Public Law Project

HERBERT SMITH FREEHILLS

Blackstone CHAMBERS

PLP 25 Years

JUDICIAL REVIEW

2015 TRENDS AND FORECASTS

LEGAL AID LAWYER OF THE YEAR AWARDS WINNER 2015

MONDAY 5 OCTOBER
HERBERT SMITH FREEHILLS
EXCHANGE HOUSE
PRIMROSE STREET
LONDON EC2A 2HS
9.30 – 17.30

EARN 6 CPD POINTS
SRA/BSB/ILEX

Speakers:

DAVID ANDERSON QC, TIM BULEY, JAMIE BURTON, SARAH CLARKE, SIMON CREIGHTON, DEBA DAS, TOM DE LA MARE QC, MARIE DEMETRIOU QC, MICHAEL DRURY CMG, MIKE FORDHAM QC, PROF CONOR GEARTY, RICHARD GORDON QC, JOHN HALFORD, RICHARD HERMER QC, PHILLIPPA KAUFMANN QC, ERIC KING, LORD JUSTICE LAWS, ANDREW LIDBETTER, DAVID LOCK QC, JOANNA LUDLAM, NICOLA MACKINTOSH QC (HONS), RAVI MEHTA, TIM OTTY QC, NAINA PATEL, JASVEER RANDHAWA, JENNI RICHARDS QC, ALICE ROSS, TOM SNELLING, MICHAEL SPENCER, IAIN STEELE, KATE STONE, ADAM STRAW, HUGH TOMLINSON QC, HEATHER WILLIAMS QC

Programme:

TOP CASES OF THE YEAR, PARLIAMENTARY VANDALISM AND NEW HUMAN RIGHTS, INFORMATION PROCESSING AND DISCLOSUE BY PUBLIC AUTHORITIES, SURVEILLANCE AND THE LAW, THE RELATIONSHIP BETWEEN LITIGATION AND POLICY, HENRY VIII CLAUSES, THE IMPACT OF TERRORISM POLICY ON FREE SPEECH, EU LAW IN DOMESTIC JUDICIAL REVIEW, PROPORTIONALITY - WHAT LIES BENEATH THE LABEL?, VICTIMS, SUSPECTS AND CONVICTS, CHALLENGING NHS DECISIONS, PUBLIC LAW AND THE REGULATORS, INTERNATIONAL LAW IN DOMESTIC COURTS, SOCIAL SECURITY SALAMI SLICING

MORNING SESSION

PLENARY CHAIR: JENNI RICHARDS QC, 39 ESSEX STREET CHAMBERS

9.00 COFFEE AND REGISTRATION

9.30 INTRODUCTION FROM THE CHAIR OF THE PUBLIC LAW PROJECT

9.35 OPENING ADDRESS: LORD JUSTICE LAWS

10.00 TOP PUBLIC LAW CASES OF THE YEAR:
Naina Patel and Iain Steele, Blackstone Chambers & Joanna Ludlam, Partner, Baker McKenzie LLP

10.45 PARLIAMENTARY VANDALISM AND NEW HUMAN RIGHTS

- Implications of repeal of the HRA and statutorily restricted rights
- The strength and potential of the common law and international human rights obligations
- A rebalanced Constitution through the principle of legality and the rule of law

Mike Fordham QC, Blackstone Chambers

11.15 BREAK

11.35 MORNING BREAKOUT SESSIONS
choose one of four on the right

12.35 INFORMATION PROCESESSING AND DISCLOSURE BY PUBLIC AUTHORITIES
Recent case law on the engagement of Article 8, data processing and privacy issues.
Hugh Tomlinson QC, Matrix Chambers

13.05 LUNCH

WHO SHOULD ATTEND?

All practitioners involved in, or who want to become involved in, judicial review proceedings.

WHY YOU SHOULD ATTEND

- This is a unique event, set up by practitioners for practitioners that brings together a mix of both claimant and defendant lawyers.
- It engages with the practical aspects of judicial review litigation, with an emphasis on access to justice and freedom of information.
- Leaders in the field will provide up-to-date information on the latest judicial review case law and trends.
- You will earn 6 hours of Solicitors Regulation Authority / Bar Council / ILEX CPD points.

MORNING BREAKOUT SESSIONS

Each session is scheduled to last one hour.
Please choose one of the following

1. EU law in domestic judicial review

- Relying on EU law in domestic proceedings
- Charter: status and horizontal effect
- Securing a reference and interveners
- Practical points for Luxembourg

Deba Das, Senior Associate, Freshfields,
Tom Snelling, Partner, Freshfields &
Marie Demetriou QC, Brick Court Chambers

2. Proportionality - what lies beneath the label? The dark arts of variable intensity of review and application of the principle in practice.

Will proportionality replace Wednesbury across the board, or only in cases involving fundamental rights and interests recognised by the common law?

How do you apply the proportionality principle in practice? In which cases will the Courts look more closely at reasons and evidence?

What arguments do you need to advance to assist or prevent this?

What evidence do you need?

Tom de la Mare QC, Blackstone Chambers &
John Halford, Bindmans LLP

3. Victims, suspects and convicts - recent developments in public law and the criminal justice system

This session will look at -

- Police investigations and the HRA
- Prison law challenges (those that are left!)
- Compensation for miscarriages of justice

Simon Creighton, Bhatt Murphy
Philippa Kaufmann QC, Matrix Chambers &
Kate Stone, Garden Court North

4. Challenging NHS decisions: How can patients and those focusing on patient interests use the law to uphold patients' rights:

This session will look at the legislative scheme affecting the NHS in England, a range of areas of challenge to NHS management decision making and how challenges can be constructed to have the best chance of success. They will cover:

- Hospital and other service reconfigurations
- NHS treatment rationing
- Failures in the duty to involve patients in commissioning decisions around restructuring services
- Challenges involving outsourcing of NHS services

David Lock QC and Tim Buley, Landmark Chambers

AFTERNOON SESSION

CHAIR: NICOLA MACKINTOSH QC (HON)

14.00 PUBLIC LAW PANEL: SURVEILLANCE AND THE LAW

The Panel will discuss recent judgments of the Investigatory Powers Tribunal (IPT) concerning the basis for lawful interception, including the implications for communications to which legal professional privilege and client confidentiality attach. They will also discuss David Anderson QC's recent report 'A Question of Trust' and other legal issues arising from surveillance by the intelligence services. There will be time for Q&A from delegates.

Hugh Tomlinson QC, Matrix Chambers (Chair)
David Anderson QC, The Government's Independent Reviewer of Terrorism Legislation
Michael Drury CMG, Partner, BCL Burton Copeland and former Head of Legal, GCHQ
Eric King, Deputy Director, Privacy International
Alice Ross, Investigative Journalist, the Guardian

14.45 AFTERNOON BREAKOUT SESSIONS

Choose one of four on the right

15.45 BREAK

16.05 THE RELATIONSHIP BETWEEN LITIGATION AND POLICY: LITIGATION BY THE CHAGOSSIAN ISLANDERS (1982 -)

This presentation will cover which acts of Government have been challenged, changes to Government policy and its stance during and after litigation. It will also look at the feasibility studies, the current Supreme Court case and what the new decision means.

Richard Gifford, Consultant, Clifford Chance LLP

16.35 WHY HENRY VIII CLAUSES SHOULD BE CONSIGNED TO THE DUSTBIN OF HISTORY

Henry VIII clauses by which Acts of Parliament may be changed by delegated legislation are a constitutional anomaly. They are derived from a time when the Crown exercised absolute power. In the modern age they have the potential to subvert the sovereignty of parliament and substitute executive tyranny. This talk examines the history and modern uses of such clauses and explains why they should have no place in our post-1688 Glorious Revolution settlement.

Richard Gordon QC, Brick Court Chambers

17.00 CLOSING ADDRESS: PROF CONOR GEARTY THE IMPACT OF TERRORISM POLICY ON FREE SPEECH

British values have always encompassed freedom of speech - but in name only. The latest assault on inconvenient speech is simply the starkest example of that truest of British values, double-standards. As a result of recent terrorism laws restricting expression, the courts are bound soon to face large challenges in negotiating a pathway between desired appearance and this authoritarian reality.

17.30 FINISH

AFTERNOON BREAKOUT SESSIONS

Each session is scheduled to last one hour.
Please choose one of the following

5. Public law and the regulators

This seminar is an update on the application of judicial review principles to the regulators across a range of commercial sectors, how the courts tend to approach the different ground for JR in this context and a number of recent cases.

Andrew Lidbetter, Partner &
Jasveer Randhawa, Senior Associate,
Herbert Smith Freehills LLP

6. International Law in the Domestic Courts

This session examines the increasing role that international law is playing in domestic public law claims. The speakers will give a broad outline of key international law sources and the principles as to how domestic courts apply them before highlighting key cases. The discussion will consider not simply claims concerning international human rights in the context of Iraq, Afghanistan and Guantanamo Bay but also how international law can be utilised in a broad range of cases for example those concerning the rights of children and increasingly social & economic rights.

Richard Hermer QC, Matrix Chambers &
Ravi Mehta, Blackstone Chambers

7. Social Security Salami Slicing: What's Left to Cut?

The new Conservative government campaigned on a promise of £30bn sending cuts including £12bn from welfare. Wherever the cuts fall they will have profound impacts and are bound to raise questions about whether they can lawfully be implemented. Is it possible to reduce spending to this extent without unlawful discrimination and can it be reconciled with domestic and international duties to which the government is subject such as the Child Poverty Act 2010, if it remains, or the UNCRC or UNCRPD?

