative and constitutional rights perspective, I examine how the United Kingdom's domestic constitutional review framework functions in parallel with the structure of the European Court of Human Rights (hereafter ECtHR). I use Aileen Kavanagh's constitutional rights review model as the theoretical basis for my argument. She argues that the delivery and implementation of constitutional rights has necessitated a dialogical relation between the three branches of

[2] I recognise the cogency of the parliamentary sovereignty argument and will address this doctrine later on in this piece. Nonetheless, the judiciary are equipped with mechanisms and remedies to counter non-compliant legislation or administrative actions of decision makers.

[3] The safeguarding of rights is fundamental to the legal tradition of the United Kingdom as evidenced through the passing of the (English) *Bill of* Rights 1689. Contracting States to the Council of Europe have declared their commitment to rights protection through the implementation of the European Convention on Human Rights.

[4] For an overview of the substantive conception of the rule of law refer to Paul Gowder, *The Rule of Law in the Real World* (Cambridge: Cambridge University Press, 2016).

government. As legislated, the HRA grants the UK courts a constitutional review mechanism expanding upon the judiciary's common law judicial review role.[5] From Kavanagh's constitutional review, I am building upon her development of a dialogical relation and transposing this element to the interrelationship between the domestic courts in the UK and the ECtHR. Rather than looking at the judiciary's relations to the two other branches of government, I wish to examine this branch's internal relations – between different levels of courts and tribunals – and external relations with the ECtHR. Specifically, I aim to examine the section 2 HRA obligation on domestic courts to take into account any decision of the ECtHR in connection with a Convention right. As an Act of Parliament, the executive/legislative branches have prescribed a dual review system: courts must abide by the common law concept of precedent while at the same time consult ECtHR jurisprudence in relation to the interpretation of ECHR Convention rights.

I am interested in building upon Kavanagh's model to review the intra-relationship and inter-relationship components of section 2 of the *Human Rights Act* 1998. Regarding the intra-relationship, I will review the First-tier and Upper Tribunals engagement with ECtHR jurisprudence with that of higher-level court, specifically in relation to Articles 3 and 8 ECHR. Regarding the inter-relationship between the domestic and Strasbourg courts, I will assess the interpretation review mechanism of Convention rights, again Articles 3 and 8 ECHR. While Kavanagh and other scholars have recognised the cooperation between the different branches of government for constitutional rights development as legislated through the HRA, I wish to contextualise the judiciary's intra-group relations, on one hand, and the UK-Strasbourg judicial institutions, on the other. In my opinion the constitutional rights review framework merits an analysis of section 2 HRA due to the judiciary's compound jurisprudential review of authoritative UK and Strasbourg case law. Furthermore, the dialogical aspect of section 2 HRA provides an opportunity to strengthen the substantive rights realisation at both the domestic and

[5] See Aileen Kavanagh, Constitutional Review under the Human Rights Act (Cambridge: Cambridge University Press, 2009) at 5: "it highlights the constitutional character of the courts' supervisory powers, and indeed, the constitutional importance of the HRA itself."

Strasbourg levels due to the contextualised interpretations developed by the respective bodies.

To analyse the dialogical component of section 2 HRA, I have examined approximately 50 cases from the First-tier and Upper Tribunals, these being the courts of first and second instance for administrative review of immigration deportation/removal orders. I bring into question the interpretation and development of section 2(1) of the HRA through the lens of Kavanagh's constitutional review framework. As I will illustrate in the survey, the domestic courts have shifted to a stricter interpretation of Convention rights and have sustained greater judicial deference over the years. In response to this trend, I argue that applying a constitutional rights review approach to section 2 HRA would incorporate a stronger rights-based approach as it would further contextualise the interpretive development of Convention rights between domestic and Strasbourg jurisprudence. Ultimately, my argument puts forth the idea that the HRA and Kavanagh's constitutional rights review theory are set to permit a more flexible structure that upholds the equilibrium between the governmental organs while ultimately advancing substantive rights. I have chosen to focus on section 2 HRA and cases of administrative review to analyse the judiciary's fortified powers of constitutional rights review granted through the HRA and to compare the domestic rights review system to that of the ECtHR.

I utilise doctrinal, empirical and theoretical research methods to explore the relationship between administrative law and constitutional law. In addition, by the very nature of the relationship between the different legal institutions, I carry out a comparative approach through review of domestic (UK) and Strasbourg (European Court of Human Rights) jurisprudence. Furthermore, in the concluding section, I will draw a brief comparison between the UK and German domestic implementation of ECtHR case law. Although the two countries have differing legal systems, the UK and Germany domestic courts have similar obligations in regard to interpreting and implementing Convention rights.[6] The research is situated within the common law model of constitutionalism and,

[6] For further information on the interrelationship between German courts and the ECtHR refer to Sebastian Müller and Christoph Gusy, "The interrelationship between domestic judicial mechanisms and the Strasbourg Court rulings in Germany" in Dia Anagnostou, ed., The

as such, does address the debates surrounding parliamentary sovereignty, judicial and political deference, and the role of the judiciary in rights review. To add a contextual layer to support this research, I have undertaken a quantitative survey of approximately 50 cases from the First-tier and Upper Tribunals in instances where the appellants have lodged an application for judicial review on the basis of medical or health grounds. The progress of judicial review cases on medical grounds raises the normative question of the recognition of the right to health.

My argument develops from Kavanagh's constitutional rights review model to examine the judiciary's decision-making and interpretation of UK and ECtHR authoritative jurisprudence. I assess the (domestic) judiciary's duty to consult ECtHR decisions in connection Convention rights interpretation; specifically, I am examining how the First-tier and Upper Tribunals appreciate this statutory duty alongside the common law concept of authoritative precedent. As my motivation is to analyse how section 2 HRA has been employed, I argue that this dialogical component engages with the comparative analysis as well as the constitutional rights review method and provides intragroup and intergroup perspectives of the UK court's rights review procedure. My thesis intends to supplement Kavanagh's constitutional rights review model on the notion that constitutional rights are cooperatively developed between different judicial institutions as well as the three branches of government. In recognition of the statutory duty to refer to the ECtHR as an authoritative figure for ECHR Convention rights interpretation, I believe that focussing on the judiciary's section 2 HRA obligation to appreciate Strasbourg jurisprudence will evaluate the judiciary's role in the execution of administrative review and substantive rights development.

Situating substantive rights? Reflecting on Justice Albie Sachs discussion economic and social rights and the European Convention on Human Rights

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European Court of Human Rights: Implementing Strasbourg's Judgments on Domestic Policy (Edinburgh: Edinburgh University Press, 2013) 28.

While my thesis predominately examines the judiciary's role in the constitutional review process, I have chosen to focus on immigration cases where the individuals have alleged a right's infringement on the basis of their ill health and the lack of medical facilities in their country of origin. The substantive right to health is not expressly included in the HRA nor the ECHR. Before continuing on, I would like to briefly reflect upon the underlying normative question of the right to health. For the discussion of substantive economic and social rights, I have been insightfully referred by my supervisor to read Justice Albie Sachs work, *The Strange Alchemy of Life and Law,* which has inspired some of the contextual elements of this piece.[7] In the context of the ECHR, Convention rights do not place an obligation on a Member State to provide adequate social and medical care to those Third Country Nationals who are administratively classified as non-regularised migrants. In addition, the evidentiary analysis of comparing the country of origin's medical facilities need not be on an equivalent level to that of the expulsing state as this would imply that the Convention would be seeking to impose the threshold of resources and facilities in the host country.[8] Despite this assertion, Articles 3 and 8 ECHR have held, in exceptional circumstances, that to return an individual with their present medical condition to their country of origin would amount to an infringement of the respective right(s) – e.g. either to be comparable to a level of inhuman or degrading treatment (Art. 3) or punishment or the right to respect for private and family life (Art. 8).

If Convention rights have been interpreted to prohibit the removal of an individual on the basis of their ill health, is there an implicit recognition of the right to health, albeit limited to exceptional circumstances as elaborated in the case law? In the South African case of *Grootboom*[9], Justice Sachs, in his role on the bench of the Constitutional Court, recognised that underlying the legal question raised was the question whether an economic and social right could be regarded as a fundamental right directly enforceable by the courts.[10] The evolution of rights has developed from the classical formulation of

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[7] Justice Albie Sachs, *The Strange Alchemy of Life and Law* (Oxford: Oxford University Press, 2009).

[8] See *N v the United Kingdom* application no. 26565/05 [2008] EECHR 453 at 42.

[9] *Government of the Republic of South Africa v Grootboom* [2000] ZACC 19

[10] See Justice Albie Sachs, *supra* note 7 at 176.

civil and political rights to those encompassing elements affecting the well-being of individual's livelihoods, such as housing, health and education, commonly associated with the public policy of states.[11] The more comprehensive nature of economic and social rights incorporate both positive and negative obligations on the state in addition to balancing the interests of the individual alongside the community.[12]

In relation to the right to health, this involves a variety of resource funding and allocation questions.[13] This raises questions of what limitations do, or should, the judiciary have in respect to policy issues. Traditionally, the separation of powers and parliamentary sovereignty doctrines have left these questions exclusively in the domain of the legislative/executive; the scope of judicial review of the executive being limited to the notable *Wednesbury* standard of reasonableness, e.g. whether any reasonable decision-maker would have arrived at the decision.[14] By the very nature of constitutional rights, however, the realities illustrate the challenges to a strict separation of powers argument. The judiciary are given the interpretative and review functions in relation to constitutional rights. In the process of carrying out their judicial obligations, the courts may very well make a decision or declare an order that does have a *substantive impact* on a policy point, for the very reason that the policy, in the specific context, failed to be rights-compatible. This very remedial aspect attests to the vitality of the constitutional rights-based system; without a safeguarding mechanism, the system is prone to volatility and a lack of enforcement, thereby undermining the very nature of rights. I refer to Justice

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[11] Economic, social and cultural rights have been recognised in the Universal Declaration on Human Rights as well as the International Covenant on Economic, Social and Cultural Rights. The Constitution of South Africa, promulgated by former President Nelson Mandela on 18 December 1996, incorporated economic and social rights.

[12] See *Soobramoney v Minister of Health, KwaZulu-Natal* [1997] ZACC 17 qtd. In Justice Albie Sachs, *supra* note 7 at 189, *per* Arthur Chaskalson, then President of the Court: "[t]he state has to manage its limited resources in order to address all these claims. There will be times when this requires it to adopt a holistic approach to the larger needs of society rather than to focus on the specific needs of particular individuals within society."

[13] See Sachs J, *ibid* at 191: "health care rights by their very nature have to be considered not only in a traditional legal context structured around the ideas of human autonomy but in a new analytical framework based on the notion of human interdependence."

[14] See *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223

Sachs and the South African Constitution to contextualise the substantive rights review process and the role of the judiciary in relation to the other branches of government.[15]

I have drawn upon Justice Sach's discussion of the normative framework of rights to relate to the underlying purpose that brought about the drafting of instruments such as the ECHR as well as the HRA. In relation to the need for a stronger rights-based review, Alan Brady enumerates three characteristics of Convention rights, stating:

> "First, they are deemed to be 'fundamental' in the sense that they are a standard to which all law and governmental action must conform. Secondly, Convention rights are of themselves highly abstract notions. Thirdly, the majority of Convention rights are non-absolute and so can be limited in certain circumstances."[16]

The European institutions have heralded the development of a stronger rights-based instrument through the contextual development of Convention rights with vast amount of supporting jurisprudence. With the UK's decision to adopt the HRA, domestic tribunals have had to incorporate the European substantive rights review model in their decisions. Has this led to a Europeanisation of the common law constitutional review model? Arguments could be made for and against the proposition; however, the adoption of the HRA has not led to a unanimous objective in favour of substantive rights review. Over the years, all branches of the government have showed reticent signs towards European institutions and the ECHR. In relation to the judiciary's role in Article 3 determinations, Judge Andrew Jordan held a slightly cynical view that "we are almost invariably focused on that protean concept of inhuman or degrading treatment."[17] This remark goes in line with the supranational effects of the ECtHR on domestic legislation and judicial

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[15] *Constitution of South Africa* 1996 (South Africa)

[16] Alan Brady, *Proportionality and Deference under the UK Human Rights Act: An Institutionally Sensitive Approach* (Cambridge: Cambridge University Press, 2012) at 3-4.

[17] *EA & Ors v SSHD* [2017] UKUT 445 at 4. See further at 4: "[t]he enquiry moves from the *motivation* of the actor behind the suffering to the *effect* of the relevant circumstances upon the individual."

independence.[18] In the next section, I turn to the historical background of the *Human Rights Act* 1998 and the development of Convention rights adjudication in the UK domestic legal setting.

[18] For discussion on the supranational role of courts in Europe, see Lech Garlicki, "Cooperation of courts: The role of supranational jurisdictions in Europe" (2008) 6:3 International Journal of Constitutional Law 509.

Chapter 2: "Rights Brought Home": historical background and the lead up to the Human Right Act 1998

Council of Europe and the European Convention on Human Rights

On 4 November 1950 members of the Council of Europe signed the *European Convention on Human Rights* (hereafter ECHR) which instrumented a constitutional rights mechanism for the contracting states and set up the institutional entities of the European Commission of Human Rights and the European Court of Human Rights (hereafter ECtHR).[19] The ECHR is in line with the developments of the *International Convention on Civil and Political Rights*, and by extension, the *United Nations Declaration of Human Rights* to grant protections to civil and political rights.[20] In addition, "inherent in the whole of the Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights."[21] Although being a signatory to the ECHR, the right of individual petition for subjects located on British territory was not granted until 1966. From 1966 onwards, individuals have had the right to take a case before the European Court of Human Rights in Strasbourg; the limitations being that the individual had to exhaust all the legal recourses in their home country before being allowed to petition to the European court. For clarification purposes, the Council of Europe is a separate and independent organisation to the EU. Although all members of the EU are also members of the Council of Europe, the ECHR is linked to exclusively to member states of the Council of Europe.

"Rights Brought Home": the 1997 Labour Government Manifesto and the Human Rights Act

The UK being a dualist legal system, an Act of Parliament had to be legislated for individuals to have recourse in domestic courts to the enumerated rights in the ECHR. Prior to the passing of the *Human Rights Act* 1998 (hereafter HRA), individuals in the UK

[19] "Human Rights: The European Convention", *BBC News* (29 September 2000).
[20] See *Airey v Ireland* (1979) at 26.
[21] *N v The United Kingdom* [2008] ECHR 453 at 43.

could not directly invoke a claim under the ECHR; they had to exhaust all legal measures in the UK before then petitioning their Convention right to the ECtHR. As a result of the length and costs associated with this, the then Labour government petitioned the human rights instrument as part of their 1997 government manifesto and introduced the legislation upon obtaining a majority government.[22] The HRA gives legal effect to the ECHR. As a result, individuals now may invoke their Convention rights at any level of the court system within the UK. There has been much discussion, and disagreement, with the apparent supranational character of the ECHR as implemented through the HRA and how it *reconciles* with the common law tradition of parliamentary sovereignty.[23]

To illustrate the political acknowledgement of the disconnect between the common law human rights structure and the European Convention on Human Rights, I cite the then Home Secretary, Jack Straw:

> "[w]hat marks out the UK's record [before the European Court of Human Rights] is the serious nature of the cases brought and the absence of speedy and effective domestic remedies. This record does little for the reputation of Parliament, government or the courts. It affects the UK's international standing on human rights as well as weakening the position of individual UK citizens."[24]

The 1997 Labour Government Manifesto, "Rights Brough Home: The Human Rights Bill" led to the party's majority win and the drafting of the *Human Rights Act* 1998.[25] The White Paper explains the Labour government's proposals regarding the passing of a Human Rights Bill which would give direct effect to the rights enshrined in the European Convention on Human Rights. The manifesto addresses the disparity between the

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[22] Secretary of State for the Home Department, "Rights Brought Home: The Human Rights Bill" CM 3782 (United Kingdom: The Stationary Office, 1997).

[23] As a general view, A.V. Dicey held parliamentary sovereignty to mean that "Parliament had the right to make or unmake any law whatever; and, further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament" qtd. in A.W. Bradley and K.D. Ewing, eds., *Constitutional and Administrative Law,* 14th ed. (London: Pearson Education, 2007) at 54.

[24] See Paul Boateng and Jack Straw, "Bringing rights home: Labour's plans to incorporate the European Convention on Human Rights into UK Law" (1997) 1 European Human Rights Law Review 71 at 74.

[25] See "Rights Brought Home" *supra* note 22.

development of the Convention in the domestic legal frameworks of European countries and the common law adjudication of Convention rights in the UK.[26] Furthermore, the White Paper also recognises the efforts of the Liberal Democratic Peer, Lord Lester of Herne Hill QC, and Conservative MP, Sir Edward Gardner, in introducing bills to propose a human rights instrument that would give effect, in some measure, to the European Convention on Human Rights.[27] While credit must be given to the Labour government in successfully tabling what would become the HRA, political and judicial sentiment for a domestic human rights instrument existed prior to Tony Blair's government. The manifesto's argument proposed four main reasons for incorporating the ECHR: 1) the rights contained in the ECHR would become recognised as "British values";[28] 2) it would streamline the process for individuals to raise rights claims in the UK thereby reducing the time and cost associated with the process previously;[29] 3) it would raise human rights awareness in society and allow British judges to make a contribution to the development of human rights laws in Strasbourg;[30] and 4) the domestic approach, through reliance solely on the common law, had not stood the test of time as reflected in the high number of violations found against the UK in Strasbourg.[31] The majority of the manifesto's

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[26] Furthermore, the document alludes to the *supranational* acceptance of the Strasbourg court in interpreting the scope of the Convention rights and the domestic tribunals referring to the jurisprudence for guidance at para 1.3: "The European Convention is not the only international human rights agreement to which the United Kingdom and other like- minded countries are party, but over the years it has become one of the premier agreements defining standards of behaviour across Europe."

[27] See "Rights Brought Home" *supra* note 22 at para 1.5.

[28] *Ibid* at para 1.14.

[29] *Ibid* at para 1.14: "… enforcing them takes too long and costs too much. It takes on average five years to get an action into the European Court of Human Rights once all domestic remedies have been exhausted; and it costs an average of £30,000. Bringing these rights home will mean that the British people will be able to argue for their rights in the British courts - without this inordinate delay and cost." Furthermore, Lord Woolf qtd. In Merris Amos, ed., *Human Rights Law,* 2nd ed. (Oxford: Hart Publishing, 2014) at 5: "In the 1994 FA Mann Lecture, Lord Woolf stated, 'it is unacceptable that our citizens should be able to obtain a remedy which the Government will honour in the European Court of Human Rights, which they cannot obtain from the courts in this country.'"

[30] *Ibid* at para 1.18.

[31] *Ibid* at para 1.16.

proposals were directly transposed into the, now effective, *Human Rights Act* 1998. The Labour government's manifesto delivered a tangible, legislative response to the challenges of the UK's dualist system. To conclude this chapter, I will briefly discuss the political and social context in the UK starting from 2010 with the passing of the infamous "hostile environment" policy.

