HOUSE OF LORDS

SESSION 2006–07
19th REPORT
([2007] UKHL 11)

on appeal from: [2005] EWCA Civ 105

APPELLATE COMMITTEE

Huang (FC) (Respondent)
v.
Secretary of State for the Home Department (Appellant)
and
Kashmiri (FC) (Appellant)
v.
Secretary of State for the Home Department (Respondent)
(Conjoined Appeals)

REPORT

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NINETEENTH REPORT

from the Appellate Committee

21 MARCH 2007

Huang (FC) (Respondent) *v.* Secretary of State for the Home Department (Appellant) *and* Kashmiri (FC) (Appellant) *v.* Secretary of State for the Home Department (Respondent) (Conjoined Appeals)

ORDERED TO REPORT

The Committee (Lord Bingham of Cornhill, Lord Hoffmann, Baroness Hale of Richmond, Lord Carswell and Lord Brown of Eaton-under-Heywood) have met and considered the cause *Huang (FC) (Respondent) v. Secretary of State for the Home Department (Appellant) and Kashmiri (FC) (Appellant) v. Secretary of State for the Home Department (Respondent).* We have heard counsel on behalf of the appellants and respondents.

1. The following is the opinion of the Committee.

2. These two appeals have been heard together. They raise a common question on the decision-making role or function of appellate immigration authorities (adjudicators, the Immigration Appeal Tribunal, immigration judges) when deciding appeals, on Convention grounds, against refusal of leave to enter or remain, under section 65 of the Immigration and Asylum Act 1999 and Part III of Schedule 4 to that Act.

3. Mrs Huang is a Chinese citizen born on 29 March 1942. Her husband (from whom she is separated), daughter, son-in-law and two grandsons are British citizens living in this country. Mr Kashmiri is an Iranian citizen born on 4 July 1981. His parents and two siblings came to this country in 2000 and were in due course granted indefinite leave to remain as refugees, but Mr Kashmiri's claim to asylum has been refused. It is unnecessary for purposes of deciding these appeals to explore the underlying facts of these two cases, and given our conclusion on the outcome of the appeals it is undesirable to do so.

4. Mrs Huang appears before the House as a respondent in an appeal by the Secretary of State and Mr Kashmiri as an appellant in an appeal against the Secretary of State, but it is convenient to refer to them as "the applicants". Neither of the applicants qualifies for the grant of leave to remain in this country under the Immigration Rules and administrative directions currently promulgated. Both claim that the refusal of leave to remain is unlawful because incompatible with their Convention right to respect for their family life guaranteed by sections 2, 3 and 6 of and article 8 in Schedule 1 to the Human Rights Act 1998. This opinion is directed solely to the position of those who, like the applicants, do not qualify for entry under the Immigration Rules and supplementary administrative directions in force from time to time and base their claim on the family life component of article 8. For convenience we shall refer to adjudicators, the Immigration Appeal Tribunal and immigration judges, without differentiation, as "the appellate immigration authority" or "the authority".

Immigration control and human rights

5. As stated in *R (European Roma Rights Centre) v Immigration Officer at Prague Airport (United Nations High Commissioner for Refugees Intervening)* [2004] UKHL 55, [2005] 2 AC 1, para 11, the power to admit, exclude and expel aliens was among the earliest and most widely recognised powers of the sovereign state. But it seems unlikely that any developed state has ever enforced, or sought to enforce, a blanket rule to exclude the entry of all foreign nationals. Some exceptions were always made, and by the 1951 Geneva Convention and the 1967 Protocol, to which

some 140 states are now party, states bound themselves to grant asylum to foreign nationals entitled to recognition as refugees.

6. In this country, successive administrations over the years have endeavoured, in Immigration Rules and administrative directions revised and updated from time to time, to identify those to whom, on grounds such as kinship and family relationship and dependence, leave to enter or remain should be granted. Such rules, to be administratively workable, require that a line be drawn somewhere. Thus, for example, rule 317, relevant to the claim of Mrs Huang, makes provision for the admission of a parent, grandparent, or other dependent relative of any person present and settled in the United Kingdom if (among other grounds) she is a mother or grandmother who is a widow aged 65 years or over. Mrs Huang does not qualify under this head since she was not, when the decision was made, aged 65 or over and she is not a widow. Such a rule, which does not lack a rational basis, is not to be stigmatised as arbitrary or objectionable. But an applicant's failure to qualify under the Rules is for present purposes the point at which to begin, not end, consideration of the claim under article 8. The terms of the Rules are relevant to that consideration, but they are not determinative.