This talk will consider the extent to which there are legal limits on the proposed cuts and will seek to map out areas where they can be subjected to successful challenges.

Jamie Burton, Doughty Street Chambers,
Sarah Clarke, The Public Law Project &
Michael Spencer, Child Poverty Action Group

8. Future proofing: running human rights arguments under the common law.

This session explores the extent to which the common law may be used in judicial review and damages claims involving human rights, and what may be done to try to enhance the protection of fundamental rights by the common law, to safeguard your cases from the potential repeal of the Human Rights Act. It supplements Michael Fordham QC's talk in the morning plenary.

It also explores another hot topic in the Admin Court: discrimination, including two recent Supreme Court decisions on article 14 of the ECHR.

Adam Straw & Heather Williams QC
Doughty Street chambers

BREAKOUT SESSIONS

Morning Break Out Sessions	Room and directions
1 EU Law in Domestic judicial review	C9 + 10 Exit stage right from auditorium
2 Proportionality	Main Auditorium
3 Victims, suspects and convicts	C3+ 4 Exits stage right from auditorium
4 Challenging NHS decisions	C 1 + 2 Exits stage right from auditorium

Afternoon Breakout sessions	Room and directions
5 Public law and the regulators	Main Auditorium
6 International law in the domestic courts	C3+ 4 Exits stage right from auditorium
7 Social security salami slicing	C9 + 10 Exits stage right from auditorium
8 Future proofing and discrimination	C 1 + 2 Exits stage right from auditorium

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The delegate pack has numbered sections (separated with a single page with a number) reserved for each seminar paper, as below.

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2. **Top public law cases of the year**
   Naina Patel and Iain Steele & Joanna Ludlam

3. **Parliamentary vandalism and new human rights**
   Michael Fordham QC

   Morning Breakout Sessions:

   4. **EU law in Domestic Judicial Review**
      Deba Das, Tom Snelling and Marie Demetriou QC

   5. **Proportionality: What Lies beneath the label?**
      Tom de la Mare QC and John Halford

   6. **Victims, Suspects and Convicts: Recent developments in public law and the justice system**
      Simon Creighton, Philippa Kaufmann & Kate Stone

   7. **Challenging NHS decisions**
      David Lock Qc and Tim Buley

8. **Public law panel: Surveillance and the law**
   Chair: Hugh Tomlinson QC
   Panellists: David Anderson QC, Michael Drury CMG, Eric King & Alice Ross

   Afternoon Breakout Sessions

   9. **Public law and the regulators**
      Andrew Lidbetter and Jasveer Randhawa

   10. **International law in the domestic courts**
       Richard Hermer QC & Ravi Mehta

   11. **Social Security salami slicing: What's left to cut?**
       Jamie Burton, Sarah Clarke & Mike Spencer

   12. **Future proofing: Running human rights arguments under the common law**
       (now with added section on Discrimination….)
       Adam Straw and Heather Williams QC

13. **The relationship between litigation and policy: Litigation by the Chagossian Islanders**
    Richard Gifford

14. **Why Henry VIII clauses should be consigned to the dustbin of history**
    Richard Gordon QC

15. Feedback form

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David Anderson QC, Independent Reviewer of Terrorism Legislation

David Anderson Q.C. practises from Brick Court Chambers, largely in the fields of EU law, public law and human rights. He is also a visiting Professor at King's College London, Editor of the Oxford EU Law series and a member of the Courts of Appeal of Jersey and Guernsey.

Since 2011 David has served as the UK's Independent Reviewer of Terrorism Legislation. In that capacity he is given extensive access to classified material and tasked by statute to report annually on the operation of the UK's anti-terrorism laws. He reads, travels and consults as widely as possible. His reports are presented to the Home Secretary and Treasury, and laid before Parliament. They are frequently relied upon in judicial proceedings, in Parliament and to inform the public and political debate on terrorism and civil liberties. They have influenced the content of new legislation (e.g. Justice and Security Act 2013 and the Counter-Terrorism and Security Act 2015) and have been relied upon in several court judgments (e.g. R v Gul [2013] UKSC 64, Beghal v DPP [2015] UKSC 49).

David was additionally tasked under the Data Retention and Investigatory Powers Act 2014 to report by May 2015 on the operation and regulation of investigatory powers. His report, entitled "A Question of Trust", was published and laid before Parliament on 11 June 2015. He reported on the operation of the Terrorism Acts in September 2015 and at the invitation of the Home Secretary is currently reviewing both deportation with assurances and the deprivation of citizenship under the Immigration Act 2014 section 66.

All David's reports and recommendations, with the Government's responses to them, are available on his website: http://terrorismlegislationreviewer.independent.gov.uk/. David can also be followed on twitter @terrorwatchdog.

Tim Buley, Landmark Chambers

Tim Buley specialises in all areas of public and human rights law, with notable experience in commercial and regulatory work, the NHS, planning and environment, immigration, social security, local government and EU law. He is member of the A-panel of Junior Counsel to the Crown and the Welsh Government panel, and was named in Chambers UK's Top Junior Bar 100 (December 2013). He is top ranked in four areas the Legal 500 2015 and Chambers UK 2015: Administrative and Public Law, Civil Liberties, Immigration and Community Care . Tim's many high profile public law cases include *R (Cart) v UT* [2012] 1 AC 663 (constitutional law), *R (Newhaven Port and Properties Ltd) v DEFRA* [2013] 3 WLR 1433 (deprivation of property), *R (Bahta) v SSHD* [2011] EWCA Civ 895, [2011] CPR Rep 43 (costs in public law), *Burnip v Birmingham CC, SSWP* [2013] PTSR 117 (discrimination, Article 14 ECHR), *R (Gudanaviciene) v Lord Chancellor* [2015] 1 WLR 2247 (exceptional funding, EU Charter of Fundamental Rights), the Benefit Cap litigation, and *R (Baker Tilly LLP) v Financial Reporting Council* [2015] EWHC 1398 (Admin) (audit, professional misconduct, financial services regulation).

Jamie Burton, Doughty Street Chambers

Jamie Burton is a public lawyer with particular expertise in social welfare and human rights. His main areas of practise are human rights, equality law, community care, asylum support, social security and criminal justice. He acted in several recent cases which challenged government cuts to public services and welfare benefits, including *R (Mosely) v. Haringey LBC* [2014] UKSC 56, *R (Blake) v. Waltham Forest LBC* [2014] EWHC, *Poshteh v. Kensington & Chelsea LBC* [2015] EWCA Civ 711, *R(T) v. Sheffield CC* [2-13] EWHC 2953 and R(CPAG) v. DWP [2011] EWHC 2616. He also regularly advises public authorities in relation to their statutory and human rights obligations.

Jamie is head of Doughty Street's Community Care and Health team and is recognised as a leading junior in public & administrative law, community care and social housing by Legal 500 and Chambers & Partners. He appeared on behalf of the successful Claimant in the only reported case under the new Care Act 2014 (*R(SG) v. Haringey LBC* [2015] EWHC 2579).

Jamie is Chair and co-founder of 'Just Fair', a charity that works on human rights issues, particularly economic, social and cultural rights. Just Fair has had a significant impact on the public debate on human rights in the UK. Jamie is also a member of the Expert Panel of 'Housing Rights Watch' - a pan-European think-tank that works on housing and homelessness rights across Europe.

Sarah Clarke, The Public Law Project

Sarah Clarke is a Project Solicitor at the Public Law Project. She was previously solicitor at the Child Poverty Action Group for many years.

Simon Creighton, Bhatt Murphy

Simon Creighton specialises in prison law, working particularly with life sentenced prisoners. He has a considerable case load of public law challenges and applications to the European Court of Human Rights. Simon has practised in prison law since 1993 when he was appointed as the first solicitor to the Prisoners' Advice Service. He was one of the first lawyers to work exclusively in this area and as well as conducting his own cases, through writing and education he has helped ensure that prison law is now seen as a distinct area of practice in its own right. He has acted in many of the key prison cases and has provided advice and input to other lawyers in their work. He also acts in cases involving data protection breaches and the right to privacy in the criminal justice system. He is regularly asked to comment in the media on issues affecting prisoners. He is the co-author of the two leading textbooks in this area, "Prisoners: Law & Practice" and "Parole Board hearings: Law & Practice", both published by LAG.

Deba Das, Freshfields

Deba Das is a senior associate in Freshfields' EU litigation practice having qualified there in 2009. His practice spans competition litigation, commercial litigation and commercial public law. He has worked on commercial fundamental rights cases domestically, and in Luxembourg and Strasbourg, and has acted pro bono on matters ranging from extraordinary rendition, to gender and nationality discrimination, and the rights of the child. He is noted for Administrative and Public Law in the Legal 500 and has since 2013 been a Council member of JUSTICE.

Tom de la Mare QC, Blackstone Chambers

Tom de la Mare QC has a broad public law practice which has a considerable cross-over with his Human Rights, EU and Environmental Law expertise. He has a wide range of clients who value his ability to provide comprehensive expert advice straddling these fields. Tom has a thriving EU public law practice which covers subjects as diverse as social security co-ordination, discrimination, citizenship, free movement, immigration and the EU Charter. He has acted as a Special Advocate in a significant number of national security cases, from the Belmarsh case to the Binyam Mohammed litigation.

Tom is recommended by both leading independent legal directories in a number of areas, including Public Law, and was acknowledged in Chambers Global 2015. He is also a regular contributor to publications such as Judicial Review, on a wide range of public law topics.