Is it truly a new human rights age? Addressing social and political realities from 2010 onwards

Starting in 2010, the United Kingdom's Home Office has undertaken the "hostile environment" policy[32] to create stricter immigration regulations with harsher penalties and limited recourses for immigrants.[33] In spring 2018, the "Windrush scandal" made headlines and caused a public retaliation to the Conservative government's "hostile environment" policy.[34] Former Home Secretary Amber Rudd resigned on 29 April 2018 after the Guardian published revealing evidence regarding deportation targets.[35] Sajid Javid replaced Amber Rudd as Home Secretary as a political response to the critical reports demonstrating the inadequacies and systemic failures.[36] He subsequently implemented a review of the practices and culture with the aim to introduce a "fairer, more compassionate"[37] immigration system.[38] Nonetheless, the press made news of the fact that the Home Office's Windrush task force has not informed people deported to Commonwealth countries in the prior year, therefore, leading some commentators to cast

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[32] "Windrush: What is the 'hostile environment' immigration policy?", *BBC News* (20 April 2018).
[33] See Liberty Human Rights' report: "A Guide to the Hostile Environment: The border controls diving our communities - and how we can bring them down" (April 2008).
34 "The UK's Windrush generation: What's the scandal about?", Al Jazeera News (18 April 2018).
35 Heather Stewart and Amelia Gentleman, "Amber Rudd resigns hours after Guardian publishes deportation targets letter", The Guardian (30 April 2018).
[36] Amelia Gentleman, "Revealed: depth of Home Office failures on Windrush", *The Guardian* (18 July 2018).
[37] Amelia Gentleman, "Sajid Javid plans 'fairer, more compassionate' immigration system", *The Guardian* (6 June 2018).
[38] Heather Stewart and Ben Quinn, "Sajid Javid pushes for Home Office changes after Windrush errors", *The Guardian* (2 November 2018).

doubts about the integrity of the revised policy measures.[39] In relation to the Home Office's administrative powers, the ministry has the authority to make changes to immigration rules through secondary legislation. The constant changes and additional requirements are one strategy used with the support of the current political climate and increasing rhetoric against immigration. To quantify this, the Home Office has made more than 5,700 changes to the immigration rules since 2010.[40] In relation to the appeals mechanism, application wait times have increased by 45% between 2016 and 2017 to an average delay of one year.[41]

Rights Brought Home? The proposal for a British Bill of Rights in response to the European Convention on the Human Rights

In response to the ECtHR's supranational scope[42], the Conservative government has proposed the creation of a British Bill of Rights[43] which would replace the HRA, and thus, the direct effect of the ECHR in domestic courts and tribunals.[44] The proposed human rights instrument was side-lined from the Conservative government's agenda after the 2017 elections due to complexity of the results of the referendum vote to leave

[39] "Windrush: Home Office criticised after deportees not contacted", *BBC News* (3 December 2018).
[40] Matha Bozic, Caelainn Barr and Niamh McIntyr, "Immigration Rules in UK more than double in length", *The Guardian* (27 August 2018).
[41] May Bulman, "Waiting times for UK immigration appeals soar by 45% in a year", *The Independent* (27 March 2018).
[42] See Roger Masterman, "The United Kingdom: From Strasbourg Surrogacy Towards a British Bill of Rights?" in S Lambrecht, K Lemmens and P Popelier, eds., *Criticism of the European Court of Human Rights: Shifting the Convention System: Counter-dynamics at the National and EU Level* (Cambridge: Intersentia 2016) at 451 :"… attacks on the European Court and its perceived 'mission creep' increasingly demonstrate a more systemic trend within UK political discourse towards challenging the authority of the Convention system as whole."
[43] See the policy document, "Protecting Human Rights in the UK: The Conservatives' Proposals for Changing Britain's Human Rights Laws."
[44] See the House of Lords European Union Committee's publication "The UK, the EU and a British Bill of Rights: 12th Report of Session 2015-2016 (9 May 2016): https://publications.parliament.uk/pa/ld201516/ldselect/ldeucom/139/139.pdf.

the European Union ("Brexit").[45] The final resolution was that the Bill of Rights would be tabled until after the date when the UK will leave the EU.[46] To date, there has not been any further mention from members of the Conservative party regarding the bill. On this note, a common oppositional sentiment regarding Strasbourg jurisprudence has led to "[t]he 'expansionist' consequences of the living instrument doctrine and the suggestion that the European Court is able to reach too far into the conduct of domestic affairs."[47] Although the scope of this piece is not to hypothesise on the final outcome of Brexit nor to discuss the possible future institutional relationships between the UK and EU, I raise the fact that the referendum vote has projected a policy platform which has looked for repatriating competencies to the domestic UK sphere.[48] As Prime Minister Theresa May has repeatedly stated, Brexit will "take back control", in reference to the supranational relation of EU institutions and the supremacy of EU law.[49] In light of Brexit, I reiterate that the ECHR is an instrument originating from the Council of Europe which is a separate and independent institution from the European Union. Nonetheless, both political and popular belief conflate the European human rights regime as within the powers of the European Union.

Despite the political discourse countering the supranational stance of the European human rights regime, there has been much support and recognition of the contributions that the ECHR and the HRA have made. In recognition of the 65th anniversary of the Convention, Adam Wagner, barrister and founder of rightsinfo.org,

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[45] See the Conservative Party Manifesto 2015.

[46] See the Conservative and Unionist Party Manifesto 2017 at p 37: "We will not bring the European Union's Charter of Fundamental Rights into UK law. We will not repeal or replace the Human Rights Act while the process of Brexit is underway, but we will consider our human rights legal framework when the process of leaving the EU concludes. We will remain signatories to the European Convention on Human Rights for the duration of the next parliament.

[47] Roger Masterman, "The United Kingdom: From Strasbourg Surrogacy Towards a British Bill of Rights?" *supra* note 42 at 468.

[48] For further information on Brexit see Alex Hunt & Brian Wheel, "Brexit: All you need to know about the UK leaving the EU" (10 December 2018).

[49] "Brexit Theresa May's 'letter to the nation' in full", *BBC News* (25 November 2018).

published the achievements of the instrument throughout its history.[50] As well, other influential sources have consistently defended the Convention, with Parliament's own Equality and Human Rights Commission regularly publishing the developments and benefits that both the ECHR and the HRA have had on various communities within the United Kingdom.[51] Lastly, the British Institute of Human Rights has outlined all of the political parties stances regarding the HRA and the ECHR. Of the eight parties covered, only two are for the revocation of the HRA and the direct effect of the ECHR: these being the Conservative Party and UKIP.[52]

Constitutional rights review: structure and outline of the thesis

I will structure the remaining sections of the thesis as follows. First, I will provide a brief overview of the provisions contained within the ECHR and the HRA and the relationship between the ECtHR and domestic UK courts. Then, I will discuss the key terms and legislation that will be analysed throughout. Following this, I will engage with the primary theoretical framework and delineate my interpretation of Aileen Kavangh's constitutional rights review model. I will then interact with the authoritative case law on Articles 3 and 8 ECHR medical cases which will lead to the recent ECtHR decision in *Paposhvili v Belgium* and its current legal debate in the domestic UK context.[53] Thereafter, I examine the recent Upper Tier Tribunal and Court of Appeal cases that consider the *Paposhvili* decision. Finally, I will provide my analysis of the Upper Tier Tribunal case law to reflect upon the overall trends. To conclude, I will summarise my critical analysis, provide a brief comparison of German interpretation of ECtHR jurisprudence, and finally propose suggestions for the domestic rights review framework.

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[50] Adam Wagner, "We must protect the European Convention on Human Rights like it protects us", *The Guardian* (3 September 2018).

[51] See the Equality and Human Rights Commission's web portal, "Understanding Human Rights" available at: https://www.equalityhumanrights.com/en/secondary-education-resources/useful-information/understanding-human-rights.

[52] British Institute of Human Rights, "Where do the parties currently stand on human rights?", online: <https://www.bihr.org.uk/where-do-the-parties-currently-stand-on-human-rights>.

[53] Application no. 41738/10 [2016] ECHR 1113.

Chapter 3: The Human Rights Act, European Convention on Human Rights and competing legal principles

In addition to giving legal effect to the ECHR, the *Human Rights Act* 1998 sets out the remit and obligations of public authorities when exercising their public functions. The HRA grants the judiciary powers of interpretation, the ability to make a declaration of incompatibility and also requires public authorities to perform their duties in alignment with Convention rights. In relation to immigration and asylum, "immigration decisions are acts of public authorities under section 6 HRA and, as such, are required to be compatible with the Convention rights derived from the ECHR."[54] As mentioned, I will primarily focus on section 2 with additional consideration of sections 3, 4 and 6 of the HRA. The statutory wording of these sections are as follows:

- [Section 2 - Interpretation of Convention Rights] Section 2(1)(a) of the HRA states, "A court or tribunal determining a question which has arisen in connection with a Convention right must take into account any judgment, decision, declaration or advisory opinion of the European Court of Human Rights."[55]
- [Section 3 — Interpretation of legislation] Section 3(1) of the HRA states, "so far as it is possible to do so, primary and subordinate legislation must be read and given effect in a way which is compatible with Convention rights."[56]
- [Section 4 - Declaration of Incompatibility] Section 4(2): "If the court is satisfied that the provision is incompatible with a Convention right, it may make a declaration of incompatibility."[57] However, in keeping with the doctrine of parliamentary sovereignty, section 4(6) recognises that "a declaration under this section does not affect the validity, continuing operation or enforcement of the

[54] Gina Clayton, *Textbook on Immigration and Asylum Law*, 5th ed. (Oxford: Oxford University Press, 2012) at 98.
[55] *Human Rights Act* 1998, section 2.
[56] *Human Rights Act* 1998, section 3.
[57] *Human Rights Act* 1998, section 4

provision in respect of which it is given; and is not binding on the parties to the proceedings in which it is made."[58]

- [Section 6 - Acts of public authorities] Section 6(1) affirms that "it is unlawful for a public authority to act in a way which is incompatible with a Convention right."[59] *AM v ECO Ethiopia* confirmed that each decision taken by a public authority which applies an immigration rule(s) is governed by section 6 and therefore must uphold Convention rights.[60]

Section 2 and the relationship between the ECtHR and UK courts

Section 2 of the Human Rights Act maintains that domestic courts must refer to Strasbourg jurisprudence when examining a Convention right. With an emphasis on the word *must*, this section of the HRA acts as a constructive exchange between the European and domestic judicial systems. In this view, it has been held that "section 2 is the provision by which Convention rights have been 'brought into the jurisprudence of the courts through the United Kingdom and their interpretation… far more subtly and powerfully woven into our law.'"[61] In the first years of the HRA, domestic courts approached section 2 as a guideline to view Strasbourg jurisprudence as authoritative in respect to the interpretation of Convention rights.[62] In more recent years, however, domestic courts have challenged the strict adherence principle, by both distinguishing and departing from ECtHR jurisprudence. In relation to the "taking into account"

[58] *Ibid.*

[59] *Human Rights Act* 1998, section 6.

[60] [2008] EWCA Civ 1082 and qtd. in Gina Clayton *supra* 20 at 98.

[61] See *Rights Brough Home: The Human Rights Bill* (Cm 3782, 1997) para 1.14 qtd. in John Wadham et al., eds., *Blackstone's Guide to the Human Rights Act 1998,* 7th ed, Oxford: Oxford University Press, 2015.

[62] John Wadham et al, eds. *Blackstone's Guide to the Human Rights Act 1998,* 7th ed, Oxford: Oxford University Press, 2015 at 63: "in the first decade of the Human Rights Act, domestic courts took the view that the purpose of section 2 was to ensure that the same Convention rights are enforced under the Human Rights Act as would be enforced by the Strasbourg Court and section 2 did not enable courts to adopt an autonomous domestic meaning of Convention rights."

requirement of section 2, Klug and Wilmore[63] describe three approaches on how UK courts apply this:

- "the 'mirror approach' by which the UK courts regard themselves as effectively bound by Strasbourg
- the 'dynamic approach' in which Strasbourg decisions are treated as a floor but not necessarily a ceiling; and
- the 'municipal approach' in which the courts consider the Strasbourg case law but seek to develop a domestic interpretation of Convention rights in specific circumstances."[64]

Of these three approaches, the UK tribunals most follow the mirror and dynamic approaches, with the opinion "that they should follow ECtHR case law where there is, in the words of Lord Slynn, a 'clear and constant jurisprudence' on a particular matter."[6566]

Referring to s. 2(1), the HRA only instructs courts to consider ECtHR jurisprudence, but the judiciary are not obliged to abide by the Strasbourg decisions.[67] *Kay v Lambeth London Borough Council*[68] privileged domestic precedence over Strasbourg jurisprudence, in which "the House of Lords held that lower courts remained

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[63] For discussion on the relationship between section 2 HRA and the European Court of Human Rights see Francesca Klug and Helen Wildbore, "Follow or Lead? The Human Rights Act and the European Court of Human Rights" *E.H.R.L.R.* 6 (2010) 621.

[64] Klug and Wildbore qtd in Gina Clayton *supra* note 67 at 99.

[65] *R (Alconbury Developments Ltd v Secretary of State for the Environment* [2001] 2 WLR 1389 at para 26 qtd in Gina Clayton *supra* note 20 at 99.

[66] In relation to spectrum of where the domestic tribunals sit in relation to the interpretive method, Roger Masterman, *supra* note 42 at 62 states: "s. 2(1) creates a significant judicial discretionary power to apply Strasbourg jurisprudence directly, to take it 'into account' but fail to apply it, or to come to a decision somewhere between the two extremes by either applying (or being influenced by) the Convention jurisprudence to a greater or lesser degree."

[67] For discussion of the non-binding drafting of section 2, see Francesca Klug and Helen Wildbore, "Follow or Lead? The Human Rights Act and the European Court of Human Rights" *E.H.R.L.R.* 6 (2010) 621 at 627: "[a]s the parliamentary debate illustrates, the language of s. 2 was purposefully drafted so as *not* to bind the domestic courts to Strasbourg jurisprudence but merely to 'take [it] into account], whether this results in a departure from Strasbourg jurisprudence or a development of it."

[68] [2006] UKHL 10

bound to follow higher domestic authority in preference to Strasbourg case law."[69] However, prior to the judgment in *Kay,* legal and political scholars raised concern towards the increasingly authoritative Strasbourg jurisprudence in reference to the unanimous House of Lords decision *R (Ullah) v Special Adjudicator*, in which Lord Bingham declared:

> "[t]he national court subject to a duty such as that imposed by section 2 should not without strong reason dilute or weaken the effect of the Strasbourg case law. It is indeed unlawful under section 6 of the 1998 Act for a public authority, including a court, to act in a way which is incompatible with Convention rights."[70]

Many scholars criticised the opinion of the House of Lords which appeared to endorse an authoritative relation towards Strasbourg jurisprudence. Lord Bingham's decision in *Ullah* has generally been extrapolated and read in isolation, rather than alongside other domestic case law. If we return to the judgement in *Kay* above, the courts revisit the section 2 debate and held that while, generally, the courts should recognise Strasbourg case law, domestic tribunals will be bound by the precedential system in the *domestic context*. The implications are a more informative approach with regard to the ECtHR, reflecting a more present judicial deference. One complexity that arises between the duty to refer to ECtHR jurisprudence and the common law precedent system, as upheld by the decision in *Kay*, is that lower-level courts and tribunals may well consider Strasbourg case law, however, they will be bound by any interpretation or determination of a Convention right by a higher-level domestic court. In support of the domestic precedential system, Masterman claims:

> "drawing on the principles which underpin Convention decisions might arguably represent a more realistic interpretation of the s. 2(1) obligation; by denying that domestic courts are obliged to follow and apply the Convention jurisprudence, this construction of s. 2(1) suggests that the domestic courts should be guided by the aims and objectives which inform the Convention and its case-law, rather than

[69] John Wadham, *supra* note 62 at 65.
[70] [2004] UKHL 26 at [20].

applying, in a precedent-like manner, the decisions of an international court of review."[71]

Domestic courts have safeguarded the authority of domestic law and, indirectly, the concept of parliamentary sovereignty. The wording of the HRA grants enough flexible discretion to the judiciary in connection to considering Strasbourg jurisprudence.[72] However, as mentioned above, the decision in *Kay* restricts lower-level tribunals from applying Strasbourg case law if there is an existing domestic precedent. In my opinion, this obfuscates the full realisation of section 2 and hinders the dialogical exchange between domestic courts and the ECtHR. Due to this shift in authoritative guidance, I am examining the intra- and inter-relational differences between domestic- and Strasbourg-developed Convention rights interpretation. My argument adds a contextual layer to Kavanagh's constitutional rights review model by assessing the UK – Strasbourg jurisprudential relationship. As a constitutional instrument, the HRA incorporates a dual rights approach regarding ECHR Convention rights. I believe an analysis of the judiciary's relationship to the Council of Europe institutions is warranted to evaluate the impact on the domestic development of constitutional rights realisation. To conclude, I aim to bring to the fore of the piece the complexities between the common law system of precedent and the authoritative guidance of the ECtHR in connection to Convention rights interpretation.

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[71] Roger Masterman, "Aspiration or Foundation? The Status of Strasbourg Jurisprudence and the Convention Rights in Domestic Law" in Helen Fenwick, Gavin Phillipson and Roger Masterman, eds., *Judicial Reasoning Under the Human Rights Act* (2007) Cambridge: Cambridge University Press 57 at 59.

[72] *Ibid* at 61: "The duty imposed on the domestic court or tribunal is to 'take into account' - not to follow or apply - appropriate Convention jurisprudence, although only insofar as it holds it to be of relevance to the case in hand. The discretion afforded to the court or tribunal may be either with regard to the decision of whether or not to follow the jurisprudence of the Strasbourg court, or concern the weight to be afforded to the Convention jurisprudence in coming to a decision under the HRA."

Chapter 4: Immigration and Convention rights: an overview of the material rights in the European Convention on Human Rights

In this next section, I expand on Articles 3 and 8 of the European Convention on Human Rights and explain the differences between the derogable status of certain Convention rights and those which are classified as non-derogable. As well, both the domestic and Strasbourg courts have developed the standard of review of proportionality exclusively with derogable rights; however, the standard of review for non-derogable rights cannot be balanced against the interests of the state. The section will focus on Article 3 as this is the Convention right which has been held to protect non-regularised migrants with a medical condition from an immigration removal order.

Article 3 of the European Convention on Human Rights

Article 3 of the European Convention on Human Rights is a non-derogable right, meaning that a contracting state cannot instrument any exception to the absolute nature of the right.[73] As written in the Convention, Article 3 establishes the prohibition of torture, and declares: "[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment."[74] In alignment with the other rights of the Convention, the finding of inhuman or degrading punishment has been for ECtHR to assess; this creates a contextual approach to Article 3.[75] However, as an absolute right, it is not the prohibition of torture that is relative, rather the interpretation of inhuman or degrading treatment or

[73] In recognition of the absolute nature of the right enshrined in Article 3, Article 15.2 of the European Convention on Human Rights states: "[n]o derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision."

[74] European Convention on Human Rights, Article 3.

[75] In regard to the threshold requirement see Stephanie Palmer "A Wrong Turning: Article 3 ECHR and Proportionality" *Cambridge Law Journal* Vol 65 No 2 (Jul 2006) 438 at 439: "The high threshold requirement has been maintained through the determination of what type of treatment should be classified as torture, or inhuman or degrading treatment."

punishment in relation to the individual's claim.[76] As recognised in the seminal Article 3 case, *Soering v the United Kingdom* (1989)[77], this approach is "in accord with the object and purpose of the Convention which requires it to be applied in a way that makes its safeguards practical and effective."[78] The adaptable approach to Article 3 allows the ECtHR the flexibility to provide provisions to protect individuals with effective protection. In light of the interpretive nature, the ECtHR in *D v United Kingdom* upheld an Article 3 protection in connection to the applicant's medical condition.[79]

Stephanie Palmer discusses the negative and positive obligations of Article 3 and the complexities of its classification as an absolute right.[80] The negative obligation is the State's (absolute) duty to not subject a person "to torture or to inhuman or degrading treatment or punishment."[81] A positive obligation has been developed through the ECtHR case law to require states "to take all reasonable steps to secure respect for those rights and freedoms to everyone within its jurisdiction as required by Article 1 ECHR."[82] The majority of Article 3 claims have dealt with the positive obligations required of states. For the scope of the medical claims surveyed in this thesis, the Strasbourg court has interpreted Article 3 to find the removal of an individual with a critical medical condition or medical state to amount to inhuman treatment. Regarding the nature of public authorities, the responsibility is not limited to inhuman or degrading acts that have manifested; states are also required to take reasonable measures to preclude the risk of these acts occurring. "In extradition and deportation cases, the Court has found that State responsibility is engaged if acts by the State have 'sufficiently proximate

[76] See Enni Lehto, "Applicability of Article 3 of the European Convention on Human Rights at the Borders of Europe" Helsinki Law Review (2018) at 58.
[77] Application no. 14038/88 [1989] ECHR 14 at 87.
[78] Enni Letho, *supra* note 76 at 58.
[79] Application no. 30240/96 (1997) 24 EHRR 423
[80] See Stephanie Palmer, *supra* note 75.
[81] European Convention on Human Rights, Article 3
[82] Stephanie Palmer, *supra* note 75 at 440. Furthermore, in respect to the positive obligations of Article 3, Palmer states at 440: "[t]he State has a protective or deterrent obligation requiring State authorities to protect individuals from proscribed ill-treatment emanating from State agents as well as private individuals."

repercussions on rights guaranteed by the Convention, even if those repercussions occur outside its jurisdiction,' as per *Ilascu & Ors v Moldova and Russia*[83]*."*[84]

Therefore, the question regarding the evolution of the nature of Article 3 on Contracting States' responsibility is whether the positive obligation also has an absolute character. Palmer is of the view that there should not be any difference in the results, whether they be negative or positive responsibilities, and that proportionality should not be used to quantify an appropriate level of required positive state action.[85] The seminal case of *Soering v United Kingdom* covered the extradition of the individual to the United States where, if found guilty, he would have likely face the death penalty.[86] Palmer is of the view that it appears that the Court balanced the act of extradition with the conditions of detention and the risk of the death penalty against the individual's ECHR rights. The decision found in favour of the applicant on the point that extradition to the United States would expose him to proscribed 'inhuman or degrading treatment or punishment'. To counter the balancing claim, the ECtHR explicitly refused any notion of balancing in *Chalal v United Kingdom* in which the Court "declined to consider the UK government's claim of national security threat" against the risk of inhuman or degrading treatment.[87] Therefore, outright proportionality, even in the context of adducing the scope of the positive obligations is to be prohibited.