7. Although the United Kingdom ratified the European Convention on Human Rights in 1951, the Convention did not for some years exert any significant influence on British law and practice in the immigration field. In *Abdulaziz, Cabales and Balkandali v United Kingdom* (1985) 7 EHRR 471, 493, para 57, eminent leading counsel on behalf of Her Majesty's Government contended before the European Court in Strasbourg that matters of immigration control lay outside the scope of article 8 so that no complaint based on the application of immigration control could succeed under that article, either alone or in conjunction with a claim of discrimination under article 14. That argument was rejected (pp 494-495, paras 59-60) and the applicability of article 8 to immigration control has since been accepted.

8. In the Human Rights Act 1998 Parliament not only enabled but required the Convention rights set out in Schedule 1 to the Act (including article 8) to be given effect as a matter of domestic law in this country. It did so (section 2) by requiring courts or tribunals determining a question which had arisen in connection with a Convention right to take into account any relevant Strasbourg jurisprudence, by requiring legislation, where possible, to be read compatibly with Convention rights (section 3) and, most importantly, by declaring it unlawful (section 6) for a public authority to act in a way incompatible with a Convention right. Thus immigration officers, the appellate immigration authority and the courts, as public authorities (section 6(3)), act unlawfully if they do not (save in specified circumstances) act compatibly with a person's Convention right under article 8. The object is to ensure that public authorities should act to avert or rectify any violation of a Convention right, with the result that such rights would be effectively protected at home, thus (it was hoped) obviating or reducing the need for recourse to Strasbourg.

9. Two important steps were taken to ensure compliance with this new domestic legal obligation. The first was to amend (Cm 4851, September 2000) the then current Immigration Rules so as to require immigration officers, entry clearance officers and all staff of the Home Office Immigration and Nationality Directorate to carry out their duties in compliance with the provisions of the Human Rights Act 1998. It is these officers who ordinarily decide, in the first instance, whether leave to enter or remain in the country should be granted.

10. The second important step was to enact section 65 of and certain paragraphs of Schedule 4 to the Immigration and Asylum Act 1999. Section 65 lies at the heart of these appeals and must be quoted in full:

> "65.–(1) A person who alleges that an authority has, in taking any decision under the Immigration Acts relating to that person's entitlement to enter or remain in the United Kingdom, acted in breach of his human rights may appeal to an adjudicator against that decision unless he has grounds for bringing an appeal against the decision under the Special Immigration Appeals Commission Act 1997.

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

(3) Subsections (4) and (5) apply if, in proceedings before an adjudicator or the Immigration Appeal Tribunal on an appeal, a question arises as to whether an authority has, in taking any decision under the Immigration Acts relating to the appellant's entitlement to enter or remain in the United Kingdom, acted in breach of the appellant's human rights.

(4) The adjudicator, or the Tribunal, has jurisdiction to consider the question.

(5) If the adjudicator, or the Tribunal, decides that the authority concerned acted in breach of the appellant's human rights, the appeal may be allowed on that ground.

(6) No appeal may be brought under this section by any person in respect of a decision if–

(a) that decision is already the subject of an appeal brought by him under the Special Immigration Appeals Commission Act 1997; and

(b) the appeal under that Act has not been determined.

(7) "Authority" means–

(a) the Secretary of State;

(b) an immigration officer;

(c) a person responsible for the grant or refusal of entry clearance."

Section 65 was supplemented by paragraphs 21 and 22 of Part III of Schedule 4 to the 1999 Act which, so far as relevant, provided:

"21.–(1) On an appeal to him under Part IV, an adjudicator must allow the appeal if he considers–

(a) that the decision or action against which the appeal is brought was not in accordance with the law or with any immigration rules applicable to the case, or

(b) if the decision or action involved the exercise of a discretion by the Secretary of State or an officer, that the discretion should have been exercised differently,

but otherwise must dismiss the appeal.