Marie Demetriou QC, Brick Court Chambers

Marie Demetriou QC took Silk in 2012. In 2015 she was appointed Standing Counsel to the Competition and Markets Authority. Marie has extensive advocacy experience before the English and European Courts across her specialist areas of EU law, competition law and public law (including human rights). She has an insider's knowledge of how the European Court of Justice operates, having worked there for three years as a référendaire to Judge Edward, then the British Judge. Her EU law practice ranges from representing large companies in competition damages claims to preliminary references before the ECJ on asylum law and human rights on behalf of NGOs and individuals. It spans every area of EU law including free movement, sports, broadcasting and telecommunications, aviation, pharmaceuticals, taxation and social security. Marie is also recognised in the principal legal directories for her public law and human rights practice. Before taking Silk, she was a member of the Attorney General's 'A' Panel.

Michael Drury CMG,BCL Burton

Michael Drury joined BCL in 2010 from GCHQ where he was Director for Legal Affairs. Originally a tax lawyer he then prosecuted for HM C&E and was at the SFO from its inception, where he had the conduct of some of the most notable cases in the 1980s and 1990s.

During his 14 years at GCHQ, Michael advised upon the full range of legal issues concerning the intelligence agency and its operations, and has unrivalled expertise in the fields of interception and surveillance, being responsible in part for the drafting of the Regulation of Investigatory Powers Act 2000 (RIPA) and its secondary legislation. Until 2010 he was involved in all the significant litigation concerning RIPA. He has wide experience of acting in public inquires, resisting challenges to Government action and disclosure in civil and criminal litigation (including asset freezing and sanctions).

Michael offers a service to individuals and corporate clients, both where litigation has started and where advice is being sought to minimise litigation and business risk, and especially in cases with a national security element.

Mike Fordham QC, Blackstone Chambers

Michael Fordham QC is a public lawyer specialising in judicial review. He writes the Judicial Review Handbook and sits as a Deputy High Court judge. He has won Human Rights Lawyer of the Year, the Bar Pro Bono Award and Public Law QC of the Year. He is a Fellow of the Bingham Centre for the Rule of Law and a College Lecturer in Administrative Law at Hertford College Oxford.

Prof Conor Gearty LSE & Matrix Chambers

Conor Gearty is Professor of Human Rights Law and Director of the Institute of Public Affairs at the London School of Economics, where he has been since his move from Kings College London in 2002. He has directed LSE's centre for the study of human rights between 2002 and 2009, and the Institute from 2011. Before LSE and Kings he was a university lecturer in law at Cambridge University where he was also a fellow of Emmanuel College Cambridge. He received his LLB and PhD from Cambridge University after studying Law as an undergraduate at University College Dublin. He also qualified as a solicitor in Ireland before leaving for England, where he has since qualified as a barrister. He is a founding member of the barristers' chambers Matrix from where he practices law, specialising in public law and human rights.He has appeared in the High Court, the Court of Appeal and the House of Lords.He is also a fellow of the British Academy and a Bencher of Middle Temple.

Conor Gearty's scholarship is mainly in the fields of human rights, terrorism and civil liberties. His most recent book is *Liberty and Security* published by Polity in early 2013. In 2012 he published *Debating Social Rights* (with V Mantouvalou) and edited (with Costas Douzinas) *The Cambridge Companion to Human Rights Law*. His co-edited collection (with Costas Douzinas) *The Meanings of Rights* appeared in early 2014. In 2011 he completed a web-based book *The Rights Future* (see http://www.therightsfuture.com). His next book *ON Fantasy island* will be a defence of the Human Rights Act

Richard Gifford, Consultant, Clifford Chance LLP

Richard Gifford read law at Trinity Hall, where he was also President of the Cambridge University French Society. He was articled to Theodore Goddard & Co. There followed 30 years as a partner in Sheridans, and now as a consultant at Clifford Chance LLP

Litigating from the outset, Gifford has developed areas of the law in a wide spectrum of cases. These have included the first case to reach the House of Lords concerning division of family assets on divorce, a series of cases on the status of Commonwealth citizens seeking UK nationality, obtaining 3rd Party discovery in different Divisions of the High Court and the well-known case of the Chagos Islanders.

It was on a visit to Mauritius as Chairman of the Anglo-Mauritian Association that Gifford had the idea of investigating the little known exile of the Chagos Islanders.. As the lawyer representing the Chagos community both in Mauritius and Seychelles, Gifford featured in the award winning documentary by John Pilger "Stealing a Nation" and has lost count of the professional time spent in helping academics, journalists and film-makers in their enquiries into this unusual episode of English Colonial History.

In their search for justice Gifford has piloted their claims through all the higher Courts in England, the ECtHR, and the Supreme Courts of both the UK and USA

Gifford is a trustee of the ASHA Foundation which administers many EU programmes from its hospitality venue in the Forest of Dean.

Richard Gordon QC, Brick Court Chambers

Richard Gordon QC practises both in the UK and in foreign jurisdictions in the fields of constitutional and administrative law, fundamental rights and EU and competition. He is the author of several works on these subjects including *'Repairing British Politics – A Blueprint for Constitutional Change'* (Hart Publishing). His most recent work is the 2nd edition of *'EU Law in Judicial Review'* (OUP, 2014). He is a member of the Advisory Board of the Constitution Society UK and has been a Special Advocate. Richard has recently been appointed as a Special Legal Adviser to the Public Administration Select Committee of the House of Commons. He is also the trustee of a recently established Foundation for the promotion of the rule of law in Africa.

John Halford, Bindmans LLP

John Halford is a public law specialist and a partner at Bindmans LLP. As a litigator, he has focussed on judicial review work since 1993, challenging the unfair exercise and abuse of power by public authorities, human rights breaches and discrimination. John has had a number of notable successes in high profile test cases in the Court of Appeal, the House of Lords and the UK Supreme Court, including Laporte (challenging police kettling), Elias (a challenge to discriminatory compensation arrangements) and JFS (overturning a racially discriminatory admissions policy). In October, the Court of Appeal is due to hear Public Law Project, a case here he acts for PLP in resisting the legal aid residence test and the Supreme Court is about to give judgment in Keyu, a case about the application of human rights and proportionality principles to the refusal to investigate a massacre by British troops. John acts for the families of those killed.

John is also a source of trusted advice on a wide range of complex public law issues. His advisory caseload includes professional disciplinary, regulatory, procurement, transport and road use, planning, pensions EU and human rights law matters.

In the Chambers legal directory John has starred rankings (the highest awarded) in the fields of administrative and public law, human rights and civil liberties and is recommended as a leader in the fields of professional disciplinary and police law work. The Legal 500 directory lists him as a leader in administrative and public law, civil liberties, human rights and healthcare. He is a past winner of a Legal Aid Lawyer of the Year award. In 2014 he was named 'Lawyer of the Year' for Administrative and Public Law by the Best Lawyers Directory and was one of three lawyers shortlisted for Liberty's 'Human Rights Lawyer of the Year' award.

Richard Hermer, QC Matrix Chambers

Richard Hermer QC practices at Matrix Chambers.

Ben Jaffey, Blackstone Chambers

Ben Jaffey was appointed Chair of PLP's trustees in September 2015. He is a barrister at Blackstone Chambers, specialising in public law. He won the Liberty Human Rights Lawyer of the Year Award in 2015.

Philippa Kaufmann QC Garden Court North

Philippa Kaufmann's expertise spans the public and private law arenas with a focus on claims involving the abuse of the state's coercive machinery. She was counsel for the claimants in DSD and NBV v Commissioner of Police of the Metropolis [2015] EWCA Civ 646 in which the Court of Appeal considered for the first time the duty cast upon the police under Article 3 ECHR to conduct effective investigations into serious ill treatment by not state actors.

Phillippa was named 'Human Rights and Public Law Silk of the Year' at the 2014 Chambers Bar Awards. She is an ADR Group Accredited Civil and Commercial Mediator.

Eric King, Privacy International

Eric King is the Deputy Director at Privacy International. His campaign for export controls on surveillance technology resulted in new international trade controls between more than 50 countries in 2013, after a number of years exposing the surveillance industry and their role in human rights abuses. More recently he has worked on reforming laws governing signals intelligence collection, helping bring a series of legal challenges against intelligence agencies. He has previously worked at Reprieve, is on the advisory council of the Foundation for Information Policy Research and teaches law at the London School of Economics and Queen Mary University.

Lord Justice Laws, Lord Justice of Appeal

LAWS, Rt Hon Sir John (Grant McKenzie), Kt 1992; a judge of the High Court of Justice, Queens Bench Division from 1992 to 1999; a Lord Justice of Appeal, since January 1999; First Junior Treasury Counsel, Common Law, 1984-92. Hon Fellow, Robinson College, Cambridge 1992; Hon Fellow, Exeter College, Oxford, 2000; President, Bar European Group, 1995; Judicial Visitor, University College London, 1997; Reader, Honourable Society of the Inner Temple, 2009 and Treasurer in 2010.

Biographies JR London 2015

Andrew Lidbetter Partner Herbert Smith Freehills LLP

Andrew Lidbetter is a solicitor advocate partner in the Disputes division of Herbert Smith Freehills LLP. He has considerable experience in dealing with a wide range of disputes. He is the head of Herbert Smith Freehills' public law practice in London, specialising in all aspects of administrative and public law, including judicial review, statutory appeals, regulatory disputes, investigations, public and other inquiries, professional regulation, human rights and freedom of information issues. His experience extends across a wide range of sectors and fields including media, telecoms and broadcasting, consumer, energy, various modes of transport, utilities, pensions, financial services, planning, competition and taxation. In addition to being involved in high profile commercial public law cases, he has also acted pro bono, in particular, for various NGOs as interveners in cases of significant public interest.