While explicit balancing has been rejected by the ECtHR, there are contextual components that must be demonstrated for a successful Article 3 claim; specifically, the severity or risk of inhuman or degrading treatment or punishment, the substantive grounds for this claim and the burden of proof. In relation to medical cases and establishing the "minimum level of severity to engage Article 3"[88], the Court has declared that the assessment is relative to the individual claimant:

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[83] Application no. 48787/99 of 8 July 2004.
[84] Stephanie Palmer, *supra* note 75 at 441.
[85] *Ibid*
[86] (1989) 11 EHRR 439.
[87] (1997) 23 EHRR 413 at para 81 qtd. in Stephanie Palmer, *supra* note 75 at 448.
[88] *GS and EO v Secretary of State for the Home Department* [2012] UKUT 397 at [84].

> "[t]he assessment of this minimum is, in the nature of things, relative; it depends on all the circumstances of the case, such as duration of the treatment, its physical or mental effects, and, in some cases, the age, sex, vulnerability and state of health of the victim."[89]

After the contextual evaluation of the individual's circumstances is held to reach the minimum level of severity, the obligation under Article 3 is absolute.[90] This exercise should not be mistaken with the proportionality balancing test as the circumstances of the individual are not being balanced against any public interests of the states; the individual's Article 3 right is absolute.[91] However, Enni Lehto is of the view that the relative assessment of the individual's case can be used to limit the scope of Article 3.[92] Lehto cites the case of *Babar Ahmad and Others v the United Kingdom*[93] in which the ECtHR claimed that if the treatment were to occur in a non-contracting state the claim "might not attain the minimum level of severity which is required for there to be a violation of Article 3 in an expulsion or extradition case."[94] In relation to medical claims, it has been accepted as authority that non-regularised individuals do not have a right to access medical or other social assistance in the host state and that "Article 3 does not place an obligation on the Contracting State to alleviate such disparities through the provision of free and unlimited health care to all aliens without a right to stay within its jurisdiction.[95] A finding to the contrary would place too great a burden on the Contracting States."[96] In

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[89] *Ireland v United Kingdom* application no. 5310/71 of 18 January 1978 at [162].

[90] *Chalal v United Kingdom* (1996) 23 EHRR 413.

[91] See Stephanie Palmer, *supra* note 75 at 439: "The Court is not carrying out a balancing exercise in determining whether the severity threshold has been met. By focusing on the individual case and the victim in question, it is engaging in an exercise of relativity… The relativity element does not detract from the absolute nature of Article 3, as it does not qualify the right."

[92] See Enni Lehto, *supra* note 76 at 69.

[93] Application no. 24027/07 [2012] ECHR 609

[94] Enni Lehto, *supra* note 76 at 69-70.

[95] Article 3 is framed as a negative right, albeit one with positive obligations. In the international human rights framework, the right to health is a positive right and as such is to be addressed by the state in a progressive manner.

[96] *N v the United Kingdom* [2008] EHRR 39 at 42. Furthermore, in this assessment: "[t]he fact that the applicant's circumstances, including his life expectancy, would be significantly reduced

the relative assessment of the applicant, there are indications that a form of balancing does occur when contextualising the facts of the case. However, the relative approach still does not detract from the Article 3 right in itself, rather it is used to assess whether the expulsion and the situation of the individual in the country of origin would amount to a situation equivalent to inhuman or degrading treatment or punishment. Perhaps this is a nuanced reading of the judgment, but I do agree with Palmer in that it is not an outright exercise of the proportionality balancing approach that is used with the qualified rights of the ECHR. I now turn to Article 8 which carries with it a different interpretation and analysis process.

Article 8 of the European Convention on Human Rights

In the survey of case law, Article 8 of the Convention is commonly invoked in conjunction with Article 3 claims. Article 8 ECHR is a qualified right and establishes the right to respect for private and family life. Article 8 states:

- "Article 8(1): Everyone has the right to respect for his private and family life, his home and his correspondence."
- "Article 8(2): There shall be no interference by a public authority with the exercise of this right except such as 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 of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."[97]

In contrast to Article 3 which upholds the absolute right against torture, inhuman or degrading treatment, Article 8 can be qualified under the enumerated public policy categories established in Article 8(2). In relation to immigration appeals, Article 8 is commonly used to secure the right to family reunification, especially in the context of an EU-citizen dependent on a third-country national parent. For the purpose of medical

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if he were to be removed from the Contracting State is not sufficient in itself to give rise to breach of Article 3."

[97] European Convention on Human Rights, Article 8.

cases, Article 8 has a lower threshold in relation to proving that there is a connection to the individual's private or family life, however the qualified conditions generally permit the State to argue, on the balance of factors, that the deportation of the individual is not disproportionate to the greater public policy measure. As a qualified Convention right, Article 8 invokes a proportionality assessment, or balancing of factors approach. To summarise the principle, it is a balancing exercise between the infringed right(s) to the individual against the greater public interest or policy. As I seek to provide an introduction to Articles 3 and 8, I will further discuss the proportionality principle in relation to the concepts of judicial deference and parliamentary sovereignty in the next chapter.

Chapter 5: Approaches to substantive rights review: Aileen Kavanagh's constitutional review and Stephen Gardbaum's commonwealth model of constitutionalism

Overview of the two theoretical frameworks and my argument's position

Aileen Kavanagh's constitutional review mechanism developed in her book, *Constitutional Review under the UK Human Rights Act,*[98] provides the foundation to my analytical framework. Kavanagh elucidates a dialogical constitutional review framework that recognises the cooperative functions between the three branches of government in relation to the overall constitutional rights mechanism. Her opposition to the strict separation of power's argument is primarily centred on the premise that constitutional rights do not become embodied in isolation. To further situate the common law model of rights review, I also refer to Stephen Gardbaum's *The New Commonwealth Model of Constitutionalism*.[99] Both authors situate themselves in the continuum between the traditional binary models of legislative and judiciary supremacy. Gardbaum proposes his new model as a third approach that positions itself between the polar ends of strict political or judicial rights reviews. He examines the structure underlying the bills of rights introduced in Canada, New Zealand and the United Kingdom.[100]

With a focus on Kavanagh's constitutional review model, I believe that a more contextualised approach to rights review as carried out through the judicial review apparatus provides for a more holistic assessment of the ECHR framework. In addition, both author's innovative model, grounded in the de facto functioning of the institutions in a parliamentary democracy, better conceptualises the judiciary's increased constitutional powers while upholding the doctrine of parliamentary sovereignty; furthermore, they appreciate the direct contribution that the judiciary has had in the

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[98] Aileen Kavanagh, *Constitutional Review under the UK Human Rights Act* (Cambridge: Cambridge University Press, 2009)

[99] Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism: Theory and Practice* (Cambridge: Cambridge University Press, 2013).

[100] *Canadian Charter of Rights and Freedoms*; *Human Rights Act* 1993 (New Zealand)

development and interpretation of constitutional rights. The cooperative relationship between the different branches of government should permit a flexible and comprehensive response as constitutional rights require a dynamic structure. Rights cannot be divorced from the complexities of the political arena nor should rights of individuals be overlooked to discharge public authorities' obligations. The safeguarding of substantive rights will necessarily require a balancing approach between the interests of the individuals and those of the greater community.

I build upon Kavanagh's framework to examine the UK judiciary's functions as legislated in section 2 HRA. Moreover, I look at the dialogical aspect imbedded in section 2 HRA and examine the similarities and differences between the domestic and ECtHR Convention rights interpretation and reasoning. By assessing s. 2 HRA through Kavanagh's constitutional rights review model I wish to assess the benefits and limitations to the dialogical mechanism afforded to the judiciary. I contend that reviewing the interpretative approach at the domestic level with the ECtHR is fundamental to fully consider the HRA's constitutional review scope.

I assert that bringing these tools to the fore of the case law survey will permit a comprehensive examination of the role of section 2 HRA which obliges the UK judiciary to consider the case law of the ECtHR. Concretely, my addition to Kavanagh and Gardbaum is that I will be assessing whether this statutory obligation to take Strasbourg jurisprudence into account is actually carried out in a holistic manner, and if not, how an interpretation in light of the aforementioned theoretical frameworks could provide an alternative model for substantive rights review. I bring this about in light of the current legal enquiry of the domestic applicability of the *Paposhvili* test which has reached the Court of Appeal. Currently, the Article 3 ECHR development as adjudicated by the ECtHR in *Paposhvili* had led to an interpretative discrepancy in the domestic sphere.[101] The conflict has arisen due to the challenges between observing the duty to consider ECtHR jurisprudence and the authoritative common law principle of precedent as outlined in *Kay v Lambeth London Borough Council*.[102] My application of these two author's frameworks

[101] Paposhvili v Belgium Application no. 41738/10 [2016] ECHR 1113
[102] [2006] UKHL 10

will be referred to as constitutional rights review due to my focus on the substantive rights review capacity of the judiciary as afforded by the HRA.

Stephen Gardbaum's commonwealth model of constitutionalism

Gardbaum responds to the traditional constitutional academics' mutually exclusive options of legislative and judicial supremacy. He argues that in reality the constitutional framework is neither solely one nor the other, rather it will fluctuate dependent upon the socio-political circumstances as well as the cultural traditions of the state. He is proposing this structure in support of the recent rights-based instruments legislated in certain commonwealth countries as advancing a machinery that protects "rights within a democracy through a reallocation of powers between courts and legislatures that brings them into greater balance."[103] Specifically, "the new model's novel third approach calls for the enactment of a bill of rights and its enforcement through the twin mechanisms of judicial and political rights review of legislation, but with the legal power of the final word going to the politically acceptable branch of government, rather than the courts."[104]

Gardbaum's 'third approach' model is a dialogical method that is in constant consideration, or negotiation, with the two traditional models of political rights review and judicial review. The structure supports judicial review without extending this to judicial supremacy and thereby also providing a backstop to political supremacy.[105] I support the view that in terms of constitutional rights instruments there should be a constant conversation occurring between the inter-dependent branches of government. How much should the balance be tilted to one branch or another cannot be fixed; however, I am of the view that a respectful recognition of the merits and legitimacy of each political organ's role in the constitutional framework will be more conducive than solely relying on

[103] Stephen Gardbaum, *supra* note 99 at 1.
[104] *Ibid* at 2. Furthermore at 1, "[t]he 'new model' refers to a common general structure or approach underlying the bills of rights introduced in recent years in Canada (1982) and the UK (1998). This approach self-consciously departs from the *old* or traditional Commonwealth model of legislative supremacy, in which there is no general, codified bill of rights."
[105] *Ibid* at 61.

an "overriding" or strike out remedy. As part of the model, Gardbaum utilises two techniques for protecting rights:

- "The first technique requires both of the elected branches of government to engage in rights review of a proposed statute before and during the bill's legislative process. Political rights review is a direct and alternative response to the standard concerns about legislative/majoritarian rights sensibilities that underlie the traditional argument for judicial review of legislation."[106]
- "The second technique of rights protection is weak-form judicial review. It is this technique that decouples judicial review from judicial supremacy, meaning that although the courts have powers of constitutional review, they do not necessarily or automatically have final authority on what the law of the land is."[107]

Interestingly, Gardbaum argues that by utilising a weaker-form version of both judicial review and legislative supremacy, the commonwealth model adds a dialogical element between the different branches of government, which in turn, implements constraints on each branch.

As part of this exchange-based approach, I believe it can be mapped onto the relationship between the domestic tribunals and the European Court of Human Rights. As required by sections 2 and 6 of the HRA, the tribunals must consider the Strasbourg jurisprudence, and as public authorities, they must also act in accordance with the Convention. The nature of the judiciary in the UK, along with the powers, duties and remedies established by the HRA do permit the model to be applied to the UK context. Although not formally within the domestic political institutions, it can be argued that the ECtHR may act as an external review mechanism, thereby adding an additional review form of the domestic judiciary. I address this element when considering the judiciary's obligation with section 2 HRA in consideration of the *Paposhvili* test.

Aileen Kavanagh's constitutional rights review

[106] *Ibid* at 25-26.
[107] *Ibid* at 26.

I now move on to discuss Aileen Kavanagh's constitutional rights review approach. Kavanagh writes this foundational piece ten years after the passing of the HRA. In recognition of the fervent academic, legal and political debates, she has taken on the extensive analysis in order to:

> "contribute to the boarder constitutional debate – by examining critically the nature and extent of the alleged 'transfer' of power to the judiciary, by subjecting both the interpretive method and the substantive outcomes of the HRA case law to critical scrutiny, and finally, by taking a stance on the normative argument about the desirability and legitimacy of giving the courts strong powers of constitutional review."[108]

Similar to Gardbaum, the traditional academic and legal opinion has been of safeguarding the legacy and freedom of parliamentary supremacy in opposition to the judicial supremacy model.[109] With respect to the active debate, and disagreements, over the judicial powers granted by the HRA, Kavanagh carries out a doctrinal analysis to examine the specific tools and remedies of the HRA in light of the legitimacy of rights review capacity of the judiciary.[110]

On this point she declares that all three branches of the government have an inter-relational responsibility in regard to the HRA. Although she recognises the utility in the separation of powers doctrine, she opposes its use as she argues that no one branch of the government is solely independent in relation to the review and interpretation of constitutional rights.[111] As the scope of this thesis is on the role of the judiciary, I focus on her assessment of the courts' powers in relation to the HRA. Kavanagh distinguishes the traditional judicial review competency of the courts and centres her analysis on the

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[108] Aileen Kavanagh, *supra* note 98 at 2.

[109] *Ibid* at 3: "[b]elief in the value and importance of strong parliamentary government has been an important strand of British legal and political though."

[110] *Ibid* at 7.

[111] *Ibid* at 8-9. Kavanagh at 8 further claims," [t]his ['separation of powers] nomenclature is eschewed because it lends credence to a view which underestimates both the legitimate interaction between the three branches of government and the considerable overlap in the constitutional roles of each branch."

new HRA-based review powers. Specifically, she states, "the courts' powers to review primary legislation under the HRA shall be called 'constitutional review'. This distinguishes it from their traditional powers of 'judicial review' with respect to public authority decision-making in administrative law.[112] In respect of the denomination of constitutional review, Kavanagh declares that her terminology "highlights the constitutional character of the courts' supervisory powers, and indeed, the constitutional importance of the HRA itself."[113]

In this view, I also affirm that it is specifically sections 2, 3, 4 and 6 of the HRA that fortify the judiciary's review role in connection to complying with the ECHR. The impact of the interpretive scope puts "rights and rights-based thinking more central to the constitutional agenda and therefore makes the courts a key participant in setting that agenda."[114] I will engage with Kavanagh's analyses of these specific sections of the HRA, however, the seminal focus of my assessment will be the judiciary's carrying out of section 2 which requires the courts to take Strasbourg case law into account.

Duty of the Courts under Section 2

Section 2 of the *Human Rights Act* 1998 states that the courts 'must take into account' any judgment, decision or opinion of the European Court of Human Rights.[115] Although this section does not create a binding precedent between the ECtHR and

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[112] *Ibid* at 5. In this regard, Kavanagh further states, "[m]ore importantly, it highlights the constitutional character of the courts' supervisory powers, and indeed, the constitutional importance of the HRA itself.'

[113] *Ibid* at 5. See further at 5-6: "[b]y granting the courts the power to review primary legislation for compatibility with Convention rights, the HRA gives the courts a special responsibility with respect to the enforcement of Convention rights. […] [t]he HRA strengthens the constitutional role of the courts, by allowing judges to determine the existence and content of the legal obligations flowing from Convention rights, in response to litigation. It makes rights and rights-based thinking more central to the constitutional agenda and therefore makes the courts a key participant in setting that agenda."

[114] See Alan Brady, *supra* note 16.

[115] This is extended further as Aileen Kavanagh, *supra* note 98 at 144 states: "the mandatory duty imposed on the courts by section 2 is not confined to cases of statutory interpretation, it applies in any proceedings where judges are 'determining a question which has arisen in connection with a Convention right."

domestic case law, it does strongly persuade domestic courts to follow the development of Strasbourg jurisprudence.[116] Furthermore, section 2 also allows the courts the flexibility to distinguish, adapt or disregard Strasbourg case law.[117] On this note, section 2 applies to all Strasbourg jurisprudence and is not limited to the review of domestic legislation. However, the domestic approach of following Strasbourg decisions has waned over the years with the decision in *Kay v Lambeth Borough Council* holding that all tribunals below the UK Supreme Court are obligated to follow domestic precedent as authoritative.[118] From Kavanagh's doctrinal review, she arrives at a conclusion which predates the *Kay* judgement above: "it follows that when interpreting legislation compatibly with Convention rights, the domestic courts must recognise the interpretive supremacy of the ECtHR… lower-level courts are bound to the domestic authority regarding Convention interpretation"[119] In drafting and applying section 2 HRA, the lack of authoritative Strasbourg jurisprudence does permit for more flexibility at the domestic level, however it also results in some limitations to the extent of Convention rights-development within the domestic context. Nonetheless, a statutorily-supported dialogue between domestic and ECtHR courts has resulted in the latter acting as a court of last instance for constitutional rights review due to its power to review national court proceedings and decisions as the authoritative arbiter of ECHR rights.

Interaction between sections 3 and 4

Section 3 is an interpretive mechanism granted to the courts to read legislation in a way that is compatible with Convention rights. The process does not occur with the

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[116] See the then Lord Chancellor, Lord Irvine, qtd. In Aileen Kavanagh, *ibid* at 146: "[courts] may depart from existing Strasbourg decisions and *on occasion* it might well be appropriate to do so… However, where it is relevant, we would of course expect our courts to apply Convention jurisprudence and its principles to the cases before them."

[117] *Ibid* at 150: "the superior expertise of the domestic courts on the domestic context of the case warrants the flexibility to distinguish."