(2) Sub-paragraph (1) is subject to paragraph 24 and to any restriction on the grounds of appeal.

(3) For the purposes of sub-paragraph (1), the adjudicator may review any determination of a question of fact on which the decision or action was based.

(4) For the purposes of sub-paragraph (1)(b), no decision or action which is in accordance with the immigration rules is to be treated as having involved the exercise of a discretion by the Secretary of State by reason only of the fact that he has been requested by or on behalf of the appellant to depart, or to authorise an officer to depart, from the rules and has refused to do so.

Appeals to Immigration Appeal Tribunal

22.–(1) Subject to any requirement of rules made under paragraph 3 as to leave to appeal, any party to an appeal, other than an appeal under section 71, to an adjudicator may, if dissatisfied with his determination, appeal to the Immigration Appeal Tribunal.

(2) The Tribunal may affirm the determination or make any other determination which the adjudicator could have made ..."

The structure of the appellate immigration authority has been altered since 1999, so that there is now a single, unified, appellate body, from which an appeal on a point of law lies to the Court of Appeal. But the essential effect of the provisions stands.

11. These provisions, read purposively and in context, make it plain that the task of the appellate immigration authority, on an appeal on a Convention ground against a decision of the primary official decision-maker refusing leave to enter or remain in this country, is to decide whether the challenged decision is unlawful as incompatible with a Convention right or compatible and so lawful. It is not a secondary, reviewing, function dependent on establishing that the primary decision-maker misdirected himself or acted irrationally or was guilty of procedural impropriety. The appellate immigration authority must decide for itself whether the impugned decision is lawful and, if not, but only if not, reverse it. This is the decision reached by the Court of Appeal (Judge, Laws and Latham LJJ) in these conjoined appeals, and it is correct: [2005] EWCA Civ 105, [2006] QB 1.

12. This construction necessarily displaces earlier rulings which accorded the appellate immigration authority a more limited role. Only two authorities need be cited. In *Edore v Secretary of State for the Home Department* [2003] EWCA Civ 716, [2003] 1 WLR 2979, para 20, the Court of Appeal, approving earlier first instance authority, ruled that

> "in cases like the present where the essential facts are not in doubt or dispute, the adjudicator's task on a human rights appeal under section 65 is to determine whether the decision under appeal (ex hypothesi a decision unfavourable to the appellant) was properly one within the decision-maker's discretion, ie, was a decision which could reasonably be regarded as proportionate and as striking a fair balance between the competing interests in play. If it was, then the adjudicator cannot characterise it as a decision 'not in accordance with the law' and so, even if he personally would have preferred the balance to have been struck differently (ie, in the appellant's favour), he cannot substitute his preference for the decision in fact taken."

To somewhat similar effect is the starred decision of the Immigration Appeal Tribunal in *M (Croatia) v Secretary of State for the Home Department* [2004] UKIAT 24, [2004] INLR 327, para 29:

> "The starting point should be that if in the circumstances the removal could reasonably be regarded as proportionate, whether or not the Secretary of State has actually said so or applied his mind to the issue, it is lawful. The Tribunal and adjudicators should regard *Shala v Secretary of State for the Home Department* [2003] EWCA Civ 233 INLR 349, *Edore* and *Djali* as providing clear exemplification of the limits of what is lawful and proportionate. They should normally hold that a decision to remove is unlawful only when the disproportion is so great that no reasonable Secretary of State could remove in those circumstances. However, where the Secretary of State, eg through a consistent decision-making pattern or through decisions in relation to members of the same family, has clearly shown where within the range of reasonable responses his own assessment would lie, it would be inappropriate to assess proportionality by reference to a wider range of possible responses than he in fact uses. It would otherwise have to be a truly exceptional case, identified and reasoned, which would justify the conclusion that the removal decision was

> unlawful by reference to an assessment that removal was within the range of reasonable assessments of proportionality. We cannot think of one at present; it is simply that we cannot rule it out ..."

These decisions are right to recognise (see para 16 below) that the judgment of the primary decision-maker, on the same or substantially the same factual basis, is always relevant and may be decisive. But they do not describe the correct approach of the appellate immigration authority to its role, and the Secretary of State's argument to the contrary must be rejected.