He is the author of the judicial review and human rights chapters in Blackstone's Civil Practice and a book on DTI investigations. Andrew is on the advisory board of "Judicial Review" and is listed as a leading public law practitioner in Chambers, the Legal 500 and Legal Experts and a leader in local government and professional discipline in Chambers.

David Lock QC Landmark Chambers

David Lock QC was called to the Bar in 1985 and made a QC in 2011. In the last 12 months he has appeared in the Supreme Court, the Court of Appeal, the High Court, the County Court, the Court of Protection, has drafted Parliamentary Bills and has advised individuals, companies and government bodies in a variety of international jurisdictions. He has vast trial experience, including cross-examining expert and lay witnesses, but also has a wide-ranging public law and appellate practice. David has had an interesting and diverse career. After spending 10 years at the Bar in Birmingham he was elected as a Member of Parliament and was appointed to be a Minister at the Lord Chancellor's Department from 1999 to 2001. He has also served as a local councillor and chaired substantial Non-Departmental Public Bodies. He has also worked within a major law firm, Mills & Reeve, leading the healthcare practice and seeing life from the other side of the solicitor/barrister divide. David is a member of the BMA Ethics Committee, is chair of Innovation Birmingham Limited (the company which runs the Birmingham Science Park) and is a non-Executive director of Heart of England NHS Foundation Trust, Birmingham

Joanna Ludlam, Baker McKenzie

Joanna Ludlam practices in all areas of administrative and public law, media and defamation law and reputation management. She leads the team advising the BBC Trust, to which Baker & McKenzie is the sole legal adviser. In this role, Jo regularly attends meetings of Trustees and advises on a range of regulatory and public law matters, as well as on issues of reputation and crisis management. In addition to media and broadcasting, Jo advises on regulatory and public law matters affecting various industry sectors, including healthcare; financial services; construction; aviation; cosmetics and consumer goods.

As well as acting for public bodies and commercial clients, Jo has been involved in pro bono work with a Disputes focus for key pro bono clients of the firm. She recently represented members of the criminal bar in a high profile legal challenge of the decision to introduce QASA, a controversial quality assurance scheme for criminal advocates.

In addition to her public law focus, Jo chairs the firm's Compliance & Investigations group in EMEA, as well as co-leading the London team. Her practice includes conducting regulatory and internal investigations into issues of bribery, corruption, money laundering and fraud.

Jo is one of two Partner Sponsors of BakerWomen, a group established at Baker & McKenzie to promote gender diversity in the workplace. Jo regularly presents on the topics of ethics, conducting investigations, regulatory compliance, dealing with regulators and crisis management.

Nicola Mackintosh QC, Mackintosh Law

Nicola Mackintosh is Sole Principal of Mackintosh Law, a niche firm specialising in mental capacity and community care cases for disabled and incapacitated clients. She has brought many of the test cases in the field of access to health and social service provision including the 'Coughlan' case regarding legitimate expectation and the legal boundary between health and social care. She is regularly instructed by the Official Solicitor to represent incapacitated clients in welfare cases before the Court of Protection, including cases of abuse and neglect.

Nicola is Co-Chair of the Legal Aid Practitioners Group and a member of the Law Society's Access to Justice and Mental Health and Disability Committee. She was appointed Honorary QC in 2014 on the recommendation of the then Lord Chancellor for her work in bringing public law challenges on behalf of her vulnerable clients and for her vigorous campaigning around access to justice issues. Nicola's firm has been a Claimant in some of the challenges to aspects of the LASPO regime including the proposed inclusion of community care in the mandatory telephone gateway, and the removal of guaranteed legal aid for judicial review proceedings prior to the grant of permission. Nicola was instrumental in drafting LAPG's Manifesto for Legal Aid which was launched at the Houses of Parliament in March 2015. The Manifesto suggests changes to the LASPO regime which, if implemented, would rectify some of the most damaging reforms to legal aid whilst also, in many cases, saving public money.

Ravi Mehta, Blackstone Chambers

Ravi Mehta practises at Blackstone Chambers, specialising in public law, human rights, regulatory and competition law. He takes a keen interest in all aspects of public law and specialises in cases where there is a considerable overlap with EU and public international law.

Recent cases include a successful appeal concerning EU free movement rights and ECHR claims (best interests of the child) in an immigration context, and acting as junior counsel for Her Majesty's Government of Gibraltar in a high profile case concerning a challenge to the compatibility of the Gambling Act 2005, as amended, with EU law, which has been referred to the CJEU. He also acted for interveners in *Beghal v Director of Public Prosecutions* (Supreme Court, November 2014), an appeal raising the question of the compatibility of Schedule 7 of the Terrorism Act 2000 with the common law and European Convention Rights of liberty of the person and personal privacy, and will be junior counsel to two UN Special Rapporteurs in the case of *Belhaj and anor. v Jack Straw and ors* concerning claims about UK involvement in alleged rendition operations, due to be heard by the Supreme Court in November 2015.

Naina Patel, Blackstone Chambers

Naina Patel is an established public law practitioner specialising in areas including constitutional law, detention, discrimination, foreign policy and immigration. Naina has appeared in a number of high profile cases including *R (Public Law Project) v Secretary of State for Justice (Office of the Children's Commissioner intervening)* [2014] EWHC 2365 (Admin); *R (Hodkin and Church of Scientology Religious Education College) v Registrar General* [2013] UKSC 77; [2014] AC 610*; R (Al-Skeini and Others) v United Kingdom* (2011) 53 EHRR 18; *and HJ (Iran) v Secretary of State for the Home Department; HT (Cameroon) v Secretary of State for the Home Department* [2010] UKSC 31; [2011] 1 AC 596*.*

Naina is also a member of the Attorney General's Panel of Counsel and an expert member of HMG's Civilian Stabilisation Group, providing justice and security advice to the Ministry of Defence, Foreign and Commonwealth Office and Department for International Development. Between 2012 and 2015 she was the Education and Training Director and a Fellow of the Bingham Centre for Rule of Law and between 2010 and 2011 she was Senior Justice Adviser to the Provincial Reconstruction Team in Helmand, Afghanistan.

Jasveer Randhawa Senior Associate Herbert Smith Freehills LLP

Jasveer is a solicitor advocate in the Disputes division of Herbert Smith Freehills LLP, specialising in public and administrative law. She has substantial experience of a wide range of public and administrative law disputes including judicial review, regulatory investigations, disciplinary proceedings, human rights and freedom of information issues. Over the years she has acted for a number of clients, both commercial organisations and public bodies / regulators, in various sectors including planning, energy, transport, financial services, pensions and taxation. She has also written a number of articles for journals such as Judicial Review and Public Law.

Alice Ross, The Guardian

Alice Ross is a reporter at the Guardian specialising in drones and national security. Prior to working at the Guardian she spent three years at the Bureau of Investigative Journalism, where she jointly won the Martha Gellhorn Prize for Journalism in 2013. She is a named claimant in an ECHR case brought by the Bureau calling for journalists' communications to be protected from surveillance.

Tom Snelling, Freshfields

Tom Snelling is a partner at Freshfields and manages complex and cross-border commercial litigation disputes for clients. He is particularly well-known for his contentious regulatory work in the consumer products sector. Tom also has specialist expertise in a public law context and in advising clients on appearances before committees of the UK, Scottish, Irish and Australian Parliaments. Tom has longstanding relationships with a number of clients such as JTI, Deutsche Bank and United Biscuits. Recent cases include bringing proceedings in the European Court of Justice and national courts for JTI, a tobacco products manufacturer, against measures including bans on the branding of tobacco products.

Mike Spencer CPAG

Mike Spencer is the Legal Officer for the Child Poverty Action Group, where his role is to pursue strategic test cases which promote the rights and welfare of children in poverty. He specialises in social security and public law, representing clients in Tribunals, the High Court and the UK and European appeal courts. Mike is the author of the asylum support chapters in the CPAG Benefits for Migrants Handbook and writes regularly for the Welfare Rights Bulletin.

Martha Spurrier, Doughty Street Chambers

Martha Spurrier specialises in public law and civil claims against public authorities. She has particular expertise in human rights and her practice is focussed on cases involving the police and immigration authorities, inquests, prisons, community care, children's and women's rights, mental health and mental capacity, and open justice issues. Martha has acted at all levels, including the Supreme Court and the European Court of Human Rights. In 2014 Martha was shortlisted for the LAPG Young Legal Aid Lawyer of the Year award.

Prior to joining Doughty Street, Martha was in-house counsel at Mind and the Public Law Project, where she gained significant experience of strategic litigation in the higher courts. In 2012 Martha was judicial assistant to Lord Justice Maurice Kay, Vice-President of the Civil Division of the Court of Appeal

Iain Steele, Blackstone Chambers

Iain Steele practises at Blackstone Chambers, specialising in public law, human rights and regulatory and competition law. He acts for both claimants and defendants including companies, central government, local authorities, public interest groups, individuals and regulators. His cases cover diverse areas including police powers, education, prisoners' rights, public procurement, social security and environmental law.

Iain's cases this term include resisting the Government's appeal against the successful challenge to DRIPA (*Davis & Watson v Secretary of State for the Home Department*) and the latest Supreme Court case on 'in accordance with law' (*Roberts v Commissioner of Police of the Metropolis*). He is a member of the Attorney-General's B Panel and is ranked in the leading directories for Administrative & Public Law and Civil Liberties & Human Rights.