[118] As per *Kay v Lambeth London Borough Council* [2006] UKHL 10

[119] See Aileen Kavanagh, *supra* note 98 at 145 regarding the wording of section 2 HRA 1998, "[f]rom these debates, it seems that the Government was keen to ensure that the domestic courts would retain a discretion to depart from Strasbourg case law in certain circumstances."

courts reading proposed bills from Parliament and giving their opinion prior to its passage. Rather, on applications for judicial review, the courts must interpret the "contravening" legislation so that it will be compatible with the invoked Convention right. This interpretative mechanism can be understood as a remedial tool, one that will grant relief to the individual claiming the infringed right; however, it will be up to Parliament to rectify the legislative inconsistencies.[120] The courts can only read so much into an Act of Parliament before actually amending or rewriting the piece of legislation; if the legal instrument is clearly incompatible with the ECHR, then the courts have the authority to make a declaration of incompatibility, as per section 4 of the HRA. As a constitutional review action, the declaration of incompatibility "provides the legislature with a considered judicial view of the rights compatibility with the legislation. It can then reflect on its actions and either take the remedial steps provided for in section 10 of the Act or exercise its retained sovereign prerogative to disagree with the judicial assessment and confirm its initial view of its legislation."[121] In regard to the principle of parliamentary sovereignty, section 4 does not grant the judiciary a strike down remedy; parliament is not legally obliged to amend nor abolish the incompatible legislation. Both tools granted to the judiciary do not override the Act of Parliament, however, they serve as a strong indicator that the legislative drafting is not compatible with the Convention. The court's use of either section 3 or 4 indicates that if no remedial action is taken, an appeal to the ECtHR will likely find a similar infringement and make a declaratory judgment obliging the UK government to amend or rectify the incompatible legislation.

Proportionality and deference under the HRA

[120] *Ibid* at 118: "[a] central theme in Lord Steyn's judgment in *Ghaidan v Mendoza* [2004] 3 WLR 113 was the idea that in order to understand s 3(1) fully, we need to appreciate its role in the 'remedial scheme' of the 1998 Act." Furthermore at 119: "[h]is Lordship emphasised repeatedly that s 3(1) is 'the prime remedial measure' of the 1998 Act, whereas section 4 is a 'measure of last resort' [at paras 46 and 50]."

[121] Geoffrey Marshall, "The Lynchpin of Parliamentary Intention: Lost, Stolen or Strained? (2003) *Public Law* 236 qtd. in Aileen Kavanagh, *ibid* at 139.

Article 3 of the ECHR (the prohibition of torture and inhuman or degrading treatment or punishment) is an absolute and non-derogable right meaning there are no exceptions or limitations on this right and states cannot derogate from the right under any circumstances. Articles 8-11 of the ECHR are qualified rights. As an example, Article 8(2) – the right to private and family life – enumerates situations in which derogations from this right are permissible. Article 15 explicitly permits Contracting States the option to derogate from specific Convention rights in a time of war or other public emergency. To contrast this, Article 15(2) specifically prohibits any derogation from Articles 2, 3, 4(1) and 7 ECHR.

The very nature of absolute rights, such as Article 3, do not permit a balancing assessment, rather the review of the administrative action will be to determine whether or not the act may be considered as an act amounting to torture and/or inhuman or degrading treatment or punishment.[122] Straightforwardly, this is because the ECHR itself does not permit *any justification* of an act that amounts to a breach of Article 3; therefore, there can never be a "justified" inhuman or degrading act carried out by a public authority. Proportionality is a reserved tool for qualified Convention rights (articles 8-11 ECHR) and would not be appropriate for the absolute rights as this would affirm that there would be certain public policy objectives that would permit a derogation from safeguarding the right and, thus, would eliminate the very absolute nature of the right. In relation to the review of Convention rights, the House of Lords upheld the use of the standard of review of proportionality in *R (Daly) v Secretary of State for the Home Department*.[123] In affirming that the ground of proportionality permitted a more intense review, Lord Steyn stated three reasons to justify its use in HRA-based claims:

> "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

[122] See European Commission, Migration and Home Affairs, "Fundamental Rights" (11 December 2018) available at https://ec.europa.eu/home-affairs/content/fundamental-rights_en.
[123] [2001] UKHL 26

> attention to be directed to the relative weight accorded to interests and considerations. Thirdly, even the heightened scrutiny test is not necessarily appropriate to the protection of human rights."[124]

Proportionality requires a more comprehensive approach in the rights review process compared to the traditional common law standards of review. In support of the restriction of proportionality to qualified Convention rights, Leigh states "with reference to these more important rights, a form of 'primary review' or 'merits review' is constitutionally mandated."[125]

The application of proportionality is, in a contextual manner, reviewing the circumstances of the individual in question.[126] As Kavanagh clearly elucidates, "proportionality is invoked by the courts in order to ensure that legal measures are not excessive in relation to the social problems they are intended to solve, but *also* that it does so in a way which is not unduly restrictive of human rights."[127] Kavanagh enumerates three advantages of proportionality being: 1) it permits a more invasive review of legislative and executive action; 2) it places the burden on the public authority to justify their action/decision; and 3) in contrast to the *Wednesbury* unreasonableness standard, proportionality permits a more structured and methodical assessment.[128] My discussion of the proportionality standard of review will be limited to its exercise in relation to Article 8. To conclude, I want to reinforce that proportionality is not a tool for the judiciary to substitute its own conclusion to the facts of the case or to the process in which the decision maker arrived to their decision, rather the balancing test is orientated

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[124] *Ibid* at [27].

[125] Ian Leigh (2002) qtd in Kavanagh, *supra* note 102 at 258. Furthermore, with reference to proportionality, ""it entails a 'dilution of the rights which were meant to be 'unqualified' and this goes against the importance given to them by the text of the Convention."

[126] Aileen Kavanagh, *supra* note 98 at 233: "proportionality is thus presented as a relation concept, the legal response to a problem must be proportionate to the nature and severity of that problem."

[127] *Ibid* at 233.

[128] *Ibid* at 253-254.

towards the principal question: has there been an infringement of the Convention right(s), and if so, can it be justified.[129]

The balancing nature of proportionality review can cause tension with the principle of parliamentary sovereignty and the legislative powers granted to either the public authority or decision-maker. In contrast to other standards of review of administrative action, the rights-review approach of proportionality places a greater emphasis on the fundamental right(s).[130][131] Brady declares that "the invasiveness of review is necessitated by the Human Rights Act itself. By introducing justiciable fundamental rights, the Human Rights Act created a situation whereby government decision-makers would have to be held to a higher standard."[132] Nonetheless, the courts are cognisant of the fact that legislation generally grants authorities a wide discretion in making administrative decisions. Because of the legislative intent and the principle of a democratically elected legislature, the balancing aspect of proportionality will weigh between the infringed right and the policy behind the legislation. Also known as judicial deference, this is when the judiciary will defer to, or yield, to the decision-making process of Parliament.[133]

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[129] See *R (SB) v Denbigh High School* [2006] UKHL 15 per Lord Bingham at [29]: "the focus at Strasbourg is not and has never been on whether a challenged decision or action is the product of a defective decision-making process, but on whether, in the case under consideration, the applicant's Convention rights have been violated."

[130] Alan Brady *supra* note 16 at 19: "As a means of assessing government action, proportionality puts human rights to the fore in a way that does not occur with unreasonableness review of administrative action.

[131] See *Belfast CC v Miss Behavin Ltd* [2007] *per* Lady Hale: "The role of the court in human rights adjudication is quite different from the role of the court in an ordinary judicial review of administrative action. In human rights, the court is concerned with whether the human rights of the claimant have in fact been infringed, not with whether the administrative decision-maker properly took them into account. If it were otherwise, every policy decision taken before the Human Rights Act came into force but which engaged a Convention right would be open to challenge."

[132] *Ibid* at 19.

[133] In *R v Director of Public Prosecutions Ex p Kebeline & Ors* [1999] UKHL 43 at Lord Hope observed "[i]n some circumstances it will be appropriate for the courts to recognise that there is an area of judgment within which the judiciary will defer, on democratic grounds, to the considered opinion of the elected body or person whose act or decision is said to be incompatible with the Convention."

Kavanagh expands on the deference approach and marks a distinction between minimal deference and substantial deference.[134] "Minimal deference is essentially a form of presumptive respect: it means that a court will not overturn a decision merely because it can think of a better answer to the primary question than the initial decision-maker."[135] Whereas substantial deference will be better suited in certain circumstances in which the public authority has "more institutional competence than the court, more expertise than the court and more legitimacy than the court."[136] This reflects the non-prescriptive approach of proportionality and that the judiciary will apply it to the specific facts of the case. While precedents and decisions taken at the European Court of Human Rights will surely be taken into consideration, the four-part test will be applied to specific facts of the case to weigh the infringement on the rights of the claimant against the public policy.[137] The overall balancing procedure is the fourth element of the proportionality test.[138] The arguments of democratic legitimacy and institutional competence support the notion of deference; the former supports the view that "certain decisions should be taken by the body most accountable to the electorate" and the latter "suggests that certain decisions should be taken by the body with the greatest degree of expertise."[139]

Concluding remarks on the nature of the Human Rights Act 1998

There has been a vast amount of discussion regarding the status of the HRA and the changes in the dynamic between the judiciary and legislative/executive branches with the views ranging from it being a transfer of legislative power to a reduction of judicial

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[134] See Aileen Kavanagh, "Deference or Defiance? The Limits of the Judicial Role in Constitutional Adjudication" in Grant Huscroft, ed, *Expounding the Constitution: Essays in Constitutional Theory* (2009) Cambridge: Cambridge University Press.

[135] Aileen Kavanagh quoted in Alan Brady *supra* note 16 at 25.

[136] Aileen Kavanagh quoted in Alan Brady *supra* note 16 at 25.

[137] In relation to the overall balancing stage, Alan Brady *supra* note 16 at 57 observes "[o]nce the least intrusive means of achieving a particular legitimate aim has been chosen, the question still remains whether the level of intrusion on the protected right is in fact justified by the public interest being pursued."

[138] See *Huang v Secretary of State for the Home Department* [2007] UKHL 11 at para 19.

[139] Alan Brady *supra* note 16 at 106.

power.[140][141][142] In relation to the power of review, the HRA expands on the interpretive mechanism the courts have exercised in the administrative and constitutional capacities via the traditional common law methods of review. In response to the argument that it is a transfer of legislative power, Kavanagh asserts that "the function performed by the courts in determining the Convention-compatibility of legislation in response to litigation is not something that Parliament has ever done."[143] The constitutional rights review is dependent upon a dynamic relationship between the three branches of government as well as between the judiciary and the European Court of Human Rights.[144]

The HRA should be viewed from the perspective that its primary function is to give effect to and safeguard Convention rights; the functions granted to the respective branches of government are constitutional roles as deemed necessary to support the realisation of the ECHR. In comparison to pre-HRA, the domestic court's constitutional role has, in effect, increased with regard to the other government branches. Beyond the institutions of the state, the HRA also permits individuals to challenge legislation, public authorities' decision-making power as well as hold the state to a greater level of accountability.[145] I cite Lady Hale's declaration of the role of the court in human rights adjudication to illustrate and support the constitutional review model developed by Kavanagh:

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[140] Connor Gearty "states that the HRA is a transfer of legislative power" qtd. in Kavanagh, *supra* note 98 at 274.

[141]Countering the traditional view that the HRA increases judicial power, Sandra Fredman argues that "by making judges subject to a democratically enacted list of rights, rather than entirely free to develop the common law unconstrained by such a text, it actually limits rather than expands judicial power" qtd. in Kavanagh, *supra* note 98 at 274.

[142] Lastly, in a more moderate approach, Tom Campbell "describes the power as one of 'concretising and implementing Convention rights" qtd. in Kavanagh, *supra* note 98 at 274.

[143] Aileen Kavanagh, *supra* note 98 at 276. In addition at 278: "[t]he judges' law-making ability is so severely circumscribed in comparison to the primary law-making powers of Parliament, that it is misleading to suggest that judges can legislate."

[144] *Ibid* at 278: Kavanagh contends that "[t]he courts provides a corrective mechanism which makes them part of the system of rights protection - but they are not, cannot and should not be the whole of that system."

[145] By giving direct effect to the ECHR in domestic law, individuals can raise a Convention claim in any national court or tribunal.

> "[t]he role of the court in human rights adjudication is quite different from the role of the court in an ordinary judicial review of administrative action. In human rights adjudication, the court is concerned with whether the human rights of the claimant have in fact been infringed, not with whether the administrative decision-maker properly took them into account."[146]

Due to the nature of human rights protection, the focus of the review assessment must hinge on the right itself if we are to protect the foundations of the constitutional system. To conclude, my argument builds upon Kavanagh's constitutional rights review framework to examine the judiciary's inter- and intra-relational aspects of section 2 HRA. Based on the dialogical component of referring to both domestic and Strasbourg jurisprudence, I wish to examine the constitutional rights review brought about by the increased judiciary's powers under the HRA. In addition, my survey of First-tier Tribunal and Upper Tribunal case law raises the question concerning the challenges in reconciling the authoritative guidance of the ECtHR in Convention rights interpretation with the common law principle of precedent. Beyond the substantive framework of the HRA, a principal theme to be considered in my examination of the forthcoming survey of case law is that of the constitutional review process.

[146] *Belfast City Council v Miss Behavin' Ltd (Northern Ireland)* [2007] UKHL 19 per Lady Hale at [31].

Chapter 6: Authoritative precedents set in D United Kingdom, N v Secretary of State for the Home Department and N v United Kingdom

Introduction

The authoritative judgments accepted in domestic UK jurisprudence in relation to Article 3 ECHR medical-related immigration cases are: *D v United Kingdom*[147], *N v Secretary of State for the Home Department*[148] and *N v United Kingdom*[149]. *D v United Kingdom* (D) and *N v United Kingdom* (N v UK) are judgments from the ECtHR, while *N v Secretary of State for the Home Department* (N v SSHD) is a decision taken by the House of Lords. The House of Lords judgment was appealed to the European Court, which upheld the national court's decision. In this section I will outline the reasoning first in *D*, followed by *N v SSHD* and *N v UK*.

The Courts and Tribunal System in the United Kingdom

Prior to engaging with the authoritative case law, I will briefly state the restructuring of the courts and tribunal system regarding applications for judicial review and appeals.[150] Following the Tribunals, Courts and Enforcement Act 2007, the court system for cases concerning immigration law was restructured. As of 15 February 2010, the First-Tier Tribunal is the court of first instance for appeals against decisions made by the Home Secretary or an immigration officer, decisions taken by the UK Border Agency to refuse or terminate support for asylum seeks, and decisions made by the Office of the Immigration Services Commissioner. For an application for judicial review, the Upper Tribunal (Immigration and Asylum Chamber) is permitted to adjudicate on the matter as well as to hear appeals from the First-Tier Tribunal. The Civil Procedure Rules set out the

[147] Application no. 30240/96 (1997) 24 EHRR 423
[148] [2005] UKHL 31
[149] Application no. 26565/06 [2009] ECHR 453
[150] For more information on the courts and tribunal system, see Mark Elliott, Jack Beatson and Martin Matthews, eds., *Administrative Law: Text and Materials*, 4th ed. (Oxford: Oxford University Press, 2011).

procedure for judicial review which beings with the pre-action protocol and moves along to the permission stage, *locus standi* and time limit to lodge an application for review.[151]

D v United Kingdom

D v United Kingdom held the act of deporting the appellant to his country of origin, St Kitts, would be equivalent to inhuman or degrading treatment or punishment. This case falls within the contextual approach of the European Court's reasoning of Article 3. The appellant D, a national from St Kitts, was diagnosed with HIV while serving a prison sentence in the UK.[152] Of note, this decision was made prior to the passing of the HRA. D's Article 3 claim could only be considered by the ECtHR after exhausting all of his domestic judicial recourses. In his application to the European Commission, D "alleged that his proposed removal to St Kitts would be in violation of Articles 2, 3 and 8 of the Convention and that he had been denied an effective remedy to challenge the removal order in breach of Article 13."[153]

The Court determined that the individual's Article 3 right had been violated.[154] In its reasoning, the Court referred to its authority regarding the absolute nature of Article 3 and its application to cases of extradition, expulsion or deportation of individuals to third

[151] The Civil Procedure Rules (United Kingdom) 1998 No. 3131 (L. 17) as amended.
[152] See *D v United Kingdom* [1997] ECHR 25 at para 8: "In August 1994, while serving his prison sentence, the applicant suffered an attack of pneumocystis carini pneumonia ("PCP") and was diagnosed as HIV (human immunodeficiency virus)-positive and as suffering from acquired immunodeficiency syndrome (AIDS). The infection appears to have occurred sometime before his arrival in the United Kingdom."
[153] *Ibid* at para 37.
[154] Prior to reaching the ECtHR, the European Commission considered D's application and approved it for consideration stating in *D v United Kingdom, ibid* at [45]: "the Commission concluded that the removal of the applicant to St Kitts would engage the responsibility of the respondent State under Article 3 even though the risk of being subjected to inhuman and degrading treatment stemmed from factors for which the authorities in the country could not be held responsible. The risk was substantiated and real. If returned, he would be deprived of his current medical treatment and his already weakened immune system would be exposed to untreatable opportunistic infections which would reduce further his limited life expectancy and cause him severe pain and mental suffering."

countries.[155] The judges of the Grand Chamber presented their consideration of the fundamental right in question as follows:

> "the Court must reserve to itself sufficient flexibility to address the application of that Article [Art. 3] in other contexts which might arise. It is not therefore prevented from scrutinising an applicant's claim under Article 3 where the source of the risk of proscribed treatment in the receiving country stems from factors which cannot engage either directly or indirectly the responsibility of the public authorities of that country, or which, taken alone, do not in themselves infringe the standards of that Article. To limit the application of Article 3 in this manner would be to undermine the absolute character of its protection. In any such context, however, the Court must subject all the circumstances surrounding the case to a rigorous scrutiny, especially the applicant's personal situation in the expelling State."[156]

It is the "living instrument" characteristic of the ECHR that permits even an absolute right to be flexible enough to apply to specific factual circumstances on an individual. While the expanding nature has been criticised by many political actors, the fundamental rights approach invested in the ECHR is ultimately to uphold, secure and afford the Convention rights to individuals.

In this view, the Court did find that the exceptional circumstances and the applicant's critical medical condition at the moment of the judgment would mean that a decision to deport him would amount to inhuman treatment by the UK government.[157] The Court was cautious of the possible legal implications of their decision and underlined the fact that the provision of medical treatment to a non-regularised individual will not

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[155] *Ibid* at para 47: "the Court has repeatedly stressed in its line of authorities involving extradition, expulsion or deportation of individuals to third countries that Article 3 (art. 3) prohibits in absolute terms torture or inhuman or degrading treatment or punishment and that its guarantees apply irrespective of the reprehensible nature of the conduct of the person in question."

[156] *Ibid* at para 49.

[157] *Ibid* at para 53: "In view of these exceptional circumstances and bearing in mind the critical stage now reached in the applicant's fatal illness, the implementation of the decision to remove him to St Kitts would amount to inhuman treatment by the respondent State in violation of Article 3."

automatically set a precedent of entitlement to remain in the Member State in order to benefit from medical assistance. Rather, it was the exceptional circumstances of D's condition and the assessment of the medical facilities and conditions in St Kitts that led to finding the decision to deport D would amount to inhuman treatment.[158]

To summarise, the ECtHR held that by deporting D with his medical condition in addition to the lack of medical facilities in his country of origin would amount to an act severe enough to surpass the inhuman or degrading treatment or punishment threshold. That being said, the decision of the ECtHR does not clearly provide a legal test in which to apply Article 3 to medical claim cases, rather the contextual approach utilised by the Court is case-sensitive and specific to the realities of the individual. As it will be adduced in the subsequent cases, D will be considered as an "exceptional circumstance" case and can be argued to have set an arduously high threshold for other individual's medical conditions to reach the severity threshold necessary to deem the administrative act of deportation/removal as inhuman and/or degrading treatment.

Comparing the interpretation of Article 3 in the UK House of Lords with the Strasbourg Grand Chamber, Part I: N v Secretary of State for the Home Department

Moving forward to the next authoritative case on Article 3 are *N v Secretary of State for the Home Department*[159] and *N v United Kingdom*[160], respectively. It is important to note that between 1997 and 2005, the ECtHR did not decide a case in favour of the appellant's claim to a violation of Article 3 on medical grounds.[161] One point to underscore regarding the legislative difference between *D* and this case is that the

[158] *Ibid* at para 54: "Against this background the Court emphasises that aliens who have served their prison sentences and are subject to expulsion cannot in principle claim any entitlement to remain in the territory of a Contracting State in order to continue to benefit from medical, social or other forms of assistance provided by the expelling State during their stay in prison. However, in the very exceptional circumstances of this case and given the compelling humanitarian considerations at stake, it must be concluded that the implementation of the decision to remove the applicant would be a violation of Article 3."
[159] [2005] UKHL 31
[160] Application no. 26565/05 [2008] ECHR 453
[161] *Ibid* at [34].