13. In the course of his justly-celebrated and much-quoted opinion in *R(Daly) v Secretary of State for the Home Department* [2001] UKHL26, [2001] 2 AC 532, paras 26-28, Lord Steyn pointed out that neither the traditional approach to judicial review formulated in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 nor the heightened scrutiny approach adopted in *R v Ministry of Defence, Ex p Smith* [1996] QB 517 had provided adequate protection of Convention rights, as held by the Strasbourg court in *Smith and Grady v United Kingdom* (1999) 29 EHRR 493. Having referred to a material difference between the *Wednesbury* and *Smith* approach on the one hand and the proportionality approach applicable where Convention rights are at stake on the other, he said (para 28): "This does not mean that there has been a shift to merits review". This statement has, it seems, given rise to some misunderstanding. The policy attacked in *Daly* was held to be ultra vires the Prison Act 1952 (para 21) and also a breach of article 8. With both those conclusions Lord Steyn agreed (para 24). They depended on questions of pure legal principle, on which the House ruled. *Ex p Smith* was different. It raised a rationality challenge to the recruitment policy adopted by the Ministry of Defence which both the Divisional Court and the Court of Appeal felt themselves bound to dismiss. The point which, as we understand, Lord Steyn wished to make was that, although the Convention calls for a more exacting standard of review, it remains the case that the judge is not the primary decision-maker. It is not for him to decide what the recruitment policy for the armed forces should be. In proceedings under the Human Rights Act, of course, the court would have to scrutinise the policy and any justification advanced for it to see whether there was sufficient justification for the discriminatory treatment. By contrast, the appellate immigration authority, deciding an appeal under section 65, is not reviewing the decision of another decision-maker. It is deciding whether or not it is unlawful to refuse leave to enter or remain, and it is doing so on the basis of up to date facts.

The task of the appellate immigration authority

14. Much argument was directed on the hearing of these appeals, and much authority cited, on the appellate immigration authority's proper approach to its task, due deference, discretionary areas of judgment, the margin of appreciation, democratic accountability, relative institutional competence, a distinction drawn by the Court of Appeal between decisions based on policy and decisions not so based, and so on. We think, with respect, that there has been a tendency, both in the arguments addressed to the courts and in the judgments of the courts, to complicate and mystify what is not, in principle, a hard task to define, however difficult the task is, in practice, to perform. In describing it, we continue to assume that the applicant does not qualify for leave to enter or remain under the Rules, and that reliance is placed on the family life component of article 8.

15. The first task of the appellate immigration authority is to establish the relevant facts. These may well have changed since the original decision was made. In any event, particularly where the applicant has not been interviewed, the authority will be much better placed to investigate the facts, test the evidence, assess the sincerity of the applicant's evidence and the genuineness of his or her concerns and evaluate the nature and strength of the family bond in the particular case. It is important that the facts are explored, and summarised in the decision, with care, since they will always be important and often decisive.

16. The authority will wish to consider and weigh all that tells in favour of the refusal of leave which is challenged, with particular reference to justification under article 8(2). There will, in almost any case, be certain general considerations to bear in mind: the general administrative desirability of applying known rules if a system of immigration control is to be workable, predictable, consistent and fair as between one applicant and another; the damage to good

administration and effective control if a system is perceived by applicants internationally to be unduly porous, unpredictable or perfunctory; the need to discourage non-nationals admitted to the country temporarily from believing that they can commit serious crimes and yet be allowed to remain; the need to discourage fraud, deception and deliberate breaches of the law; and so on. In some cases much more particular reasons will be relied on to justify refusal, as in *Samaroo v Secretary of State for the Home Department* [2001] EWCA Civ 1139, [2002] INLR 55 where attention was paid to the Secretary of State's judgment that deportation was a valuable deterrent to actual or prospective drug traffickers, or *R (Farrakhan) v Secretary of State for the Home Department* [2002] EWCA Civ 606, [2002] QB 1391, an article 10 case, in which note was taken of the Home Secretary's judgment that the applicant posed a threat to community relations between Muslims and Jews and a potential threat to public order for that reason. The giving of weight to factors such as these is not, in our opinion, aptly described as deference: it is performance of the ordinary judicial task of weighing up the competing considerations on each side and according appropriate weight to the judgment of a person with responsibility for a given subject matter and access to special sources of knowledge and advice. That is how any rational judicial decision-maker is likely to proceed. It is to be noted that both *Samaroo* and *Farrakhan* (cases on which the Secretary of State seeks to place especial reliance as examples of the court attaching very considerable weight to decisions of his taken in an immigration context) were not merely challenges by way of judicial review rather than appeals but cases where Parliament had specifically excluded any right of appeal.