Kate Stone Garden Court North

Kate Stone was called to the Bar in 2004 and has a broad-based practice with an emphasis on human rights, public law and equality & discrimination law. She is recommended as a leading junior in Administrative and Public Law (Chambers & Partners 2015).

Kate undertakes all types of public law challenge and has a particular interest in cases involving human rights issues. She has substantial experience of judicial review claims arising in the prison context and also deals with judicial review arising from inquests, mental health proceedings, homelessness and education law. Kate is regularly instructed in civil actions against the police, prisons and other public authorities, notably in claims under the Human Rights and Equality Acts.

Kate has substantial knowledge in the field of Coronial law and regularly represents bereaved families at inquests into the deaths of family members, in particular those involving state culpability. She is currently instructed in the Hillsborough inquests as junior counsel for 22 families. Kate is particularly interested in the parameters of Article 2 and is currently dealing with inquest proceedings raising issues about the Article 2 obligations of local authorities dealing with vulnerable children and of probation authorities placing offenders into supported accommodation.

Kate has a particular interest in public international law and holds a Masters in International Human Rights Law from the University of Oxford. She has experience in drafting applications to the European Court of Human Rights and regularly undertakes advisory and drafting work in public international law on a consultancy and pro-bono basis.

Adam Straw, Doughty Street Chambers

Adam Straw specialises in judicial review, human rights and civil claims against public authorities. He was awarded Chambers & Partners Human Rights & Public Law junior of the year 2014, and LAPG Young Legal Aid Barrister of the year in 2010.

Adam's practice includes cases involving inquests, prisons, police, surveillance, intercept evidence, closed proceedings, international law, terrorism, mental health, children's rights, discrimination, immigration detention, and community care. Recent cases include the Alexander Litvinenko inquiry, the Mark Duggan inquest, *Sandiford, Keyu,* and *Nunn* in the Supreme Court*,* and a case in the Grand Chamber at Strasbourg brought by the family of Jean Charles de Menezes. He is the author of the article 2 section of *Human Rights Practice* Simor QC and Emmerson QC; of the LAG book *Inquests - a Practitioner's Guide;* and of *Judicial Review* by Supperstone, Goudie and Walker. He is listed in band 1 or 2 as a notable practitioner by Chambers and Partners 2015 in the following categories: inquests and public inquiries, administrative & public law, civil liberties & human rights, and police law: mainly claimant.

Biographies JR London 2015

Hugh Tomlinson QC. Matrix Chambers

Hugh Tomlinson QC has a wide-ranging practice in both private and public law. He is a noted specialist in media and information law including defamation, confidence, privacy and data protection and was named Chambers & Partners Defamation and Privacy Silk of the Year 2011. His practice also includes advisory work and litigation in the freedom of information field. He is joint author of the leading practitioner texts on the law of human rights and on civil actions against the police. The 2015 directories rate him as "Accessible, hands-on and able to think outside of the box" and "an outstanding all-round silk." (Chambers & Partners 2015).

Heather Williams QC, Doughty Street Chambers

Heather Williams QC is Head of the Doughty Street Chambers' Actions Against the Police & Other Public Authorities Team and also the Employment & Discrimination Team. She is a Band 1 ranked leading Silk in the Chambers & Partners 2015 Directory in the Police and in the Civil Liberties & Human Rights categories, where she is described as "a masterful advocate who has fantastic judgment". She is also ranked in the recently published Legal 500 Directory for 2015, where she is described as having "a brilliant legal mind.

She has spent much of the last 18 months representing a bereaved family at the Hillsborough Inquest, focusing on the police failings that led to the deaths. Her recent significant cases include: *Copeland v CPM* (who is a prosecutor in malicious prosecution); *AJA v CPM* (claims brought by victims of undercover policing); *R (Hallam) v SSJ* (whether new statutory definition of a miscarriage of justice infringes presumption of innocence); *Singh v Governors of Moorland Primary School* (witness immunity doctrine in context of a race discrimination claim); *R (Dowsett) v SSHD* (whether prison searching policy sexually discriminatory) and *ZH v CPM* (1st successful case of disability discrimination in the provision of police services / public functions and 1st domestic case to establish an infringement of Art 3 ECHR by police officers. .

She is co-author of the LAG textbook, *Police Misconduct: Legal Remedies* (4th ed) and is working on a new edition. She also co-authors the bi-annual updates on police misconduct in the Legal Action magazine.

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PUBLIC LAW PROJECT ANNUAL CONFERENCE 2015

TOP PUBLIC LAW CASES OF THE YEAR

JOANNA LUDLAM, PARTNER, BAKER & MCKENZIE

IAIN STEELE, BLACKSTONE CHAMBERS

NAINA PATEL, BLACKSTONE CHAMBERS

Introduction

The number and diversity of JR cases is now such that a review of the year can only hope to cover a small sample of the Administrative Court's workload. The selection of cases below (from September 2014 to July 2015) necessarily reflects our personal choice, and no doubt there are many others that could have been included. We have each picked four cases. They are summarised below in chronological order.

Consultation – duty to refer to discarded alternatives?

***R (Moseley) v Haringey London Borough Council* [2014] UKSC 56, [2014] 1 WLR 3947, 29 October 2014**

1. The challenge was to Haringey's decision to make a council tax reduction scheme (CTRS) to replace the former system of council tax benefit (CTB). Before making a CTRS, Haringey was required by statute to consult interested parties. Haringey consulted on a draft CTRS whereby the shortfall in central government funding would be covered by reducing the level of relief below that previously provided by CTB, rather than Haringey absorbing it in other ways. Following the consultation, Haringey decided to adopt such a scheme.

2. The Supreme Court upheld the challenge on grounds that the consultation had not been lawful. Lord Wilson (with whom Lord Kerr agreed) gave the leading judgment. He identified the purposes of procedural fairness as threefold: to improve decisions, to avoid the sense of injustice which interested parties would otherwise feel, and to reflect the democratic principle at the heart of our society [24]. He approved the well-known 'Sedley requirements' for lawful consultation

[25] and emphasised that fairness will sometimes require consultation not only upon the preferred option, but also upon arguable yet discarded alternatives [27]. Even when the subject of the consultation is limited to the preferred option, fairness may require passing reference to other options [28]. Consultation about a proposal inevitably involves inviting and considering views about possible alternatives. Fairness demanded that in Haringey's consultation document brief reference should be made to other ways of absorbing the shortfall and the reasons why it had concluded that they were unacceptable [29]. The document had wrongly represented, as being an accomplished fact, that the shortfall would be met by a reduction in council tax support and that the only question was how, within that parameter, the burden should be distributed [31].

3. Lord Reed stated that he was generally in agreement with Lord Wilson, but that he preferred to express his analysis of the relevant law in a way which laid less emphasis on the common law duty to act fairly, and more on the statutory context and purpose of the particular consultation duty in question [34]. He contrasted the circumstances where a duty of fairness may require consultation with the present situation, which involved a wide-ranging duty to consult in respect of a local authority's exercise of a general power in relation to finance [38]. Meaningful public participation in this particular decision-making process required that consultees should be provided not only with information about the draft scheme, but also with an outline of realistic alternatives and an indication of the main reasons for the authority's adoption of the draft scheme [39].

4. Baroness Hale and Lord Clarke gave a joint judgment, agreeing with Lord Reed that the court must have regard to the statutory context and that, in the particular statutory context, Haringey's duty was to ensure public participation in the decision-making process. They concluded that they could safely agree with both of the other judgments.

Judicial Review – Convention Rights – International Relations - Deference

***R (Lord Carlile of Berriew) v Secretary of State for the Home Department* [2014] UKSC 60, [2015] AC 945, 12 November 2014**

5. The Appellants were 16 Members of Parliament and Mrs Rajavi, a dissident Iranian politician resident in France who had challenged the Home Secretary's

decision to maintain the exclusion of Mrs Rajavi on the grounds that her entry to the UK would risk jeopardising the UK's economic interests and its diplomatic relationship with Iran. The challenge was brought on the basis that the decision, which would prevent the Appellants meeting in London to discuss human rights and democracy in Iran, constituted an unjustified interference with their Article 10 ECHR rights.

6. The Supreme Court rejected the Appellants' argument that the Secretary of State's reasons for maintaining the exclusion were legally irrelevant as she was not entitled to have regard to the potential reaction of a foreign state which did not share the values embodied in the Convention and had no respect for the right of free speech or other democratic values. The consequences of exclusion were plainly relevant and Article 10 ECHR did not only protect the transmission of information and ideas which accord with the Secretary of State or her perception of the existing values of our society (Lord Sumption at [14-18].

7. The Supreme Court went onto consider the intensity of review that was appropriate to the proportionality assessment. The court was obliged to form its own view of proportionality but the degree of deference it would afford to the executive depended on context (Lord Sumption at [19-20 and 34].

8. Lord Sumption (with whom Lord Neuberger substantially agreed) noted at [22] that such deference had two sources: (1) the constitutional principle of the separation of powers and (2) the evidential value of certain of its judgments, the latter of which varied according to subject matter: *Secretary of State for the Home Department v Rehman* [2003] 1 AC 153. Considering these sources in the context of a case founded on a complaint regarding Convention rights, Lord Sumption noted at [27-31] that the constitutional distribution of powers had been modified such that any arguable allegation of a breach of those rights was necessarily justiciable; there were no forbidden areas, but this did not mean that a court could substitute its view for the decision-maker. However, (at [32-34]) it remained the case that the executive's assessment of facts might be entitled to great weight, depending on the context; rationality often could not be tested empirically; the justification for a decision might depend on a judgment about future impact where there was no single right answer; such deference reflected the principle that those making such assessments should be democratically accountable for them.