Human Rights Act 1998 had passed and domestic courts, thus subject to section 2(1) of the HRA, were required to take into account the case law of the ECtHR.[162] In the House of Lord's decision, the legal analysis of Strasburg jurisprudence will give domestic effect and act as an authoritative precedent to all lower-level courts. While *D* will be regarded as the "exceptional circumstances" test, the House of Lords' reasoning in N will provide authoritative guidance in establishing a threshold for Article 3 claims on medical grounds.

The legal question raised in the case was whether the deportation of the appellant, suffering from advanced stages of AIDS, would equate to inhuman treatment in violation of Article 3.[163] Specifically, the argument of what would constitute the inhuman treatment "derives from Uganda's lack of medical resources compared with those available in the United Kingdom."[164] Here, the court is not faced with the exceptional circumstances of the appellant being returned to a country with no medical resources and the individual was in a stable condition due to the treatment received in the UK.[165]

The House of Lord's examination of the Strasbourg jurisprudence assessed the European Court's analysis and discussion of the exceptional circumstances in *D*. Lord Nicholls of Birkenhead acknowledged that in contrast with the current case, D was dying

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[162] *N v SSHD, supra* note 148 at para 11: "In reaching its decision the House is required to take into account the Strasbourg jurisprudence: section 2(1) of the Human Rights Act 1998."

[163] *Ibid* at para 7: "The sole legal issue before the House is whether deporting the appellant to Uganda would be incompatible with her Convention right under article 3 of the European Convention. Article 3 prohibits torture and, more widely, 'inhuman' treatment."

[164] *Ibid* at para 8. Furthermore, at para 8: "Thus the all-important question is whether expelling the appellant would be inhuman treatment within article 3 given the uncertainties confronting her in Uganda through shortage of the necessary drugs and medical facilities there."

[165] Regarding the exceptional circumstances upheld by the European Court see *N v SSHD, ibid* at para 48: "subsequent cases have shown that *D v United Kingdom* is taken as the paradigm case as to what is meant by this formula. The question on which the court has to concentrate is whether the present state of the applicant's health is such that, on humanitarian grounds, he ought not to be expelled unless it can show that the medical and social facilities that he so obviously needs are actually available to him in the receiving state. The only cases where this test has been found to be satisfied are *D v United Kingdom,* where the fatal illness had reached a critical stage, and *BB v France* where the infection had already reached an advanced stage necessitating repeated stays in hospital and the care facilities in the receiving country were precarious."

at the moment of his appeal; however, he raised the substantive right's query and criticised the exceptional circumstances held in D:

> "why is it *unacceptable* to expel a person whose illness is irreversible and whose death is not, but *acceptable* expel a person whose illness is under control but whose death will occur once treatment ceases (as may well happen on deportation)?"[166]

While the scope of this thesis is not to examine the moral arguments raised in the administrative review of rights, the statement illustrates the difficult reality regarding the constitutional rights review procedure. Referring to the issue raised by Lord Nicholls of Birkenhead: is the imminent threat of death, then, required to reach the 'inhuman treatment' threshold in relation to Article 3 ECHR?

In this judgment, the Lords are attempting to rationalise the exceptional circumstances of D's case and contend that the ECtHR's judgment was an "extension of an extension" of the Article 3 jurisprudence.[167] Although it may have been an extension of Article 3 applied to the specific facts of D's case, in my opinion they fail to appreciate the evolutionary nature of the ECHR and its characteristic as a 'living instrument'. The Lords declare that their "task is to determine the limits of that extension, not to enlarge it beyond the limits which the Strasbourg Court has set for it" and to provide domestic authority in light of the obligations derived from the Human Rights.[168] In alignment with Kavanagh's rights review under the HRA, Lord Hope of Craighead enumerates the judiciary's obligations under the HRA and the role of Strasbourg jurisprudence, as follows: "I would respectfully endorse what was said on this point by Lord Bingham in *R (Ullah) v Special Adjudicator* [2004] 2 AC 323 at para 20:

> 'In determining the present question, the House is required by section 2(1) of the Human Rights Act 1998 to take into account any relevant Strasbourg case law.

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[166] *Ibid* at para 13.

[167] *Ibid* at para 22 *per* Lord Hope of Craighead: "We are dealing here with a decision of the Strasbourg court which created what the Court of Appeal rightly accepted was an "extension of an extension" [D v United Kingdom] to the article 3 obligation: *N v Secretary of State for the Home Department* [2003] EWCA Civ 1369, *per* Laws LJ at para 37."

[168] *Ibid* at para 22.

> While such case law is not strictly binding, it has been held that courts should, in the absence of some special circumstances, follow any clear and constant jurisprudence of the Strasbourg court: *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 AC 295, para 26. This reflects the fact that the Convention is an international instrument, the correct interpretation of which can be authoritatively expounded only by the Strasbourg court. From this it follows that a national court subject to a duty such as that imposed by section 2 should not without strong reason dilute or weaken the effect of the Strasbourg case law. It is indeed unlawful under section 6 of the 1998 Act for a public authority, including a court, to act in a way which is incompatible with a Convention right. […] The duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less.'"[169]

As the supreme judicial institution of the United Kingdom, this passage reinforces the role of the HRA and the application of the ECHR on public authorities. For the remit of this thesis, it is specifically section 2 that I wish to underscore, being the obligation to consider the jurisprudence from the ECtHR.

Regarding the assessment of N's facts under the 'exceptional' circumstances, the House of Lords found that her medical conditions and the facilities available in Uganda did not present a scenario in which her deportation would amount to an inhuman treatment within the scope of Article 3. The fact that the appellant is fit to travel, her current condition is not critical and that there is available medical treatment in Uganda were held to be similar to the other decisions of the ECtHR which did not find a violation of Article 3.[170] As well, Lord Hope is of the view that it is not for the House of Lords to

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[169] *Ibid* at para 24.

[170] *Ibid* at para 51: "Her present condition cannot be said to be critical. She is fit to travel and will remain fit if and so long as she can obtain the treatment that she needs when she returns to Uganda. The evidence is that the treatment that she needs is available there, albeit at considerable cost … In my opinion her case falls into the same category as *SCC v Sweden*, *Henao v The Netherlands*, *Ndangoya v Sweden* and *Amegnigan v The Netherlands*, where the court has consistently held that the test of exceptional circumstances has not been satisfied. In

extend the 'exceptional circumstances' scope of Article 3 medical situations as established in *D*, rather a competency held for the ECtHR as the ultimate arbitrators of the ECHR.[171][172]

Baroness Hale's concurring judgment recapitulates the disposition in *D* as well as the majority judgment. She states:

> "[i]n my view, therefore, the test, in this sort of case, is whether the applicant's illness has reached such a critical stage (i.e. he is dying) that it would be inhuman treatment to deprive him of the care which he is currently receiving and send him home to an early death unless there is care available there to enable him to meet that fate with dignity. […] It sums up the facts in *D*. It is not met on the facts of this case."[173]

This passage summarises the 'exceptional circumstances', and upon first reading, it puts forth an Article 3 test in a language without such an extreme qualifier. However, when further assessed, the inclusion of the example 'he is dying' and 'early death' will unfortunately create a restrictive interpretation of the medical conditions that will satisfy the Article 3 threshold. Baroness Hale does recognise that there may be other 'exceptional cases' which will merit a finding equivalent to inhuman treatment as prohibited by Article 3 and the Convention must be flexible to permit this.[174] Further to

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my opinion the court's jurisprudence leads inevitably to the conclusion that her removal to Uganda would not violate the guarantees in article 3 of the Convention."

[171] *Ibid* at para 52: "The corollary of what I have just said is that a decision that her appeal should nevertheless be allowed would amount to an extension of the exceptional category of case which is represented by *D v United Kingdom*. As I said at the start of this opinion, it is not open to the national court to extend the scope of the Convention in this way. If an extension is needed to keep pace with medical developments, this must be left to the Strasbourg court."

[172] Baroness Hale also declares that finding the deportation of the appellant as equivalent to inhuman treatment would be an interpretative extension of Article 3. See N v SSHD supra note 148 at para 71: "For these reasons I conclude that we would be implying far more into our obligations under Article 3 than is warranted by the Strasbourg jurisprudence, if we were to allow the appeal in this case, much though I would like to be able to do so."

[173] *Ibid* at para 69 per Baroness Hale.

[174] *Ibid* at para 70 per Baroness Hale: "There may, of course, be other exceptional cases, with other extreme facts, where the humanitarian considerations are equally compelling. The law must be sufficiently flexible to accommodate them."

this finding, I also question whether it is impliedly contingent that the individual be in a critical state at the moment of lodging an application? Although only a reflective question to focus on the apparent qualifying factors to surpass the threshold, the court took into account the present condition of the applicant, acknowledging that she was fit to travel, which does differentiate, in a substantial manner, the circumstances between her and D. Nonetheless, the case was appealed to the European Court and my analysis of the decision follow next.

Comparing the interpretation of Article 3 in the UK House of Lords with the Strasbourg Grand Chamber, Part II: N v United Kingdom

The applicant, N, lodged her case with the claims that her return to Uganda would give rise to violations of Articles 3 and 8 ECHR as she would not have access to required medical treatment. The Court reviewed the decisions taken at the Court of Appeal and the House of Lords and the submissions for the alleged violation of Article 3. In reviewing the precedent case law of decisions undertaken by the ECtHR, the tribunal reaffirmed the principles in relation to Article 3 medical cases:

- "'non-regularised' migrants cannot claim entitlement to benefit from public assistance provided by the host state.
- A reduction in the applicant's life expectancy / health conditions does not in itself grant Article 3 protection
- The removal/deportation of an individual who is suffering from physical or mental illness to a country where the medical facilities and treatment are inferior may give rise to an inhuman situation, in exceptional circumstances."[175]

In specific reference to the decision in *D,* the Court declared that there may be other exceptional cases and that Article 3 would not be confined to the specific medical circumstances of the case. However, in agreement with the House of Lords, it must uphold the high threshold set in *D*, as applied in subsequent case law, on the grounds that the principle is correct given the future harm to the individual is linked to the illness

[175] *N v the United Kingdom, supra* note 149. at para 42.

and lack of medical resources in the country of origin rather than the acts of the public authorities in the host country.[176] On the basis of this reasoning, the Court held, fourteen to three, that the applicant's case did not fall within the exceptional circumstances, and as such, did not reach the Article 3 threshold.[177] Because the applicant's claim rested on the lack of medical facilities in Uganda, the Court did not consider there to be any separate issues to consider under the Article 8 claim.[178]

To contextualise the ECtHR's legal reasoning, I will briefly outline the dissenting opinion of Judges Tulkens, Bonello and Spielmann. In their view, the review of the domestic courts' analyses and evidence did support the view that the applicant did face a risk of inhuman or degrading treatment or punishment if she were to be deported to Uganda. Along with this, they held that the "case is indeed one of exceptional gravity meeting the 'very exceptional circumstances' test as laid down in *D v the United Kingdom*."[179] Furthermore, they criticised the majority's opinion that the suffering caused would be a result of the illness and not the public authority's actions. They revisited the European Court's '*Pretty* threshold'[180] which held that "the suffering which flows from naturally occurring illness, physical or mental, may be covered by Article 3, where it is, or risks being, exacerbated by treatment, whether flowing from the conditions of detention, expulsion or other measures, for which the authorities can be held responsible."[181] While the finding is cogent in light of the jurisprudence of the ECtHR, the factual circumstances between the *Pretty* and *N* do differ; the Court also did not find a violation Pretty's Article 3 Convention rights.[182]

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[176] *Ibid* at para 43.
[177] *Ibid* at para 51.
[178] *Ibid* at para 53.
[179] *Ibid* at para 3 of the Joint Dissenting Opinion.
[180] *Pretty v the United Kingdom*, application no 2346/02, ECHR 2002
[181] *N v the United Kingdom*, supra note 149 at para 5 of the Joint Dissenting Opinion.
[182] *Pretty* concerned the individual's petition for medically-assisted suicide with claims under articles 2, 3, 8, 9 and 14 of the ECHR. The ECtHR concluded that the right to die could not be deduced from the scope of the Convention and that the interference with the right to respect for private life could be justified on the qualified grounds of Article 8: paras 40 and 78 of *Pretty v the United Kingdom, supra* note 180.

The dissenting opinion considered the 'exceptional circumstances' of *D* and applied the principle to the facts of the case: "there are substantial grounds to believe that the applicant faces a real risk of prohibited treatment in the country of proposed removal"[183] and the lack of medical care in the country of origin could amount to a separate potential violation of Article 3.[184] However, the dissenting judges failed to address the fact that the majority judgment of the Grand Chamber at paragraph 42 relied on the exceptional circumstances passage from *D* as well as the subsequent case law to find no violation of Article 3.[185] On the basis of the perceived risk of prohibited treatment, the dissenting opinion arrives to the conclusion that a violation of Article 3 ECHR could have been found in favour of the applicant without expanding the interpretation set forth in *D*.[186]

I agree with the dissenting judges in their critique of the majority's disregard of the Article 8 claim and analysis. Because the ECtHR is the authoritative institution responsible for interpreting ECHR rights, a consideration of any rights-based claim should be, at minimum, addressed to maintain a continued dialogue. By providing judicial commentary on all rights-based claims, the Strasbourg court would sustain a more comprehensive analysis adding to the authoritative repertoire for reference by national courts. For the very reason espoused in the House of Lords decision, it is for Strasbourg to address the scope of Convention rights, and extend them, when necessary.[187] I transcribe the dissenting judges' statement,

> "[w]hilst the Court considered that the present case lacked very exceptional circumstances and that the threshold of seriousness for the purposes of Article 3 was thus not satisfied, it should nevertheless, in our opinion, have examined

[183] *N v the United Kingdom*, *supra* note 149 at para 22 of the Joint Dissenting Opinion.
[184] *Ibid* at para 21 of the Joint Dissenting Opinion.
[185] See survey of subsequent ECtHR jurisprudence in *N v SSHD, supra* note 148 at para 51.
[186] *N v the United Kingdom*, *supra* note 149 at para 24: "finding a potential violation of Article 3 in this case would not have been an extension of the exceptional category of cases which is represented by D v the United Kingdom."
[187] See *N v SSHD*, *supra* note 148 at para 52: "As I said at the start of this opinion, it is not open to the national court to extend the scope of the Convention in this way. If an extension is needed to keep pace with medical developments, this must be left to the Strasbourg court."

closely and carefully the situation of the applicant and of her illness under Article 8 of the Convention, which guarantees, in particular, a person's right to physical and psychological integrity."

In the view of the review mechanisms of the courts, an assessment of the right's claim should have been undertaken as part of the contextual approach of human rights review.[188] As the applicant had successfully lodged an application to the ECtHR, the assessment of Article 8 would have provided authoritative discussion and reasoning regarding its application to medical cases, regardless of the actual outcome.

To facilitate the link between the Upper Tribunal cases that above-referred authoritative jurisprudence, I present the first part of the empirical survey of case law from the Upper Tribunal. Following the next section, I will analyse the most recent ECtHR case regarding Article 3 medical cases, *Paposhvili v Belgium*, which is currently for debate and, as of the moment of writing this thesis, not applicable as domestic authority.[189] Due to the judicial debate regarding the standing of the *Paposhvili* test, I have considered it best to divide the examination of Upper Tribunal case law to contextualise the authoritative precedents discussed in *D v UK, N v SSHD* and *N v UK*.

[188] The dissenting opinion further opines that "[f]aced with the situation of a person who will, without doubt, be sent to certain death, we think that the Court could neither legally nor morally confine itself to saying "[no] separate question arises under Article 8 of the Convention" at para 26 of the Dissenting Judgment in *N v United Kingdom*, *supra* note 149.

[189] However, the Upper Tribunal as well as the Court of Appeal have all appreciated the fact that individuals have raised a valid argument in relation applying the *Paposhvili* criteria and that it would be beneficial for an appeal to reach the UK Supreme Court for judicial guidance.

Chapter 7: "Exceptional circumstances" and Articles 3 and 8 of the European Convention on Human Rights: Upper Tribunal case law survey (pre-Paposhvili)

I have carried out a survey of 51 cases from the Upper Tribunal to provide quantifiable data as another element of this thesis analysis.[190] As discussed previously, I have chosen cases in which the individual has invoked their Article 3 and/or 8 Charter right to appeal or apply for judicial review against their deportation or removal order as instructed by the Secretary of State for the Home Department. Further along, I will also provide a graph of the data collected from the survey of the Upper Tribunal cases. These cases can be referred to in the bibliography and are denoted with an asterisk (*). Decisions from the First-tier Tribunal (hereafter FtT) are not available to the public, therefore any discussion of the decisions at the FtT are through the summary and review of facts or evidence detailed in the appeal or application for judicial review at the Upper Tribunal level.

I have chosen to review the decisions at the Upper Tribunal in response to the fact that academic research tends to focus on decisions taken at the higher-level tribunals. I understand, with good reason, that the system of precedent does warrant a stronger scrutiny of the judicial reasoning in the decisions carried out at the higher-level courts; in practice, these cases are binding and influence the rationale in the courts and tribunals below them. However, in my opinion, reviewing the decisions of the Upper Tier Tribunal provides insight on the extent of substantive rights review and trends within the domestic judicial sphere. I then analyse the judiciary's interaction with the HRA mechanisms, underlining the section 2 duty to refer to ECtHR jurisprudence. By applying Kavanagh's constitutional rights review to this case law survey, I want to examine the internal judicial reasoning vis-à-vis ECtHR jurisprudence. As well, my analysis substantiates Kavanagh's contextual argument by scrutinising the intra-branch rights-

[190] I would like to extend my sincere thanks and appreciation to the financial support offered by the Faculty of Law and Graduate & Postdoctoral Studies through the Graduate Mobility Award which permitted me to carry out the quantitative research at the Institute of Advanced Legal Studies in London, England.

based review powers granted to the judiciary. In light of the ECtHR being the interpretative authority Convention rights, I contend that reviewing the dialogical relationship is necessary to illustrate the development of the common law constitutional rights review framework post-HRA.

The HRA has induced academic commentary which frames the internal judicial debate between the domestic common law and European rights review models. I explore the following cases which demonstrate particular developments, methods or changes in the approach to the judicial reasoning and assessment of Convention rights. To demonstrate the Upper Tribunal's different approaches, I present three cases which best represent the general trends found in the Upper Tribunal case law. The first two cases were judged pre-*Paposhvili*. The first case only examines the Article 3 claim while the second assesses both Article 3 and 8 claims. After this section, I will explore the decision in *Paposhvili v Belgium* as well as the Upper Tribunal case which determined the non-applicability of the *Paposhvili* test in the domestic context.[191]

The Upper Tribunal's Article 3 analysis: GS & EO v Secretary of State for the Home Department

In the case of *GS and EO v the Secretary of State*, the Upper Tribunal affirms that as an Article 3 rights-review appeal, the extent of the principles held in *D*, *N v SSHD* and *N v UK* are central to the case.[192] The Upper Tribunal (hereafter UT) outlines the appellants' Article 3 claim on the administrative act of deportation to their country of origin and that the removal of medical treatment would amount to inhuman or degrading treatment. In this case, the Tribunal identifies the complexities regarding the minimum level of severity threshold and what is to be considered as inhuman and degrading treatment.[193] Furthermore, the UT asserts the contextual nature of specific facts and

[191] Application no. 41738/10 [2016] ECHR 1113

[192] [2012] UKUT 397

[193] *Ibid* at para 84: "We remind ourselves of the Strasbourg Court's approach to Article 3 in general. The Court requires a "minimum level of severity" to engage Article 3. 'Inhuman' treatment is conduct that causes sufficient mental and/or physical suffering to attain the minimum standard of severity (e.g. Ireland v UK (1978) 2 EHRR 25 at [162]). 'Degrading'

circumstances of the individuals. To remind the reader, this is not a proportionality or balancing exercise, as the Article 3 right is non-derogable and cannot be outwardly "justified" against pressing public policy issues. However, Article 3 does incorporate a contextual element when considering the severity threshold. Nonetheless, the UT affirm that any changes or developments in relation to the principles set out in *N v SSHD* and *N v United Kingdom* must be reserved for the higher courts.