17. Counsel for the Secretary of State nevertheless put his case much higher even than that. She relied by analogy on the decision of the House in *Kay v Lambeth London Borough Council* [2006] UKHL 10, [2006] 2 AC 465, where the House considered the article 8 right to respect for the home. It held that the right of a public authority landlord to enforce a claim for possession under domestic law against an occupier whose right to occupy (if any) had ended and who was entitled to no protection in domestic law would in most cases automatically supply the justification required by article 8(2), and the courts would assume that domestic law struck the proper balance, at any rate unless the contrary were shown. So here, it was said, the appellate immigration authority should assume that the Immigration Rules and supplementary instructions, made by the responsible minister and laid before Parliament, had the imprimatur of democratic approval and should be taken to strike the right balance between the interests of the individual and those of the community. The analogy is unpersuasive. Domestic housing policy has been a continuing subject of discussion and debate in Parliament over very many years, with the competing interests of landlords and tenants fully represented, as also the public interest in securing accommodation for the indigent, averting homelessness and making the best use of finite public resources. The outcome, changed from time to time, may truly be said to represent a considered democratic compromise. This cannot be said in the same way of the Immigration Rules and supplementary instructions, which are not the product of active debate in Parliament, where non-nationals seeking leave to enter or remain are not in any event represented. It must be remembered that if an applicant qualifies for the grant of leave to enter or remain under the Rules and is refused leave, the immigration appeal authority must allow such applicant's appeal by virtue of paragraph 21(1)(a) of Part III of Schedule 4 to the 1999 Act. It is a premise of the statutory scheme enacted by Parliament that an applicant may fail to qualify under the Rules and yet may have a valid claim by virtue of article 8.

18. The authority must of course take account, as enjoined by section 2 of the 1998 Act, of Strasbourg jurisprudence on the meaning and effect of article 8. While the case law of the Strasbourg court is not strictly binding, it has been held that domestic courts and tribunals should, in the absence of special circumstances, follow the clear and constant jurisprudence of that court: *R(Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23, [2003] 2 AC 295, para 26; *R(Ullah) v Special Adjudicator* [2004] UKHL 26, [2004] 2 AC 323, para 20. It is unnecessary for present purposes to attempt to summarise the Convention jurisprudence on article 8, save to record that the article imposes on member states not only a negative duty to refrain from unjustified interference with a person's right to respect for his or her family but also a positive duty to show respect for it. The reported cases are of value in showing where, in many different factual situations, the Strasbourg court, as the ultimate guardian of

Convention rights, has drawn the line, thus guiding national authorities in making their own decisions. But the main importance of the case law is in illuminating the core value which article 8 exists to protect. This is not, perhaps, hard to recognise. Human beings are social animals. They depend on others. Their family, or extended family, is the group on which many people most heavily depend, socially, emotionally and often financially. There comes a point at which, for some, prolonged and unavoidable separation from this group seriously inhibits their ability to live full and fulfilling lives. Matters such as the age, health and vulnerability of the applicant, the closeness and previous history of the family, the applicant's dependence on the financial and emotional support of the family, the prevailing cultural tradition and conditions in the country of origin and many other factors may all be relevant. The Strasbourg court has repeatedly recognised the general right of states to control the entry and residence of non-nationals, and repeatedly acknowledged that the Convention confers no right on individuals or families to choose where they prefer to live. In most cases where the applicants complain of a violation of their article 8 rights, in a case where the impugned decision is authorised by law for a legitimate object and the interference (or lack of respect) is of sufficient seriousness to engage the operation of article 8, the crucial question is likely to be whether the interference (or lack of respect) complained of is proportionate to the legitimate end sought to be achieved. Proportionality is a subject of such importance as to require separate treatment.