9. The primary facts and good faith of the Secretary of State were accepted, as was the existence of an interference with Article 10 ECHR [35]. The questions identified by Lord Sumption at [38] were therefore whether the Secretary of State had (1) understated the importance of freedom of expression; (2) overstated the risks to national security, public order and the rights of others; or (3) could reasonably have achieved his objective by some lesser measure.

10. As to the first question, the Secretary of State's decision deprived the Appellants of one method and one location for their exchanges, which were potentially the best but not the only ones. The restriction was not therefore trivial but it was fairly described as limited (at [39-44]).

11. As to the second question, the Secretary of State drew on the expertise of the Foreign Office and having received a reasoned professional assessment of the consequences of admitting Mrs Rajavi, rationally relied on it. The Court had no experience or material that could justify its rejection of that assessment (at [45-46]).

12. As to the third question, it was difficult to see what lesser measure than her exclusion would meet the problem which arose from Mrs Rajavi's prospective presence in the United Kingdom. The only suggestion was for the Secretary of State to explain that she is bound by the decision of the court, but previous attempts to persuade have failed, states deal with each other as unitary entities and there is no reason to suppose that Iran would be different, it having treated the judicial decision to proscribe Mujahedin e-Khalq (of which Mrs Rajavi was previously co-chair and Secretary General) as a political decision in defiance of the facts (at [47]).

13. Lord Neuberger, Lady Hale and Lord Clarke gave separate judgments which reached the same ultimate conclusion.

14. Lord Kerr (dissenting) reached a contrary conclusion for two main reasons. First, a large element of uncertainty attached to the putative consequences of admitting Mrs Rajavi (at [176-179]). Second, the anticipated reaction of the Iranian authorities was rooted in profoundly anti-democratic beliefs (at [171-172]). Both these factors meant that little weight should be given to the risk of harm as assessed by the Secretary of State.

R (Kaiyam) v Secretary of State for Justice **[2014] UKSC 66, [2015] 2 WLR 76, 10 December 2014**

15. The Appellants were prisoners with indeterminate sentences (life or IPP) who claimed they were not sufficiently progressed towards release on or after the expiry of their tariffs, whether through a move to open conditions or the provision of a particular offender treatment programme. The principle issue was the effect of the decision in *James, Lee and Wells v United Kingdom* (2012) 56 EHRR 399 following the decision of the House of Lords in *R (James, Lee and Wells) v Secretary of State for Justice* [2009] UKHL 22; [2010] 1 AC 553. The House of Lords had held that no breach of Article 5(1) of ECHR was involved in a failure properly to progress prisoners towards post-tariff release. The ECtHR in James took a different view. Correctly, the courts below, from which the present appeals lie, held themselves bound by the House of Lords' reasoning and decision. The Supreme Court must now consider whether and how far to modify its jurisprudence.

16. Lord Mance and Lord Hughes (with whom Lord Neuberger, Lord Touslon and Lord Hodge agreed) recalled at [2] that the James cases concerned IPP prisoners who remained in their local prisons without access to recommended rehabilitative courses after the expiry of their tariffs. The House of Lords held that there was a breach of the Secretary of State's systemic public law duty to progress prisoners but no breach of Articles 5(1) and 5(4) ECHR as the detention remained lawful until the Parole Board was satisfied that it was no longer necessary for the protection of the public pursuant to section 28(6)(b) of the Crime Sentences Act 1997 or the system of review itself had completely broken down or ceased to be effective (at [10-11]). In contrast, the ECtHR had held that there was a breach of Article 5(1) ECHR until steps were taken to progress them through the system with access to the relevant rehabilitative courses (at [12]). The Secretary of State invited the Court to take the ECtHR decision into account but to continue to follow the reasoning of the House of Lords (at [16]).

17. The ECtHR's reasoning in James had as its premise the notion that whether detention is lawful is not conclusively decided by the fact that there has been a valid conviction by the domestic court; thus detention could become arbitrary simply as a result of the failure to provide rehabilitative courses (at [24-29]). The

problems with this approach were multiple: it would mean that detention could only be arbitrary and so unlawful after the expiry of the tariff period, that primary legislation was in conflict with Convention rights, the release of someone whose safety had not been established and his re-detention upon provision of appropriate courses (at [30-34]). The approach should not be followed (at [35]).

18. Nor, however, should the House of Lords' reasoning be followed (at [35]). The Supreme Court should accept the ECtHR's conclusion that the purpose of the sentence includes rehabilitation (at [36]). The Supreme Court should also accept as implicit in the scheme of Article 5 that the state is under a duty to provide an opportunity reasonable in all the circumstances for such a prisoner to rehabilitate himself and to demonstrate that he no longer presents an unacceptable danger to the public (at [36]). But such a duty was better located as an ancillary duty to Article 5(4) than in the express language of Article 5(1) ECHR; thus its breach did not directly impact on the lawfulness of detention but would sound in damages rather than an order for release (at [37-38]). But except in the rarest of cases, it would not be possible to establish a prolongation of detention rather than frustration/anxiety (at [39]).

19. Whether there was a breach of the ancillary duty in the instant cases was a highly fact-sensitive question in each case. There was such a breach in the cases of Haney who suffered a delay in transfer to open conditions of about a year prior to his tariff expiry (at [50]) (but no discrimination in comparison to post-tariff prisoners – at [54]), Massey who suffered a delay in the provision of a rehabilitative course of about a year after his tariff expiry (at [69]), but not Kaiyam who complained he was not recommended for a particular course sooner (at [60]) or Robinson (Lord Mance dissenting) who suffered an eight month post-tariff delay in the provision of a particular course. Article 5 ECHR does not create an opportunity to maximise coursework nor for the Court to substitute its own view of the quality of management of an individual prisoner, only to provide an opportunity which is reasonable in all the circumstances (at [91-93]). Lord Mance considered that the opportunity was not reasonable in light of the fact that Robinson would now not be released until some two and a half years after tariff expiry if he was to complete the relevant rehabilitative course and the further work thereafter (at 109-111]).

***R (Catt) v Association of Chief Police Officers; R (T) v Commissioner of Police of the Metropolis* [2015] UKSC 9, [2015] AC 1065, 4 March 2015**

20. These cases concern the Article 8 rights of those who have not had any formal contact with the criminal justice system and yet have been the subject of data gathering by the police. The first claimant, Mr Catt, frequently attends demonstrations, some organised by a group whose core supporters are thought to be violent, but he has not been convicted of any offence. He sought an order requiring the police to remove all references to him from the national database which contains reports on the activities of various protest groups. The second claimant, Ms T, had been served with a warning letter following an allegation made to the police by a neighbour's friend that she had directed a homophobic insult towards him. The letter informed her that an allegation of harassment had been made against her and that a repetition of her behaviour could involve the commission of a criminal offence. The claimant denied the allegation and sought an order that the police destroy their copy of the letter and remove from their records all references to the decision to serve it on her.

21. Both claimants failed at first instance but succeeded in the Court of Appeal. However, the Supreme Court allowed the Commissioner's appeals, by a 4:1 majority in Mr Catt's case and unanimously in Ms T's case.

22. Lord Sumption (with whom Lord Neuberger agreed) gave the leading judgment. Article 8 was engaged, since the state's systematic collection and storage in retrievable form even of public information about an individual is an interference with private life [6]. As to Article 8(2), the retention of data in police information systems in the UK is "in accordance with the law". Although there are some discretionary elements in the statutory scheme, this is inevitable, and the space of discretionary judgment is limited and subject to judicial review; further, future disclosure is limited by comprehensive restrictions [13]-[17]. The real issue in these appeals was proportionality, as the other judges all agreed.

23. Lord Sumption held that the interference with Mr Catt's private life was minor: the information stored was personal but not intimate or sensitive; the primary facts recorded had always been in the public domain; there is no stigma attached to the inclusion of his information in the database as part of reports primarily

directed to the activities of other people; the material was usable and disclosable only for police purposes and in response to requests made by Mr Catt himself under the DPA; and the material was regularly reviewed for deletion according to rational and proportionate criteria contained in a publicly available Code of Conduct and guidance [26]-[28]. There are numerous proper policing purposes to which the retention of evidence of this kind makes a significant contribution. The longer-term consequences of restricting the availability of this method of intelligence-gathering to the police would potentially be very serious, and the amount of labour required to excise information relating to persons such as Mr Catt from the database would be disproportionate [29]-[31].

24. Lady Hale agreed, but added that it would have been disproportionate to keep a nominal record about Mr Catt since he has not been and is not likely to be involved in criminal activity himself and the keeping of such records has a potentially chilling effect on the right to engage in peaceful public protest [50]-[52]. Lord Mance agreed with Lord Sumption and Lady Hale [58]. By contrast, Lord Toulson did not think that the evidence explained why it was necessary to retain for many years after the event information about someone about whom the police have concluded was not known to have acted violently and did not appear to be involved in the co-ordination of the relevant events or actions [65].

25. In Ms T's case, Lady Hale [54]-[56] and Lord Toulson [76] both held that retaining information about previous harassment complaints serves a vital purpose, particularly in domestic abuse cases, and it is not unlawful for the police to adopt a standard practice of retaining such information for several years, provided that the policy is flexible enough to allow it to be deleted when retention no longer serves any useful policing purposes, as in fact happened in this case. Lord Mance agreed, but added that even if the policy were originally inflexible, he would still have allowed the appeal for the reasons given by Lord Sumption [59]. Lord Sumption held that the letter, while unnecessarily accusatorial, clearly served a legitimate policing purpose, but the standard period of retention applied by the police was wholly disproportionate in light of the trivial nature of the incident in this case. However, Article 8 had not been violated because the material was in fact retained for only two and a half years, a period at the far end of the spectrum but not disproportionate [42]-[44].