The Upper Tribunal enumerates ten principles to be derived from Article 3 decisions, taken from the ECtHR and the House of Lords decisions mentioned above. For the scope of the argument, I will outline the following principles, but invite the reader to refer to paragraph 85 to consult the entire analysis:

- "The Article 3 obligation to not expel a person where they face a risk to be subjected to ill-treatment 'can arise where the course of the individual's alleged ill-treatment is not directly or indirectly the responsibility of the receiving state but rather arises form a naturally occurring illness, disease or condition where treatment (in particular, life-sustaining treatment) is not available in the receiving statement.'" [point 1]
- "Although a non-regularised migrant cannot argue for a right to remain to benefit from medical or other social assistance, the ECtHR has held that in 'very exceptional' circumstances, the host State would violate Article 3 if they were to return 'an individual to another state in which they would be unable to obtain medical treatment or care for their condition in circumstances where the absence of that treatment or care could result in the individual's death.'" (point 2)
- "The Tribunal affirms the use of a contextual or relative analysis, and this is done in relation to determining the circumstances the individual will encounter in their

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treatment is conduct which arouses feelings of fear, anguish and inferiority such as to humiliate or debase the individual (Ireland at [167]). Again, that must reach a minimum level of severity to engage Art 3. The assessment is relative and depends upon an assessment of all factors including the duration of the treatment, its physical or mental effects, and the age, sex, vulnerability and state of health of the individual (Ireland at [162]). Once established, the obligation under Art 3 is absolute (e.g. Chahal v UK (1996) 23 EHRR 413 and Saadi v Italy (2009) 49 EHRR 30)."

country of origin and whether this amounts to the 'exceptional' margin. In addition, to the judiciary's rights-based review, this approach is also extended to the public authority: "the decision maker must a holistic assessment of the individual's circumstances in the receiving country." (point 4)

- The touch-stone recognition that "the very essence of the Convention is respect for human dignity and human freedom" which must inform any assessment of the case and in determining if it the circumstances presented amount to an "exceptional case".[194] (point 5)
- "The Upper Tribunal affirms that, although not raised in this case, there may be other contextual factors that need to be taken into consideration and any concurrent claims such as a breach of Articles 14 or 8 ECHR could be established." (point 7)
- "The Upper Tribunal also extends the claims invoked by the appellants and provides guidance on the approach to Article 8 claims in medical cases. The claim has to be raised in relation to the individual's private or family life as "an aspect of that individual's 'physical and moral integrity'[195]. However, Article 8 is a qualified right and will be subject to a proportionality analysis; the permitted derogable area of the economic well-being of the state would be used in the balancing assessment."[196] (point 8)

The Tribunal concludes that neither of the appellants would surpass the threshold set out in *D v UK* or *N v SSHD* as upheld by *N v UK*. Nonetheless, this case does present a thorough and contextual analysis of principles developed in both the domestic and European case law. Furthermore, the UT's comprehensive examination of the established case law demonstrates its willingness to consider Strasbourg jurisprudence

[194] This principle which is to manifest itself in the interpretation of Convention rights was emphasised in *Pretty v United Kingdom*, *supra* note 180 at [65].

[195] See *Bensaid v UK* (2001) 33 EHRR 10.

[196] *GS & EO v SSHD*, *supra* note 192 at para 85: "Again we note that in N v UK the minority disagreed with the failure to address Article 8. We see some force in this. […] an Article 8 proportionality analysis might yield a different outcome in other cases, possibly where the claimant had a lawful permission to reside in the host state before the disease was diagnosed."

as required by section 2 HRA. In reference to the substantive rights review, the UT pronounces the discrepancies and lack of clarity concerning Article 3 claims, specifically in relation to the inconsistent factual circumstances in which the severity threshold will be met. Nonetheless, the Tribunal rests its determination on the binding authority of the House of Lord's decision in *N v SSHD*, thus being precluded from acting upon an analysis which would distinguish the House of Lord's decision.[197]

In view of their obligation under s 2 of the HRA, I believe the UT could have continued with their assessment to provide judicial reasoning on the subject matter. Even if the conclusive departed from binding authority, it would have provided guidance and judicial support for both an appeal and continued the development of the contextual rights-based review approach. The review competencies given to the judiciary via section 2 HRA have bolstered the constitutional review mechanism in the UK. However, it is imperative that all levels of the courts and tribunals thoroughly consider the *obiter dicta* and *ratio decidendi* of previous judgments to fully realise the potential that the HRA has provided and, in turn, to distinguish the authoritative standing of precedent case law from the bottom-up.

RS & Ors v Secretary of State for the Home Department

The judgment in *RS & Others v the Secretary of State for the Home Department* (hereafter *RS*) follows a strict interpretation of the principles established in *D v UK* and *N v SSHD*.[198] As a result of relying on the Foreign and Commonwealth Office's country guidelines that the conditions in Zimbabwe are considered to be satisfactory, the UT found a "country-wide" designation that, in general, individuals from Zimbabwe who have HIV/AIDS will not meet the minimum severity threshold and, therefore, will not succeed

[197] *Ibid* at para 87: "We are however completely satisfied that it is not for this Tribunal to conduct such an analysis. We are bound by the conclusion of the House of Lords in *N v SSHD* and have had due regard to the decision of the majority in the Strasbourg Court in *N v UK.* We have no doubt for both reasons we must follow *N v SSHD*. Any development in the applicable principles will not be for us."

[198] [2010] UKUT 363

in a Convention rights-based claim.[199] The three appellants claimed that their removal would violate their rights under Article 3, 8 and 14, and by extension, sections 21D and 21E of the *Disability Discrimination Act* 1995. For the assessment of Articles 3 and 8, the Upper Tribunal's approach follows that of the increasingly strict interpretation of the authoritative case law principles. To demonstrate the interrelationship between Convention rights and other human rights instruments, I have chosen the case for the engagement with Article 14 ECHR (prohibition of discrimination) whereby the appellants claimed a discriminatory infringement in relation to their Article 8 right and the domestic *Disability Discrimination Act* 1995*.*[200] As such, this case illustrates an instance in which the UT assesses the compatibility of domestic legislation with the ECHR invoking another power conferred upon it by the HRA.

In relation to Article, 3 the Tribunal upheld the reasoning in *D v United Kingdom* regarding the availability of medical support/facilities in the individual's country of origin. Both medical treatment and facilities were available in Zimbabwe, although limited in accessibility. The UT also referred to the judgement *in FH (HIV/AIDS - medical facilities) Sierra Leone CG*[201] which held that even if there were limited or little medical resources in the country of origin, if the individual was not in the terminal stages of their illness, their Article 3 right would not be engaged.[202] The remaining assessment of the Article 3 claim rested on the 'exceptional circumstances' threshold, applying the direct authority from *D v United Kingdom* and *N v SSHD*.

Regarding the Article 8 claim, the UT held that since the appellants did not surpass the Article 3 threshold "there was no basis to consider under Article 8 issues not already fully considered under Article 3 or to reach a different conclusion on the lawfulness of

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[199] The Upper Tribunal does recognise that there could be an individual case whose case would fall under the "exceptional circumstances" threshold set out in *N v SSDH*. However, by providing a precedent base on the general conditions in the country, a satisfactory finding of a claim surpassing the severity threshold will be more difficult for any future individual originating from Zimbabwe.

[200] *Disability Discrimination Act* 2010 (United Kingdom)

[201] [2002] UKIAT 3905

[202] *RS & Ors v SSHD*, *supra* note 198 at para 89.

removal."[203] This approach demonstrates the rigidness generally undertaken by the lower-level courts and tribunals which has progressed over the years. I argue that this trend supports the claims of judicial deference. Politically, the judiciary are reluctant to acknowledge any further positive obligations on administrative decision-makers. Judicially, the courts and tribunals are also disinclined to engage in a contextual constitutional rights review of the Convention rights claims. This is demonstrated by the strict application of the oft-repeated *ratio decidendi* from one of the three authoritative cases; specifically, upon a finding of a non-successful claim under one Convention right (e.g. a failure to demonstrate a breach of Article 3), the judiciary will apply the same rationale and neglect to engage in a full assessment of the other Convention claim (e.g. Article 8). The failure to carry out the assessment, even if unsuccessful, detracts from the individual's Convention rights review and precludes any development with respect to the Article 8 claim in medical cases. Furthermore, as discussed earlier in this piece, the approach to each article carries with it an array of different case law as well as a distinct interpretive and analytical framework. As well, Article 8 is a qualified right which permits a full proportionality analysis, whereas Article 3 is an absolute, non-derogable right. Therefore, utilising the same assessment for the two rights fails to carry out a proper substantive review of each Convention right.

Article 14 ECHR is the prohibition of discrimination. This right has to be raised in conjunction with either another Convention right or legislation from a Contracting State.[204] In theory, the possibility of Article 14 is significant for rights-based reviews as it necessitates a contextualised assessment of the individual's claims and operates as a substantive review of legal claim(s) raised. The individuals argued that their deportation from the UK would be a breach of their right to private and family life (Article 8 ECHR) and counter the anti-discrimination protection in the *Disability Discrimination Act* 1995, thereby invoking Article 14 ECHR. In *Thlimmenos v Greece,* the ECtHR held that

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[203] *Ibid* at para 94.

[204] European Convention on Human Rights, Article 14: "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

"discrimination might arise either because analogous groups were treated differently or where States, without an objective and reasonable justification, failed to treat differently persons whose situations were significantly different."[205] The appellants failed on the group claim as Article 8 is a qualified right and the State has an objective and reasonable justification which could not lead to a failure to give proper treatment to disabled people facing removal or desperation from the UK.[206] In relation to the *Disability Discrimination Act* 1995, the appellants claimed that the "Secretary of State for the Home Department failed to comply with the duty to make reasonable adjustments after adopting a practice or policy which made it impossible or unreasonably difficult for disabled persons to receive any benefit which was or might be conferred."[207] The UT addressed both discrimination claims through a proportionality analysis of Article 8 ECHR. The UT referred to the exceptions permitted under Article 8(2) ECHR in conjunction with the public policy argument raised by the Secretary of State. These two points balanced the pressing public policy of the economic well-being of the country against the individuals' claims.[208] Oddly enough, on the basis that Article 8 was not infringed, the UT found that disapplying the claims raised under the *Disability Discrimination Act* 1995 was legitimate following the failed proportionality assessment.[209]

To summarise, although *RS* did consider the three Convention rights, the judicial reasoning for Articles 3 and 8 are lacklustre from a substantive rights-review point of view. With limited interaction with Strasbourg and domestic jurisprudence, the UT applies the binding precedent with minimal engagement of the nuances in other case law and judicial opinions. A more contextualised engagement with the Convention rights interpretation and the varying degrees of their application in domestic and ECtHR jurisprudence would bring the judicial element in better alignment with the principles of

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[205] [2001] 31 EHRR 14 qtd. in *RS & Ors v SSHD*, *supra* note 198, at para 95.
[206] See *RS & Ors v SSHD*, *supra* note 198 at para 95.
[207] *Ibid* at para 110. Furthermore, at para 111, "the Disability Discrimination Act 1995 extended the definition of disability so as to treat people with HIV infection as disabled from the point of diagnosis, whether asymptomatic or not."
[208] *Ibid* at para 281.
[209] *Ibid* at para 281.

the judiciary's function in rights review. Lastly, this would substantiate the constitutional rights review method, deliver on the judiciary's section 2 HRA duty and bolster the HRA-review mechanisms.

Empirical data: findings and trends amongst the Upper Tribunal case law

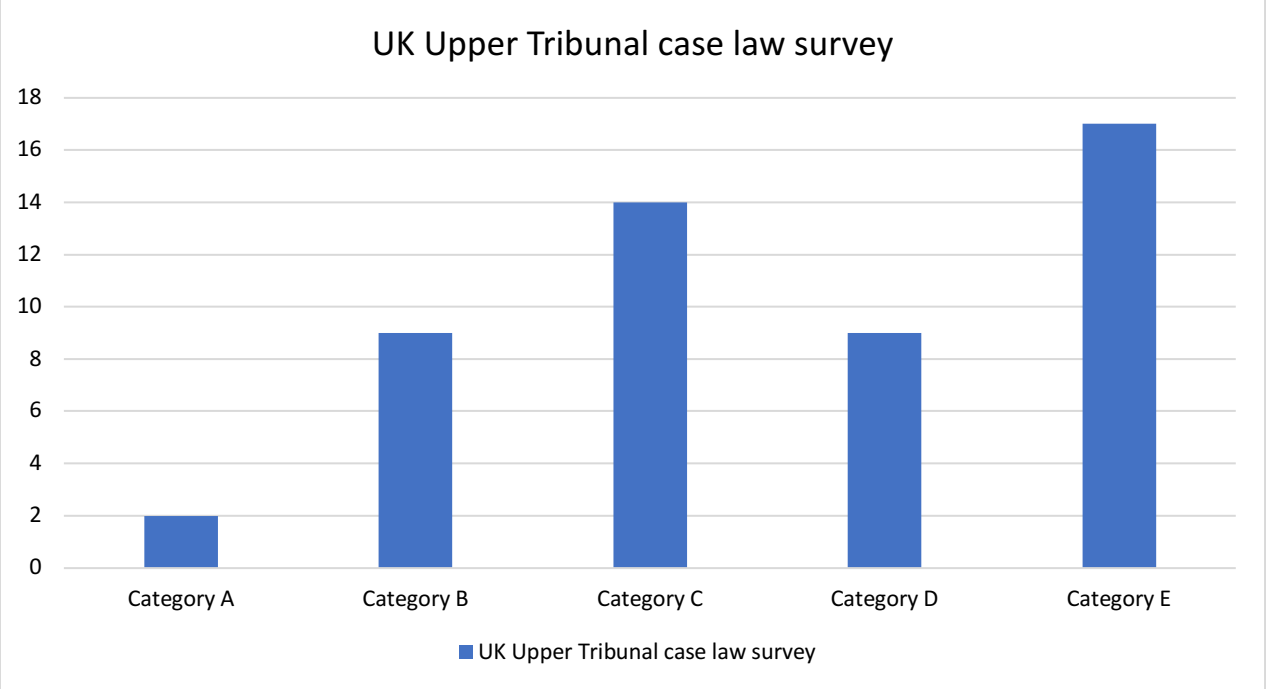

Figure 1: Survey of 51 cases from the Upper Tribunal between 2007-2018

- Category A (two cases): The appellant or applicant raised the "Paposhvili test" in relation to examining their Article 3 and Article 8 claims
- Category B (nine cases): The Upper Tribunal fully assessed both Articles 3 and 8 claims
- Category C (14 case): The Upper Tribunal made their decision on the assessment of Article 3 exclusively
- Category D (nine cases): The Upper Tribunal made their decision on the assessment of Article 8 exclusively
- Category E (17 cases): The Upper Tribunal considered an additional claim in addition to the Article 3 and/or Article 8 right: e.g. 1951 Refugee Convention, another Convention right or domestic legislation

The bar graph above presents the trends amongst the survey of the 51 cases examined from the Upper Tribunal.[210] I have grouped the cases into five different

[210] These cases have been denoted with an asterisk (*) in the bibliography.

categories as noted above. Category A is limited to two cases from 2018 as the applicants have raised claims to utilise the *Paposhvili* test instead of the authoritative guidelines set out in *N v SSHD*. Over the years, the UT has tended to apply a strict interpretation of the authoritative case law in relation to Article 3 medical cases. Furthermore, the Tribunal regularly applied the legal reasoning used to reject the Article 3 claim to the Article 8 or any other rights-based claim. Alarmingly, in nearly half of the cases, the UT utilised a single analysis to reject any other Convention right; be this an analysis of Article 3 to reject the Article 8 claim or vice-versa. Only in nine of the 51 cases did the Upper Tribunal carry out a full assessment of both Article 3 and 8 claims raised by the applicant. Although category E contains the highest number of cases, the discussion of the other human rights claims tended to be cursory, excepting a few cases. I selected to expand on *RS* in the previous section to illustrate the engagement with multiple Convention rights as well as a domestic legislative claim. However, in the majority of the cases, the UT repeats its cursory legal analysis and applies its rationale for the Convention claim to the additional human rights-based petitions.

The data supports the point raised earlier that the judiciary, at the First-Tier and Upper Tier Tribunal levels, are resorting to greater judicial deference. I contend that the deference carried out is not solely political but also judicial in regard to a strict-interpretation approach of authoritative domestic jurisprudence. Rather than conducting a comprehensive analysis of Strasbourg jurisprudence as mandated by section 2 HRA, the UT opts for a strict rights-based review rather than a substantive method. This rigid approach counters the constitutional review method as developed by Kavanagh and undermines the commonwealth model of constitutionalism espoused by Gardbaum. It restricts the developed judicial competencies enumerated in the HRA. When reviewing the inter-institutional dialogue (UK – ECtHR), the limitations of fully considering ECtHR Convention rights interpretation is also restricting the substantive rights realisation of the ECHR and the HRA. The failure to engage in a dialogical procedure debilitates the underlying purpose of the HRA as well as the ECHR.

Chapter 8: Diverging rights: the European Court of Human Right's decision in Paposhvili v Belgium

Diverging rights queries

I refer again to the dialogical relationship between the European and domestic courts and the subsidiary character reinforced by the ECtHR's authoritative domain on the interpretation of Convention rights. The judiciary in the UK have held that it is for the ECtHR to interpret the extent of ECHR and its application to different facts and cases. However, at the same time, and with increased frequency, the domestic courts have stayed with domestic authoritative interpretations of ECtHR jurisprudence citing the binding judgement of *Kay v Lambeth London Borough Council*.[211] How is this relationship to be reconciled in relation to sections 2 and 6 of the Human Rights Act 1998?

Background Information

Paposhvili v Belgium (hereafter *Paposhvili)* is an appeal from the Chamber (Fifth Section of the Court) to the Grand Chamber of the ECtHR.[212] The initial case held that the decision to deport the applicant to Georgia would not entail a violation of Articles 2, 3 or 8 of the Convention.[213] The applicant was diagnosed with chronic lymphocytic leukaemia while in prison in 2006. His medical condition progressed, and he was given a new course of treatment, with the drug Ibrutinib, to help improve his overall condition. Various medical reports were issued over the course of time and the one dated 14 July 2015 supported the fact that if the Ibrutinib treatment were removed the average remaining life expectancy would be three months.[214] Mr Paposhvili had also suffered from

[211] [2006] UKHL 10

[212] Application no. 41738/10 [2016] ECHR 1113

[213] *Ibid* at para 4.