Proportionality

19. In *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69, 80, the Privy Council, drawing on South African, Canadian and Zimbabwean authority, defined the questions generally to be asked in deciding whether a measure is proportionate:

> "whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective."

This formulation has been widely cited and applied. But counsel for the applicants (with the support of Liberty, in a valuable written intervention) suggested that the formulation was deficient in omitting reference to an overriding requirement which featured in the judgment of Dickson CJ in *R v Oakes* [1986] 1 SCR 103, from which this approach to proportionality derives. This feature is (p 139) the need to balance the interests of society with those of individuals and groups. This is indeed an aspect which should never be overlooked or discounted. The House recognised as much in *R (Razgar) v Secretary of State for the Home Department* [2004] UKHL 27, [2004] 2 AC 368, paras 17-20, 26, 27, 60, 77, when, having suggested a series of questions which an adjudicator would have to ask and answer in deciding a Convention question, it said that the judgment on proportionality

> "must always involve the striking of a fair balance between the rights of the individual and the interests of the community which is inherent in the whole of the Convention. The severity and consequences of the interference will call for careful assessment at this stage" (see para 20).

If, as counsel suggest, insufficient attention has been paid to this requirement, the failure should be made good.

20. In an article 8 case where this question is reached, the ultimate question for the appellate immigration authority is whether the refusal of leave to enter or remain, in circumstances where the life of the family cannot reasonably be expected to be enjoyed elsewhere, taking full account of all considerations weighing in favour of the refusal, prejudices the family life of the applicant in a manner sufficiently serious to amount to a breach of the fundamental right protected by article 8. If the answer to this question is affirmative, the refusal is unlawful and the authority must so decide. It is not necessary that the appellate immigration authority, directing itself along the lines indicated in this opinion, need ask in addition whether the case meets a test of exceptionality. The suggestion

that it should is based on an observation of Lord Bingham in *Razgar* above, para 20. He was there expressing an expectation, shared with the Immigration Appeal Tribunal, that the number of claimants not covered by the Rules and supplementary directions but entitled to succeed under article 8 would be a very small minority. That is still his expectation. But he was not purporting to lay down a legal test.

Disposal

21. Mrs Huang was successful in her appeal to an adjudicator, but that decision was reversed on the Secretary of State's appeal to the Immigration Appeal Tribunal. Mr Kashmiri was unsuccessful before both the adjudicator and the Immigration Appeal Tribunal. The Court of Appeal ([2006] QB 1, para 63) found the decisions of the Tribunal in each case to be legally defective, since both, following the approach laid down in *M (Croatia) v Secretary of State for the Home Department* [2004] INLR 327, adopted a review approach incorrectly based on deference to the Secretary of State's view of proportionality. In the case of Mrs Huang, the Court of Appeal considered that a tribunal might, properly directing itself, find that she had a valid claim under article 8 although she could not qualify under the Rules. It therefore allowed her appeal and remitted her case to the Immigration Appeal Tribunal. In the case of Mr Kashmiri the Court of Appeal was of opinion that a tribunal properly directing itself could not have upheld his claim. It therefore dismissed his appeal.

22. As already indicated, we agree with the Court of Appeal's criticism of the standard of review applied by the Immigration Appeal Tribunal in these two cases. We would accordingly dismiss the Secretary of State's appeal in Mrs Huang's case, and uphold the Court of Appeal's order. In Mr Kashmiri's case, the Secretary of State did not seek to uphold the Court of Appeal's order if the House should find that the Immigration Appeal Tribunal had misdirected itself, fairly accepting that Mr Kashmiri was entitled to a decision by a properly directed tribunal. We would accordingly allow his appeal, and remit his case also to the tribunal. Both cases, therefore, are now remitted to be heard before the unified appellate body, the Asylum and Immigration Tribunal. In Mrs Huang's case, the costs order made by the Court of Appeal will stand. The Secretary of State must pay her costs of this appeal to the House. The Secretary of State must pay Mr Kashmiri's costs in the Court of Appeal and the House.