***R (SG) v Secretary of State for Work and Pensions* [2015] UKSC 16, [2015] 1 WLR 1449, 18 March 2015**

26. This was an HRA challenge to the Regulations which impose a "benefits cap". The cap limits the total amount of benefits an out-of-work family can receive to £500 per week. It is applied regardless of family size or circumstances such as rental costs. As a result, lone parents with children in large families are disproportionately affected, as they are more likely to be hit by the cap and less likely to be able to avoid its effects. It was conceded that the Regulations indirectly discriminate against women, since most lone parents are women, and that the benefits could amount to 'possessions' within Article 1 of Protocol No.1 to the ECHR (A1P1). The issue was whether the indirect discrimination could be justified, so as to avoid a finding of violation of A1P1 read with Article 14. The Supreme Court held by a 3:2 majority that justification was made out.

27. Lord Reed (with whom Lord Hughes agreed) held that the Regulations pursued the legitimate aims of securing the economic well-being of the country, incentivising work and imposing a reasonable limit on the total amount which a household can receive in welfare benefits [63]-[66]. Further, the Regulations maintained a reasonable relationship of proportionality between the means employed and the aims sought to be realised; no credible means had been suggested by which the aims might have been achieved without affecting a greater number of men than women [67]-[77]. As to Article 3 of the UN Convention on the Rights of the Child (UNCRC), this had not been incorporated into UK law, but can be relevant to the application of the ECHR. However, the Strasbourg case law did not support the argument that the cap impinges on the Article 8 rights of children so as to oblige the Government to treat the best interests of children as a primary consideration [78]-[80]. As to reliance on the UNCRC in the proportionality analysis under Article 14 ECHR, although the UNCRC can be relevant to questions concerning the rights of children under the ECHR, the present context was one of alleged discrimination against women in the enjoyment of their A1P1 rights [86]-[87]. The test of justification in this context was whether the democratically elected institutions' assessment was 'manifestly without reasonable foundation' [92]-[96].

28. Lady Hale, dissenting, considered that the UNCRC was relevant to proportionality and discrimination as well as informing the substantive content of Convention rights, even in cases where the discrimination is not against the children but their mothers [215]-[222]. The issue was whether the measure could be justified independently of its effects, and in this regard it was necessary to ask whether proper account was taken of the best interests of the children affected by it [224]. It was clear that, contrary to Article 3 UNCRC, their best interests were not treated as a primary consideration [225]. The indirect discrimination against women therefore could not be seen as a proportionate means of achieving a legitimate aim [229].

29. Lord Kerr, also dissenting, considered that the UNCRC can be directly enforced in domestic law [255]-[256]. Further, a mother's personality is defined not simply by her gender but by her role as carer for her children, so that justification of a discriminatory measure must directly address the impact on the children of lone mothers [264]-[265].

30. Lord Carnwath had the casting vote. He agreed with Lady Hale and Lord Kerr that the Government had not shown compliance with the UNCRC [122]-[128]. However, in his view the consequences of that finding must be addressed in the political rather than the legal arena [133]. This was because there was no connection between the UNCRC and the discrimination relied on under Article 14 ECHR: the treatment of the child does not depend on the sex of their parent [129]-[132]. He therefore agreed with Lords Reed and Hughes that the claimants' appeal should be dismissed.

Loss of British Citizenship- Stateless Persons

***Pham v Secretary of State for the Home Department* [2015] UKSC 19, [2015] 1 WLR 1591, 25 March 2015**

31. The analysis which follows draws from Professor Mark Elliott's blog, Public Law for Everyone, for which we are most grateful.

32. This decision indicates a possible judicial step-change in the role of proportionality as a common-law ground of judicial review. Although the case did not ultimately turn upon proportionality, the judgments contain detailed discussion of the doctrine, and demonstrates judicial support for its availability

as a ground of judicial review irrespective of whether the case has a European Union or ECHR dimension.

33. The key issue in Pham was whether it was lawful for the Home Secretary to withdraw the appellant's British citizenship and deport him to his birth country of Vietnam. The appellant had moved to the UK with his family in 1989 and was granted indefinite leave to remain. He gained British citizenship in 1995 but did not renounce his Vietnamese nationality. On 22 December 2011, under section 40(2) of the British Nationality Act 1981, the Home Secretary withdrew the appellant's British citizenship after he was suspected of being involved in terrorist activities. Vietnamese officials refused to recognised the appellant as Vietnamese.

34. The appellant appealed the Home Secretary's decision to the Special Immigration Appeals Commission (the "SIAC") on a number of grounds, including that the decision made him stateless in contravention of section 40(4) of the British Nationality Act 1981 ("BNA 1981"). Under the BNA 1981 the Home Secretary may deprive a person of their citizenship for public policy reasons, but not if such an order would make that person "stateless". A stateless person is defined in article 1(1) of the 1954 Convention Relating to the Status of Stateless Persons, which is binding on the UK, as “a person who is not considered as a national by any State under the operation of its law”.

35. On 29 June 2012 the SIAC allowed the appellant's appeal, "holding that the effect of the Secretary of State's decision would be to render him stateless" [6]. This decision was appealed to the Court of Appeal which held that the appellant was in fact a Vietnamese national given the relevant Vietnamese laws on the matter. As such, the appellant's British citizenship could be withdrawn.

36. The Supreme Court, agreeing with the Court of Appeal's decision, unanimously dismissed the appeal with Lord Carnwath giving the lead judgment. Lord Carnwath noted that there was "... no evidence of a decision made or practice adopted by the Vietnamese government, which treated the appellant as a non-national [38]. Critically, Lord Carnwath noted that even if there had been a decision by the Vietnamese government to withdraw the appellant's Vietnamese citizenship, such a decision could not be applied retrospectively and therefore,

such a decision was not effective at the time of the Secretary of State's decision to withdraw British citizenship from the appellant [37].

37. Of particular interest, however, is an alternative argument that the claimant sought to advance, but which was not determined by the Supreme Court. That alternative argument was that withdrawal of British citizenship deprived the claimant of his citizenship of the European Union; that this EU angle meant that the Home Secretary's decision should be reviewed on proportionality grounds; and that the Home Secretary's decision would not satisfy the proportionality test.

38. However, the Supreme Court noted that this EU point of law was not properly before them. Furthermore, all four of the judgments given in the Supreme Court suggested that it was unnecessary to decide the EU point because whether EU law was applicable would make no difference to the outcome of the case. The appellant's argument assumed that the applicability of EU law would allow a review on proportionality grounds that would otherwise be unavailable at common law. The Supreme Court doubted this. It was in connection with this observation that the Court went on to consider the availability of proportionality review in purely domestic cases.

39. Lord Carnwath relied on the Supreme Court's judgment in *Kennedy v Information Commissioner* [2014] UKSC 20 which, he said, endorsed "a flexible approach to principles of judicial review, particularly where important rights are at stake". Lord Carnwath does not go so far as to confirm explicitly the availability of proportionality in cases where an "important right" or a "fundamental status" is at stake. However, he arguably suggests that the common law is capable, in appropriate cases, of allowing the Court to scrutinise decisions with the intensity equivalent to that which is available under proportionality.

40. However, Lord Mance went further and suggested that proportionality could be the standard of review at common law when considering the lawfulness of a decision to withdraw citizenship and that it was "improbable that the nature, strictness or outcome of such a review would differ according to whether it was conducted under domestic principles or whether it was also required to be conducted by reference to a principle of proportionality derived from Union law" [98].

41. Lord Reed's judgment went even further he argued that one can infer from cases such as *R v Secretary of State for the Home Department, ex parte Leech (No 2)* [1994] QB 198 and *R v Secretary of State for the Home Department, ex parte Daly* [2001] "that, where Parliament authorises significant interferences with important legal rights, the courts may interpret the legislation as requiring that any such interference should be no greater than is objectively established to be necessary to achieve the legitimate aim of the interference: in substance, a requirement of proportionality". This goes further than either *Leech* or *Daly*, given that proportionality was never explicitly used in the former, and given that the Convention rights were in play in the latter. In this way, and as Professor Elliott's blog points out, Lord Reed's analysis in *Daly* represents the most explicit and authoritative judicial acknowledgment to date of the capacity of the principle of legality to operate as a vehicle for proportionality review in cases lacking any EU or ECHR dimension.

Judicial Review – Constitutional Law

***R (Evans) v Attorney General* [2015] UKSC 21, [2015] 2 WLR 813, 26 March 2015**

42. The case concerned whether the Attorney General had acted lawfully in seeking to prevent the disclosure of the black spider memos (the "Letters") following a decision by the Upper Tribunal that they should be disclosed following a request under the Freedom of Information Act 2000 ("FOIA 2000") and the Environmental Information Regulations "EIR 2004"). The Letters included correspondence relating to certain causes which were of particular interest to The Prince of Wales, including the environment.

43. In April 2005 Mr. Evans, a journalist for the Guardian, requested various government departments to disclose the Letters under FOIA 2000 and EIA 2004. All the departments in question refused. The decision to withhold the information was subsequently upheld by the Information Commissioner.