[214] *Ibid* at para 46: "[t]he literature also shows that only 7% of patients being treated with Ibrutinib achieve complete remission. Mr Paposhvili is currently in partial remission and is thus wholly dependent on the treatment. This is a new targeted therapy to which he would have no access in his country of origin. With continuous treatment the patient's prognosis is more favourable, with an 87% survival rate after three years."

other illnesses which complicated his overall health.[215] Although Mr Paposhvili died before the hearing, his family decided to continue with the application. On appeal from the Chamber, the application raised an alleged violation of Articles 2, 3 and 8 of the Convention on the grounds that if Paposhvili had been expelled to Georgia he would have succumbed to premature death, faced inhuman or degrading treatment and the administrative act would have resulted in the separation of his family, who had been granted regularised status in Belgium.[216]

The Grand Chamber's assessment begins with reinforcing the sovereignty of individual states in terms of their right to "control the entry, residence and expulsion of aliens."[217] The repetition of this phrase in the Strasbourg jurisprudence appears to appease the critique from Member States in relation to the ECtHR's authoritative decision-making powers. The Grand Chamber prefaces the absolute right of Article 3, there being a minimum level of severity.[218] Despite the non-derogable quality of Article 3, the assessment of the level of severity "is relative [and] it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim."[219] The Grand Chamber revisits the facts and judicial reasoning in both *D v the United Kingdom* and *N v the United Kingdom,* affirming that the ECtHR has applied the decision in the latter case in subsequent applications.[220] After its assessment of the precedent case law, the Grand Chamber declares that the Article 3 exceptional circumstances test has deprived other individuals who are also seriously ill.[221] Furthermore, in support of the contextual

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[215] *Ibid* at paras 49-53.
[216] *Ibid* at paras 134 and 208.
[217] *Ibid* at para 172.
[218] *Ibid* at paras 173 and 174.
[219] *ibid* at para 174 citing N v United Kingdom at para 29.
[220] *Ibid* at para 179: "The Court has applied the case-law established in *N. v. the United Kingdom* in declaring inadmissible, as being manifestly ill-founded, numerous applications raising similar issues, concerning aliens who were HIV positive."
[221] *Ibid* at para 181: "The Court concludes from this recapitulation of the case-law that the application of Article 3 of the Convention only in cases where the person facing expulsion is close to death, which has been its practice since the judgment in *N v the United Kingdom*, has deprived aliens who are seriously ill, but whose condition is less critical, of the benefit of that

approach of rights review and the evolving nature of the ECHR, the Court states that "it is essential that the Convention is interpreted and applied in a manner which renders its rights practical and effective and not theoretical and illusory."[222]

The Grand Chamber asserts its clarification of the precedent ECtHR case law, and expounds on the reformulated approach to Article 3 cases as follows:

> "The Court considers that the 'other very exceptional cases' within the meaning of the judgment in *N. v. the United Kingdom* (§ 43) which may raise an issue under Article 3 should be understood to refer to situations involving the removal of a seriously ill person in which substantial grounds have been shown for believing that he or she, although not at imminent risk of dying, would face a real risk, on account of the absence of appropriate treatment in the receiving country or the lack of access to such treatment, of being exposed to a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering or to a significant reduction in life expectancy. The Court points out that these situations correspond to a high threshold for the application of Article 3 of the Convention in cases concerning the removal of aliens suffering from serious illness."

What will be known as the '*Paposhvili* test', the Grand Chamber removed the exceptional qualifier of 'imminent risk of death' to include seriously ill individuals who would be at risk of a situation amounting to inhuman treatment while still upholding the high threshold. Of note, the Court established that the causal event for inhuman treatment under Article 3 is the host country's act of deportation rather than the lack of medical facilities in the country of origin.[223] In applying the test in paragraph 183 to the facts of the case, the Grand Chamber found a violation of Article 3 in respect to the *procedural aspect*. The Belgian authorities failed to adequately examine Paposhvili's state of health and the medical treatment available in Georgia, and therefore, reached a decision with insufficient

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provision. As a corollary to this, the case-law subsequent to *N v the United Kingdom* has not provided more detailed guidance regarding the "very exceptional cases" referred to in *N v the United Kingdom*, other than the case contemplated in *D v the United Kingdom*."

[222] *Ibid* at para 182.

[223] *Ibid* at para 192.

information to support the establishment that Paposhvili would not be subject to inhuman treatment contrary to Article 3.[224]

The Court appears to have trodden a fine line here between the potentially contentious political response to the Grand Chamber's decision. The finding of a violation of Article 3 on procedural grounds did not explicitly establish that, on the substantive grounds - the specific medical conditions and/or facts of Paposhvili's circumstances - would grant rise to inhuman treatment. Nonetheless, the revised and expanded test in paragraph 183 does serve as authoritative guidance for Member States and clarifies the 'exceptional circumstances' qualifier. This guidance expands the individual fact-specific rationale adduced from *D* as reasoned in *N v United Kingdom* and presents a contextualised assessment of the individual's application in view of the medical conditions, facilities in the country of origin and the proposed risk of inhuman treatment.

Although the Court did review the Article 8 claim, it quickly arrived at a similar rationale that the Belgian authorities did not comply with the required procedural assessment to determine whether the removal of Mr Paposhvili would infringe upon his right to private and family life taking into consideration that his family also had a regularised migratory status in Belgium. The lack of engagement with the assessment and the comparison to the procedural assessment used for Article 3 provides little authoritative guidance in relation to the Article 8 medical claims, specifically in the development of the interpretation of Article 8 at the ECtHR level.

[224] *Ibid* at paras 205 and 206.

Chapter 9: The Upper Tribunal's judicial assessment of Paposhvili

The Upper Tribunal's judgement in *EA & Ors v Secretary of State for the Home Department* raised the applicability of the *Paposhvili* test in the UK's domestic judicial bodywork.[225] The case has launched the subsequent Court of Appeal challenges underscoring the judicial debate regarding the uncertainty of the *Paposhvili* standard in the domestic context. The three appellants in the case are EA, MO and Rashid who are suffering from mental illness, AIDS and ankylosing spondylitis, respectively.[226] The appeal raises the question whether the *Paposhvili* test may be applied, as this is instrumental for the correct assessment of the appellants' cases. Despite the duty in s. 2 HRA, the principles of judicial precedent are clearly indicative of the judiciary's scope, as the opening statement of the case states, "[t]he test in in *Paposhvili v Belgium* is not a test that is open to the Tribunal and to apply by reason of its being contrary to judicial precedent."[227]

Following the prevalent trend amongst other decisions at the UT, Judge Jordan refers to Lord Neuberger's judgment in *Manchester City Council v Pinnock*[228] and established that the following points emerge from this decision:

- "(i) The Supreme Court is not bound to follow a decision of the ECtHR
- (ii) The decisions of the ECtHR are of persuasive effect because they come from an authoritative source and from a Court whose rulings are acknowledged by statute. Indeed, s. 2(1) of the Human Rights Act 1998 expressly provides that a court or tribunal determining a question which has arisen in connection with a Convention right '*must take into account'* a judgment or decision of the ECtHR. The obligation is absolute, '*must*', but the nature of the obligation is to take it '*into account*', not necessarily to apply it.

[225] [2017] UKUT 445
[226] *Ibid* para 1.
[227] *Ibid* at para 2.
[228] [2011] UKSC 45

- (iii) However, a different approach is called for on the part of the Supreme Court when there has been a clear and constant line of authority but only if it is consistent with United Kingdom law (or at least some '*fundamental substantive or procedural aspect'* of it) or the decision of the ECtHR is not flawed in a material way."[229]

While Lord Neuberger's decision does provide guidance in relation to ECtHR authority, the UT has unilaterally decided that the decision in *Paposhvili* is not in the gradual line of 'clear and constant line of authority' and that the case is a divergence from precedent case law. However, when referring to the Grand Chamber's decision in *Paposhvili*, Jordan J refers to the 'exceptional circumstances' in *D* as reaffirmed in *N v United Kingdom*. In my opinion however, the Grand Chamber is not overturning the previous decision, rather they are elaborating on the threshold in *N v United Kingdom* and contextualising it to the facts of the appeal in question - Mr Paposhvili and his interactions with the Belgian authorities. In addition, if we return to *N v SSHD* and the cited passage from *R (Ullah) v Special Adjudicator*[230] the House of Lords endorse what Lord Bingham mentions in regards to the duty to follow ECtHR jurisprudence supported by the statutory requirements of sections 2 and 6 of the HRA 1998.[231] While Lord Bingham does state that domestic tribunals are not statutorily bound to follow ECtHR case law, the HRA does clearly legislate that domestic courts and tribunals *should* follow Strasbourg jurisprudence. On this note, there is no qualifier in the HRA stating that the UK Supreme

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[229] *EA & Ors v SSHD*, *supra* note 225 at para 10

[230] [2004] 2 AC 323 at para 20

[231] *N v SSHD, supra* note 148 at para 24: ""In determining the present question, the House is required by section 2(1) of the Human Rights Act 1998 to take into account any relevant Strasbourg case law. While such case law is not strictly binding, **it has been held that courts should, in the absence of some special circumstances, courts shall follow any clear and constant jurisprudence of the Strasbourg court**: *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 AC 295, para 26. This reflects the fact that the Convention is an international instrument, the correct interpretation of which can be authoritatively expounded only by the Strasbourg court. **From this it follows that a national court subject to a duty such as that imposed by section 2 should not without strong reason dilute or weaken the effect of the Strasbourg case law.** It is indeed unlawful under section 6 of the 1998 Act for a public authority, including a court, to act in a way which is incompatible with a Convention right" (emphasis added).

Court (formerly the House of Lords) must approve any ECtHR reasoning to grant it domestic authority; unless the case overturns a long series of jurisprudence, or there are procedural incompatibilities, domestic tribunals have been held to follow these judgments.[232] In addition, to comply with section 2 HRA, domestic tribunals should not be diluting the effect of Strasbourg case law.

Returning to the Judge Jordan's reasoning, the UT considers the ECtHR's intention and reconsideration of case law to be a "departure from the clear and constant case law identified"[233] and "resulted in a decision that is not consistent with United Kingdom domestic law."[234] I find the argument that *Paposhvili* overturns the 'clear and constant' jurisprudence overstretched. Furthermore, I am of the view that Jordan J should have discussed the non-application of *Paposhvili* test as potentially diluting the effect of Strasbourg case law by prohibiting the ECtHR's "living instrument"[235] interpretation of Article 3.

As its authoritative guidance, the Upper Tribunal refers to the Court of Appeal case *GS (India)* in which the Court of Appeal analysed the seminal Article 3 decisions pre-

[232] See *R (Ullah) v Special Adjudicator, supra* note 230.

[233] The Upper Tribunal describes the *Paposhvili* test as an extension or departure from the decision in *N v UK*. However, the difference in deeming the decision as either an extension and departure is significant. See specifically *EA & Ors v SSHD*, *supra note* 225 at para 18:
"Furthermore, in seeking to depart from the decision in N v UK [2008] EHRR 39 it extended the principle in a way we have already identified so as to include situations involving the removal of a seriously ill person in respect of whom 'substantial grounds had been shown to believe in that he or she, although not at imminent risk of dying, would face a real risk on account of the absence of appropriate treatment in the receiving country or the lack of access to such treatment of being exposed to serious rapid and irreversible decline to his or her state of health resulting in intense suffering or a significant reduction in life expectancy', ('the Paposhvili test')".

[234] *EA & Ors v SSHD, supra* note 225 at para 19.

[235] *N v SSHD*, *supra* note 148 per Lord Hope at para 21: "[t]he Convention, in keeping with so many other human rights instruments, is based on humanitarian principles. There is ample room, where the Convention allows, for the application of those principles. They may also be used to enlarge the scope of the Convention beyond its express terms. It is, of course, to be seen as a living instrument."

Paposhvili.[236] Accordingly, the Upper Tribunal summarised the Court of Appeal's approach as follows:

> "The Court of Appeal approached Article 3 by reference to the paradigm case of a breach of Article 3 being an intentional act by the state which constituted torture or inhuman or degrading treatment or punishment. Accordingly, the case of a person whose life would be foreshortened by the progress of natural disease if removed to his home state did not fall within the paradigm unless justified by a pressing reason to hold the state responsible for the claimant's plight. Such an exception was justified in deathbed cases where the person's illness had reached such a critical stage that it would constitute inhuman treatment to deprive him of the care he was currently receiving".[237]

The UT refers to the 'deathbed exception' as the successful Article 3 challenge in *D*. The Tribunal cites Baroness Hale's concurring judgement in *N v SSHD*[238] finding that it "permit[s] no departure from the 'D exception.'"[239] The short-sited and selective approach of the Upper Tribunal is disturbingly problematic, and incorrect, as in the subsequent paragraph, Baroness Hale explicitly states: "[t]here may, of course, be other exceptional cases, with other extreme facts, where the humanitarian considerations are equally compelling. The law must be sufficiently flexible to accommodate them."[240] To cite the concurring judgment but blatantly disregard her recognition and approval of the fact that other exceptional cases could very well meet the Article 3 threshold, or the 'exceptional circumstances' of *D v UK*, not only delegitimises the UT's legal reasoning, but demerits its argument for the authoritative use of *GS (India)*[241] and rationale in finding the *Paposhvili* test as an overt departure from the 'clear and constant' jurisprudence of the ECtHR. In addition to citing the Court of Appeal's decision regarding Article 3

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[236] [2015] 1 WLR 3312
[237] *EA & Ors v SSHD*, *supra* note 225 at para 23.
[238] *N v SSHD*, *supra* note 148 at para 69.
[239] *EA & Ors v SSHD*, *supra* note 225 at para 28.
[240] *N v SSHD*, *supra* note 148 at para 70.
[241] *Supra* note 236.

interpretation as domestically authoritative, the UT invalidated the possible application of *Paposhvili*[242] and affirmed that the test cannot be considered as part of domestic law.

This conclusion raises the following concern: the extent and limitation of the statutory obligation to take Strasbourg case law into consideration as per section 2 HRA. In reference to Kavanagh's constitutional rights review method, the effect of this judgement is significant to the progressive restraint of substantive rights review under the scope of the HRA. The intra-relational component of the domestic courts demonstrates an increasing resistance from the lower-level tribunals to fully engage with Strasbourg interpretative guidance; on this line, the common law system of precedent will assert itself over the statutory duty to refer to ECtHR jurisprudence. Despite there not being an obligation to follow Strasbourg jurisprudence, the UK courts have recognised the ECtHR as the authoritative institution in connection to Convention rights interpretation. Therefore, the increasing resistance to not apply Strasbourg jurisprudence and solely refer to domestic case law counters the substantive rationale behind section 2 HRA and undercuts the dialogical component of substantive rights development between national courts and the ECtHR.

[242] *Supra* note 212.

Chapter 10: Contextualising rights or strict rights interpretation? The Court of Appeal's review of Paposhvili

In relation to the applicability of *Paposhvili* in domestic jurisprudence, I will outline the Court of Appeal's decisions in the following three cases, all on appeal from the Upper Tier Tribunal: *AM (Zimbabwe) & Anor v Secretary of State for the Home Department*[243], *R (MM (Malawi) & Anor) v Secretary of State for the Home Department* [2018] EWCA Civ 1365 and *R (MM (Malawi) & Anor) v Secretary of State for the Home Department* [2018] EWCA Civ 2482, as well as SL (St Lucia) v *Secretary of State for the Home Department*[244]. My inclusion of these cases serves primarily to give more guidance regarding the judicial dialogue with the *Paposhvili* case following the Upper Tribunal decision in *EA*. In addition, the Court of Appeal directly raises the section 2 HRA debate: the shift in the binding authority between domestic tribunals and the ECtHR in relation to the interpretation of Convention rights. My analysis of these three cases will focus on the judicial reasoning regarding the *Paposhvili* test as well as consideration of domestic case law as authoritative over Strasbourg jurisprudence.

AM (Zimbabwe) & Anor v Secretary of State for the Home Department

In *AM (Zimbabwe) & Anor v SSHD*, the First-tier Tribunal dismissed the Article 3 and 8 claims, and the Upper Tier Tribunal upheld the FtT's decision stating that this tribunal had properly considered the medical evidence.[245] In reviewing the facts, both the appellants and the Court of Appeal agree that neither of the applicants reach the threshold of the Article 3 test as set out in *N v SSHD*.[246] In assessing the *Paposhvili* test, the Court of Appeal is correct in stating that the Grand Chamber only found a *procedural* breach of Article 3 and not a *substantive* breach; had the medical evidence been properly adduced by the Belgian authorities, the case would not necessarily have amounted to a

[243] [2018] EWCA Civ 65
[244] [2018] EWCA Civ 1894
[245] *Supra* note 243 at paras 6-7.
[246] *Ibid* at para 20.

violation of Article 3.[247] By recognising the procedural aspect, the Court of Appeal is clarifying that the European Court has not relaxed the strict threshold that was held in the ECtHR's decision in *N v UK*.

Rather than rely on the decision in *GS (India),* the Court of Appeal refers to the decisions of *N v SSHD* and *N v UK*. In recognition of the rules of precedent,[248] the justices identify the interpretative conundrum regarding the ECtHR test set out in *Paposhvili*[249] and the House of Lords' rationale in *N v SSHD*. In addition, the Court is aware of the number of other cases raising the *Paposhvili* test and declares that any removal order of an individual should be postponed until the Supreme Court has considered the test and reaffirmed or modified the current domestic stance.[250] In relation to those claims, all courts below the Supreme Court will be bound by the decision in *N v SSHD,* but claimants may contend that they have grounds that their cases are covered by the new guidance in *Paposhvili* (in particular at para. [183]) and that any question of their removal from the UK should be stayed until the Supreme Court has decided to modify domestic law by reference to that guidance.

To provide jurisprudential rationale, the Court of Appeal decided it was appropriate to rule upon the meaning and effect of *Paposhvili* as persuasive authority and to provide uniform guidance to the FtT and UT.[251] The Court of Appeal rephrases the *Paposhvili* test as follows to provide domestic direction:

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[247] *Ibid* at para 27.

[248] See *Kay v Lambeth London Borough Council, supra* note 211 at para 43.

[249] *AM (Zimbabwe) & Anor v SSHD, supra* note 243 at para 30: "It is common ground that this is so even though it appears that the ECtHR has more recently, in *Paposhvili*, decided to clarify or qualify to some degree the test previously laid down in *N v United Kingdom*, which corresponds with that set out by the House of Lords in *N v Secretary of State for the Home Department.*

[250] *Ibid* at para 32: "In relation to those claims, all courts below the Supreme Court will be bound by the decision in *N v Secretary of State for the Home Department,* but claimants may contend that they have grounds for saying that their cases are covered by the new guidance in *Paposhvili* (in particular at para. [183]) and that any question of their removal from the UK should be stayed until the Supreme Court has decided to modify domestic law (potentially decisively in their favour) by reference to that guidance."

[251] *Ibid* at para 35: "In all these situations, the test in para 183 of *Paposhvili* provides the relevant criterion which will in practical terms determine whether a stay of removal from the UK

> "This means cases where the applicant faces a real risk of rapidly experiencing intense suffering (i.e. to the Article 3 standard) in the receiving state because of their illness and the non-availability there of treatment which is available to them in the removing state or faces a real risk of death within a short time in the receiving state for the same reason. In other words, the boundary of Article 3 protection has been shifted from being defined by imminence of death in the removing state (even with the treatment available there) to being defined by the imminence (i.e. likely "rapid" experience) of intense suffering or death in the receiving state, which may only occur because of the non-availability in that state of the treatment which had previously been available in the removing state."[252]

The rephrasing of the passage in *Paposhvili* provides guidance on what can be considered to amount to the threshold required to be equivalent to inhuman or degrading treatment or punishment. On this note, *Paposhvili* does not overturn the decision in *N v United Kingdom*; it provides further guidance regarding the other 'exceptional cases' mentioned in the cited case.[253] Referring to *Paposhvili,* Lord Justice Sales then goes on to assess the appellants' cases and is of the view that neither of them satisfies the *Paposhvili* test. As such, Sales LJ declares that the Supreme Court should consider the impact of the Strasbourg jurisprudence to provide authoritative guidance and incorporate the judgment as domestic law, however these appeals would not be the best suited for

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is justified or not. Therefore, contrary to the argument of the appellants, it is relevant and appropriate for this court to rule upon the meaning and effect of the guidance in *Paposhvili*, in particular as regards the test in para 183. In doing so, we will provide guidance to other courts and tribunals which are faced with arguments based on the test in *Paposhvili* to ensure that they adopt a uniform and consistent approach to such arguments. At the very least, what we say will be persuasive authority."

[252] AM (Zimbabwe) & Anor v SSHD, *ibid* at para 38.

[253] In support of the ECtHR guidance argument, see para 40: "It is impossible to infer that by the formula used in para. [183] of *Paposhvili* the ECtHR intended to reverse the effect of *N v United Kingdom*. Moreover, the Grand Chamber's formulation in para. [183] requires there to be a "serious" and "rapid" decline in health resulting in intense suffering to the Article 3 standard where death is not expected, and it makes no sense to say in the context of analysis under Article 3 that a serious and rapid decline in health is *not* a requirement where death rather than intense suffering is the harm expected."

that task.[254][255] In my opinion, the Court of Appeal has thoroughly exercised their section 2 HRA duty by reviewing the *Paposhvili* interpretation and providing interpretative guidance in the domestic sphere. Furthermore, by explicitly recognising the constraints of precedence on lower-level tribunals, Sales LJ view that the UK Supreme Court should consider the ECtHR decision is significant. Considering the fact that there has been a decisive interpretative development regarding Article 3, it should be for the highest-level court (UK Supreme Court) to have the authority to not apply the judgment in the domestic sphere. While all courts and tribunals have the duty to refer to Strasbourg jurisprudence, a binding domestic precedent contrary to Strasbourg will prohibit the interpretation unless the decision is appealed to the Supreme Court or an application is lodged with the ECtHR; this represents a similar return to the ECHR framework in the UK prior to the HRA. Individuals are restricted from benefitting from the fully developed Conventions rights if the FtT and UT are unable to follow ECtHR jurisprudence.

R (MM (Malawi) & Anor) v Secretary of State for the Home Department

The first case of *R (MM (Malawi) & Anor) v Secretary of State for the Home Department* [No. 1] is an application for appeal.[256] The applicants argue that the individuals' circumstances would meet the *Paposhvili* criteria, however they accept that they do not satisfy the *N v SSHD* threshold.[257] Following the successful application for appeal, *R (MM (Malawi) & Anor) v Secretary of State for the Home Department* [No. 2] is concerned with whether the case would be permitted to successfully lodge an appeal to the UK Supreme Court to bring the *Paposhvili* test into consideration.[258] At paragraph 10:

> "the applicants and appellant – rightly – concede that (i) the test for article 3 medical cases set out in N as explained in AM (Zimbabwe) is binding on this court,

[254] AM (Zimbabwe) v SSHD, *ibid* at [46].
[255] *Nota*: at the time of writing, the three decisions referred to in para 25 of *AM (Zimbabwe) & Anor v SSHD* are pending trial. Any of these cases could be determined to be a suitable to approve an application for appeal to the UK Supreme Court.
[256] [2018] EWCA Civ 1365
[257] *Ibid* at paras 9-10.
[258] [2018] EWCA Civ 2482.

and (ii) none of them is able to satisfy that test. However, they submit that, unlike the individual cases in AM (Zimbabwe), they each satisfy the test in Paposhvili; and this court, whilst bound to refuse their appeals, should give permission to appeal to the Supreme Court to enable that court to reconsider N in the light of Paposhvili."[259]

Through the appeal mechanism, the Court of Appeal is engaging in a dialogical process, between the ECtHR and domestic tribunals, as part of the judiciary's obligation under the HRA. As part of the administrative process, the Court of Appeal has the power to provide guidance to lower tribunals, as well as the capacity to allow an application for appeal or judicial review to go up to the UK Supreme Court. Moreover, the recognition of the interpretive guidance acts as a constructive discourse between the ECtHR and the domestic tribunals. Rather than disregard the potential finding in favour of the appellants rights under the *Paposhvili* guidance, as was done by the UT in *EA*, the Court of Appeal is attempting to address the boundary between the requirements of respecting authoritative precedence and its statutory obligations under sections 2 and 6 HRA. As part of the UT's conclusion, Lord Justice Hickinbottom does not find the factual circumstances of either of the cases to have "real prospect of satisfying the Paposhvili criteria"[260] and, as such, dismisses the appeal as these cases would not be "an appropriate vehicle for the Supreme Court to revisit the criteria in article 3 medical cases."[261] I do find that the Court of Appeal's engagement with the appeal claim demonstrates a step in support of a constitutional rights review approach despite the facts of the case not be successful to launch an appeal to the Supreme Court,.

SL (St Lucia) v Secretary of State for the Home Department

SL (St Lucia) v SSHD concerned an applicant with serious mental health issues and raised claims under both Articles 3 and 8 ECHR.[262] Her reliance upon the right to

[259] *Ibid* at para 10.
[260] *Ibid* at para 41
[261] *Ibid* at 55
[262] *Supra* note 244.

private life gives some guidance as to the applicability of Article 8 to health issues. In relation to Article 8 Judge Grant noted that, "where an individual is receiving treatment in the UK, a mental health condition and suicide risk that is not severe enough to engage Article 3 may nevertheless engage Article 8, at least in principle."[263]

The authority for article 8 and healthcare cases is *GS (India) v Secretary of State for the Home Department* which assessed the relationship between Articles 3 and 8. Sales LJ aligned the tests under both articles so that if the claim under Article 3 failed, it would most likely not succeed under Article 8 either.[264] In essence, the Article 8 claim needs to be raised as an additional factor in the assessment of the application for it to successfully engage the right to respect for private and family life.[265]

As one of the grounds of appeal, it is submitted that *Paposhvili* lowered the standard of evidence in relation to both Articles 3 and 8; therefore, if the medical condition is the only fact relied upon to engage Article 8, it would require a reassessment of the evidence.[266] However, Justice Higginbottom does not agree with this argument and states that *Paposhvili* primarily concerned the threshold for Article 3 claims as accepted in "AM (Zimbabwe), it appears to have altered the *European test* for such

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[263] *Ibid* at para 12, [h]owever, given that appropriate mental health services and support facilities were available in St Lucia, she concluded that "it cannot be argued that the [Applicant's] return to St Lucia will have such grave consequences that article 8 is engaged with respect to the right for private life encompassing mental stability."

[264] See *GS (India) v SSHD*, *supra* note 248 at para 86, per Laws LJ: "If the article 3 claim fails (as I would hold it does here), article 8 cannot prosper without some separate or additional factual element which brings the case within the article 8 paradigm - the capacity to form and enjoy relationships - or a state of affairs having some affinity with the paradigm."

[265] See *MM (Zimbabwe) v Secretary of State for the Home Department* [2012] EWCA Civ 279 at para 111, per Underhill LJ: "First, the absence or inadequacy of medical treatment, even life-preserving treatment, in the country of return, cannot be relied on at all as a factor engaging article 8: if that is all there is, the claim must fail. Secondly, where article 8 is engaged by other factors, the fact that the claimant is receiving medical treatment in this country which may not be available in the country of return may be a factor in the proportionality exercise; but that factor cannot be treated as by itself giving rise to a breach since that would contravene the 'no obligation to treat' principle."

[266] SL (St Lucia) v SSHD, *supra* note 244 at para 26.

threshold" (emphasis added).[267] As Article 8 is a qualified right, proportionality is the correct standard of review when balancing the rights of the individual against the greater interests of society. Justice Higginbottom's analysis finds that it would not be disproportionate to deport the applicant when pitted against the public interest of effective immigration control.[268] As the claimant is unsuccessful in linking her medical condition as an addition factor to an Article 8 claim, the view of her infringed rights will be very low on the balancing scale in comparison to policy arguments for effective immigration control and medical welfare. To conclude, it is held that the applicant has a very minimal chance of a successful appeal and therefore the application is dismissed. The Court of Appeal's engagement with the Article 8 claim and the proportionality test, in itself, are evidence of the rights-based review mechanism. Despite the high threshold still needed for a successful Article 8 claim, the Court of Appeal has provided legal reasoning to support its decision.

At the time of writing, a determination on *Paposhvili* in the domestic context is pending a successful appeal or application for judicial review to the UK Supreme Court. Whether the Supreme Court affirms the decision in *N v SSHD* or modifies the domestic interpretation of Article 3 in relation to medical cases, the review of the Upper Tribunal and Court of Appeal cases demonstrates the judiciary's Article 3 legal reasoning process. For the purpose of the theoretical arguments, the approach utilised by the UT differs from the contextual and more flexible reasoning carried out by the Court of Appeal. The stricter interpretative outlook of the UT is reinforced in *EA* and illustrates the Tribunal's growing deference to scrutinise any additional ECtHR case law other than that which has been

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[267] *Ibid* at para 27, per Higginbottom J: "However, there is no reason in logic or practice why that should affect the threshold for, or otherwise the approach to, article 8 claims in which the relevant individual has a medical condition. As I have indicated and as GS (India) emphasises, article 8 claims have a different focus and are based upon entirely different criteria. In particular, article 8 is not article 3 with merely a lower threshold: it does not provide some sort of safety net where a medical case fails to satisfy the article 3 criteria. An absence of medical treatment in the country of return will not in itself engage article 8." Furthermore, at para 28, "Therefore, in my firm view, the approach set out in MM (Zimbabwe) and GS (India) is unaltered by Paposhvili; and is still appropriate. I do not consider the contrary is arguable".

[268] *Ibid* at para 33.

approved in domestic authoritative case law. The simple reiteration of the three authoritative Article 3 cases presents a static approach. A *rigid* rights review is contrary to the flexible foundations necessary for a progressive realisation of substantive rights review. On the other hand, the Court of Appeal's willingness to consider the appellant's factual circumstances under the *Paposhvili* test as guiding principles to afford domestic discussion of the ECtHR case law does align with Kavanagh's constitutional review method and demonstrates a more dynamic implementation of section 2 HRA.

Chapter 11: Conclusion

Domestic reception of Strasbourg Jurisprudence: a brief comparison with the interrelationship between Germany and the European Court of Human Rights

To briefly summarise the UK context, the UT case law has veered away from an in-depth substantive rights approach in favour of a rigid review approach, citing the 'fit-all' authoritative principle from *N v SSHD*. Furthermore, the tendency to disregard an assessment of other Convention rights or human rights claims, after finding a non-violation of Article 3, restricts the contextual element of section 2 HRA. The limitations on developing ECHR Convention rights could be argued to be at odds with the obligations under sections 2 and 6 HRA, these being that the case law should follow the 'clear and constant' line of ECtHR jurisprudence and the obligation on public authorities to comply with Convention rights. Lacklustre analyses of alleged Convention rights infringements undermine the very purpose of the judiciary's role within the Human Rights Act and the overall spirit of the European Convention on Human Rights. Finally, the decision in *Kay v Lambeth Borough Council* has demarcated a non-flexible approach for courts below the UK Supreme Court to fully engage with ECtHR case law or Convention right analysis; in contrast to the duty set out in section 2 HRA, lower level courts are restricted to interpreting Strasbourg jurisprudence through domestic, authoritative precedent.

In the context of European judicial relations, is the restrained acceptance of ECtHR dominion limited to the UK? On a pan-European level, it has been argued that the ECHR has bolstered domestic human rights adjudication.[269] In addition, it is important to recognise the role that national courts have in harmonising Convention rights in the domestic sphere.[270] The ECtHR does not have the capacity to be the primary gatekeeper

[269] See Helen Keller and Alec Stone Sweet, "Introduction: The Reception of the ECHR in National Legal Orders" at 28-29: "Generally, it is argued that in virtually every country, the Convention has enhanced judicial authority vis-à-vis the legislative and executive branches."
[270] See Dia Anagnostou, "Politics, courts and society in the national implementation and practice of European Court of Human Rights case law" at 221: "[D]omestic courts are the pre-eminent actors in the implementation of the ECtHR's judgments. They are so both indirectly, by interpreting the status and authority of the Convention in relation to national constitutional

of Convention rights protection; the Council of Europe relies on the bodies and institutions in each Contracting State to develop their legal systems in accord with the ECHR. While not within the purview of this thesis to carry out a comprehensive analysis and comparison to another jurisdiction, I have decided to briefly review the German domestic context. My reasoning for selecting Germany is linked to the similarities between the UK and Germany judicial systems in relation to interpreting ECHR rights.[271] Likewise, both countries are economic and political powers within the European Union; the German human rights instrument, the Basic Law, has similar features to the HRA; and in recent years, Germany has become a host country for EU and TCN migrants.

Firstly, Article 1, paragraph 3 of the German *Grundgesetz* (Basic Law)[272] states that the three branches of government must follow and act in a way that is compatible with all rights listed in the instrument.[273] Regarding the interrelationship between German courts and the ECtHR, "the FCC [Federal Court of Justice] has emphasised the evolving nature of the domestic human rights system and its interdependence with the European one, declaring that the domestic courts must take into account the provisions of the ECHR and the judgments of the ECtHR (particularly with regard to comparable case law)."[274] While the higher-level authoritative Federal Court of Justice appears to support the harmonisation of ECtHR jurisprudence, a more in-depth assessment amongst the state-level courts would be better suited for a comparison with the UK courts. In a similar fashion to the UK, figures demonstrate the important role that the German courts have

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norms, and directly, by their readiness to align their jurisprudence to that of the Strasbourg Court."

[271] See Dia Anagnostou, *ibid.* at 213: "An elaborate system of judicial rights review domestically, a highly authoritative Federal Constitutional Court (FCC) with individual access, and by and large the congruence of rights norms contained in the Basic Law with those of the Convention, all contribute to the fact that the impact of the ECtHR's case law is secondary, highly subsidiary and for the most part peripheral. National authorities in Germany closely follow relevant Strasbourg case law issued against other states. They also engage in a kind of pre-emptive review of national draft legislation in order to verify its compatibility with the Convention and the ECtHR's case law."

[272] Basic Law for the Federal Republic of Germany, as amended July 2002

[273] See Sebastian Müller and Christoph Gusy, "The interrelationship between domestic judicial mechanism and the Strasbourg Court rulings in Germany" at 28: "the following basic rights shall bind the legislature, the executive and the judiciary as directly applicable law."

[274] *Ibid*. at 29.

in addressing Convention claims: in 2011, the FCC decided 5,744 complaints compared to the 1,754 applications submitted from Germany to the ECtHR.[275]

Political reservation towards the ECHR and ECtHR tend to occur when a judgment, either at the domestic or Strasbourg level, holds legislation to not be compatible with a Convention right. In the UK, Parliament has refused to fully amend the provisions restricting prisoners the right to vote. It appears that the German Federal Parliament has also shown a similar attitude towards immigration law and expulsion orders which have been held to contravene Articles 3 and 8 ECHR.[276] Specifically, "it took years for a common legal understanding to be reached in Germany and for the respective domestic courts and administration to adhere to the ECtHR's interpretation regarding Article 8 ECHR and the legal status of immigrants."[277] Different political objectives across European states, generally supported by a majority of the popular opinion, will have an influence in relation to the acceptance and implementation of ECtHR decisions, particularly in the context of amending legislation to make it compatible with the ECHR. Although a straightforward, objective comparison cannot be stated, a comparison between two Contracting States of the ECHR helps to put the domestic acceptance of ECtHR jurisprudence into perspective.

Critical perspective and suggestions for implementing a constitutional rights review reconstruction of section 2 HRA.

The institutional powers afforded to the judiciary in section 2 HRA regarding the application and interpretation of Convention rights requires a comprehensive and collaborative approach between the different levels of courts in the domestic sphere as well as with the ECtHR. The current obligation to take into account any judgment,

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[275] *Ibid.* at 30. Furthermore, at 30: "[T]he number of applications does not, however, correspond with the number of judgments finding a violation."
[276] *Ibid.* at 36: "When it comes to more structural changes in the domestic legal order, the governing parties in the Federal Parliament have shown a recalcitrant attitude, which stems not from the limited political salience of the ECtHR but from an unwillingness to amend the law." Furthermore, at 37: "[T]he administrative orders issued by the state authorities with regard to immigration law may interfere with the rights guaranteed in Articles 3 and 8 ECHR. This particularly applies in cases of expulsion orders."
[277] *Ibid.* at 37.

decision or opinion of the ECtHR fits within the two-prong method elaborated in Stephen Gardbaum's commonwealth model of constitutionalism. However, I contend that more weight should be placed on the section 2 obligation for domestic tribunals to *distinguish* the Strasbourg principle form the domestic case or authoritative principle. By requiring an extensive assessment, the judiciary would carry out a dialogical examination of the interpretative elements and case law to adjudicate a more thoroughly informed response in connection to the individual's alleged rights infringement, all the while supporting a more substantive rights-based review method. In a similar proposal, Kavanagh states that her constitutional review framework incorporates an inter-relational understanding of the constitutional apparatus in the UK. Although these flexible and dialogical structures could be argued as a more purposive model for approaching substantive rights review, it is not guaranteed to always bring about a contextual review of Convention rights. As the survey of the Upper Tribunal case law can demonstrate, the judiciary are still bound to the principle of parliamentary sovereignty and susceptible to increased judicial deference.

Without arriving at complete judicial supremacy, what solution could be brought about to strengthen constitutional rights review? The solution that I propose is to reconstruct the dialogical scope of section 2 HRA. The additional element would be a fast-track option for lower-level tribunals to ask a referring question to the Supreme Court regarding an ECtHR Convention right interpretation that is not within the "clear and constant line of Strasbourg jurisprudence."[278] If this option had been available to either the Upper Tribunal in *EA* or the Court of Appeal, firstly, there could be authoritative domestic jurisprudence on the legal uncertainty of the *Paposhvili* test. Second, rather than dismissing the appeal for it likely to not be a successful case on appeal, the judiciary could focus on delegating the rights-based claim to an appropriate-level court to get a decision on the subject matter in a quicker time frame. This would deliver on the section 2 HRA duty to consult ECtHR jurisprudence, sustain the emphasis on constitutional rights review and uphold the common law principle of precedence. Furthermore, this resolution

[278] See R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions [2003] 2 AC 295

would fit within the frameworks proposed by Kavanagh and Gardbaum, ensuring that the judiciary did not overextend their rights review capacity while still delivering a progressive realisation of substantive rights review. Lastly, this solution would strengthen Convention rights development at both the domestic and ECtHR levels, comply with section 6 HRA as well as address any potential disparities that may occur between differing Convention rights interpretation at the domestic and Strasbourg levels.

Concluding thoughts

I chose to explore the judiciary's administrative review capacity of ECHR Convention rights to analyse the strengthened powers of constitutional rights review legislated through the HRA. My thesis has sought to examine section 2(1) of the HRA through the lens of Kavanagh's constitutional review framework. Through a survey of UT case law, I have supported the point that the domestic courts have shifted to a stricter interpretation of Convention rights. In the context of judgments involving potential changes in immigration policies, Articles 3 and 8 ECHR have been subject to greater judicial deference. In response to this trend, I argue that applying a constitutional rights review approach to section 2 HRA would incorporate a stronger rights-based approach as it would further contextualise the interpretive development of Convention rights between domestic and Strasbourg jurisprudence. Lastly, I contend that section 2 HRA can be read to allow lower-level domestic courts and tribunals a more contextualised interpretation mechanism of Convention rights that would ultimately deliver on strengthening substantive rights while upholding the common law principle of precedent and the authoritative nature of the ECtHR in relation to Convention rights interpretation.

Overall, I envisioned this thesis to address the judiciary's role in respect of the HRA as well as to carry out a contextual approach to rights review. In the analyses of immigration appeals and applications for judicial review on medical grounds, I focussed on the judicial developments of Article 3 and 8 ECHR. This has raised an underlying question of whether a right to health can be deduced from the Convention rights. While perhaps a substantive right to health cannot be guaranteed, the 'living instrument' model of the ECHR demonstrates the contextual approach to rights within the European human

rights framework. Despite the reluctance towards the supranational instrument and institution, higher-level UK courts have shown more of a willingness to contextualise and develop Convention rights. While some may argue that this has ushered an unprecedented legislative role to the courts, I contend that the very nature of constitutional rights review necessitates a substantive framework that permits the judiciary to deliver tangible remedies to individuals. These instruments are legislated to protect and safeguard the human dignity of individuals. I conclude by referring again to Justice Sachs on this matter:

> "[t]he key question, then, is not whether unelected judges should ever take positions on controversial political questions. It is to define in a principled way the limited and functionally manageable circumstances in which the judicial responsibility for being the ultimate protector of human dignity compels judges to enter what might be politically-contested terrain."[279]

The principle of human dignity is what truly underlies constitutional instruments and is one of the foundational principles that led to the development of both the European Convention on Human Rights as well as the *Human Rights Act* 1998. In conclusion, both the *Human Rights Act 1998* and the European Convention on Human Rights have bolstered human rights within the UK and Europe. The HRA's constitutional rights review mechanism afforded to the judiciary has demarcated an influential period in the development of substantive rights. As such, the 20 years of the passing of this legislation should be celebrated for the very evolution of human rights within the UK and contribution to the judicial interrelationship with the European Court of Human Rights.

[279] Justice Albie Sachs, *The Strange Alchemy of Life and Law, supra* note 7 at 214.

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