44. An appeal of the Information Commissioner's decision was made to the Upper Tribunal and on 18 September 2012 the Upper Tribunal handed down a decision in which it disagreed with the decision notice that had been issued by the Information Commissioner. In a long and reasoned judgment, the Upper Tribunal held that it was in the public interest for some of the information that

had been requested (what it called the "advocacy correspondence") to be disclosed. The departments did not appeal this decision.

45. On 16 October 2012 the Attorney General at the time, Dominic Grieve MP, issued a certificate under section 53(2) FOIA 2000 and regulation 18(6) EIR 2004 which refused the disclosure of the Letter on "reasonable grounds" (the "Certificate").

46. The journalist made a judicial review claim in respect of the Attorney General's decision to issue the Certificate claiming that it was unlawful as contrary to section 53 of the Freedom of Information Act 2000, to the 'Access to Environmental Information' Directive (Directive 2004/3 EC) and Article 47 of the EU's Charter of Fundamental Rights. The Court rejected the judicial review challenge and held that the Attorney General's reasons for exercising the veto under section 53 were reasonable since they were "cogent and not irrational". The Court accepted that the public interest lay in allowing the Prince of Wales to prepare for Kingship and his participation in the "advocacy correspondence" was part of this preparation.

47. The journalist appealed this decision to the Court of Appeal. The Court of Appeal held that it is not reasonable for an accountable person to issue a section 53 certificate simply because he disagrees with the decision that has been reached. The Court suggested something such as a material change in circumstances or an error in fact or law would be necessary. The Court also held that the Attorney General did not have reasonable grounds.

48. The Attorney General was given leave to appeal to the Supreme Court. By a majority of 5:2 the Supreme Court considered that the Attorney General should not have issued the Certificate, and it was therefore invalid. On the question whether regulation 18(6) EIR 2004 was compatible with EU Council Directive 2003/4/EC (the "Directive"), the Supreme Court held 6:1 that the certificate was contrary to EU law.

49. Lord Neuberger held that the Attorney General was not permitted under section 53 FOIA 2000 to override a judicial decision by way of a certificate simply because he disagreed with the decision of the courts [59]. To permit such an action would breach two fundamental constitutional principles: (i) a decision of a court is "binding as between the parties, and cannot be ignored or set aside by

anyone" [52] (ii) that the "decisions and actions of the executive are… reviewable by the court at the suit of an interested citizen" [52]. In order to protect the two key constitutional principles Lord Neuberger stated that it was necessary to give section 53 FOIA 2000 a "narrow" application, concluding in agreement with the Court of Appeal that section 53 should only be invoked where there is a "material change of circumstance since the tribunal decision, or that the decision of the tribunal was demonstrably flawed in fact or in law" [79].

50. Lord Mance took a different approach, concluding that in this case the Attorney General had impermissibly undertaken his own reassessment of the facts [131] and the consequential reasoning behind his decision to issue the Certificate was not suitably reasoned and without adequate explanation [142]. For the Certificate to have been upheld the Attorney General must have, "under the express language of section 53(2) [been] able to assert that he has reasonable grounds for considering that disclosure was not due under the provisions of FOIA" [129]. Lord Mance concluded that the Attorney General had not done this adequately.

51. Lord Wilson and Lord Hughes dissented and considered that the Attorney General was entitled to issue the Certificate. Lord Hughes held that it was a fundamental part of the rule of law that the courts give effect to parliamentary intention [154] and given that Parliament, by way of section 53(2) FOIA, had used "plain words" to permit such a 'veto' power then, subject to this discretion being exercised on "reasonable grounds" [153] (which Lord Hughes concluded had been the case), the courts should not seek to quash such an order. Lord Wilson echoed Lord Hughes' declaration in favour of parliamentary sovereignty [168] and concluded that the Attorney General had exercised his discretion appropriately as he had prepared a reasoned response to support his action to overturn the Upper Tribunal decision [181].

Judicial Review – Public Body

***R (Holmcroft Properties Ltd) v KPMG LLP* [2015] EWHC 1888 (Admin), 24 April 2015**

52. The Administrative Court (Kenneth Parker J) granted permission for a judicial review challenge to the process followed by an 'independent reviewer'

appointed to oversee the exercise of a redress scheme operated by Barclays Bank in respect of mis-sold Interest Rate Hedging Products ('IRHPs').

53. In 2012, following the discovery of serious and widespread failings in the sales of IRHPs by a number of large United Kingdom banks, the Financial Services Authority (now the Financial Conduct Authority), reached an agreement with the banks to provide appropriate redress where mis-selling had occurred. Pursuant to the agreement, each of the banks agreed to establish a redress scheme under the oversight of an 'independent reviewer' approved by the FCA as a "skilled person" pursuant to section 166 of the Financial Services and Markets Act 2000.

54. KPMG was appointed to the role of independent reviewer by Barclays Bank. The Claimant, Holmcroft Properties Ltd, was awarded some compensation by Barclays but not for any consequential loss that they claimed to have suffered. KPMG agreed with the Barclays' decision. The Claimant sought permission to bring judicial review proceedings challenging the process which was followed by the KPMG in respect of its review of the redress proposed by the Barclays. The application was resisted by KPMG, Barclays and the FCA, who claimed, among other things, that the relationship between the bank and KPMG was a matter of contract, with no wider public law duty to act fairly.

55. Mr Justice Parker stated that due consideration need be given to the "specific function" that the appointee was called upon to do when essentially acting in a capacity of the outsourced provider of the authority's broader regulatory role [9-11]. Although Parker J did not decide the question of whether KPMG was acting in a public or private capacity, he held that KPMG could potentially be considered to be exercising the role of a public body because KPMG as the reviewer had a public law duty 'woven into the fabric' of its task by facilitating and enforcing the regulatory function, and he therefore held that KPMG could be the subject of a judicial review.

56. This is a landmark case opening up the possibility that the actions of a private company, working under s.166 powers, can be challenged on public law grounds. The substantive hearing- both in terms of the submissions made and the outcome- will be of great interest to those operating in this professional

sphere and has potentially significant implications for this quasi-regulatory domain.

Judicial Review – Quality Assurance Scheme for Advocates

***R (Lumsdon) v Legal Services Board* [2015] UKSC 41, [2015] 3 WLR 121, 24 June 2015**

57. This case is an important decision on the application of the principle of proportionality in EU law, in which the Supreme Court disapproved Sinclair Collis [2011] EWCA Civ 437 and redefined the parameters of judicial review in the EU law context.

58. The claim arose following the a decision of the Legal Services Board (LSB) to approve the introduction of the Quality Assurance Scheme for Advocates (QASA). QASA is a joint scheme developed by the Bar Standards Board ("BSB"), the Solicitors Regulation Authority ("SRA") and the ILEX Professional Standards Board ("ILEX") to regulate the quality of all advocates appearing in the criminal courts in England Wales. The appellants were barristers from the criminal bar who sought a judicial review of the LSB's decision.

59. Permission to appeal to the Supreme Court was granted on the single question of whether the decision was contrary to regulation 14 of the Provision of Services Regulation (SI 2009/2999) ("Regulation 14") [3], which the LSB argued did not apply. Regulation 14 implemented Directive 2006/123/EC on services in the internal market. The Appellants argued that regulation 14(2) required the court to assess the proportionality of the scheme itself, and that the Court of Appeal had been wrong to assess only whether the decision to approve the scheme was "manifestly inappropriate". The Appellants maintained that the scheme failed to meet the conditions in regulation 14.

60. The Supreme Court undertook a comprehensive analysis of the principle of proportionality in EU law, distinguishing between cases involving (1) the review of legislative and administrative measures adopted by EU institutions; (2) the review of national measures relying on derogations from general EU rights and; (3) the review of national measures implementing EU law.

61. In summary, the Supreme Court held: (1) that in reviewing EU measures where an EU institution has exercised political, economic or social discretion, the court

will usually only intervene if it considers that the measure adopted by the legislature is "manifestly inappropriate"; (2) that, by contrast, in the review of national measures derogating from the fundamental freedoms, the court will tend to examine closely the justification for the restriction and whether there are other measures which could have been equally effective but less restrictive. However, where a national measure does not threaten the integration of the internal market – for example where the subject matter lies within the area of national competence, e.g. gambling – the court will apply a less strict approach; and (3) that, where the court is reviewing a national measure which implements an EU measure, to the extent that the directive requires the national authority to exercise political, social or economic choices, the court will be slow to interfere with that evaluation: the court will use a "manifestly disproportionate" test. However, where the member state relies on a derogation or reservation in a directive to implement a measure restrictive of one of the fundamental freedoms, the measure will be scrutinised in the same way as other national measures which are restrictive of those freedoms.

62. The Justices confirmed that the principle of proportionality in EU law is not expressed or applied in the same way as the principle of proportionality under the ECHR: the four-stage test in *Bank Mellat v Her Majesty's Treasury (No 2)* [2013] UKSC 39 does not apply when assessing proportionality in EU law.

63. The Supreme Court stated the importance of national judges understanding the rationale behind the differences in the application and formulation of the principle and the importance of identifying the relevant precedents in each case, and held that it is for the court to decide whether the scheme is proportionate and whether the relevant authority has established that the objectives cannot be obtained by less restrictive means.

64. In the light of their analysis the Supreme Court concluded that the Court of Appeal in *R (Sinclair Collis Ltd) v Secretary of State for Health* [2011] EWCA Civ 437 had been wrong to apply the "manifestly inappropriate" test, the case being one concerning restriction of the fundamental freedoms. The Court went on to agree with the Appellants that the Court of Appeal in the QASA case had been wrong to approach proportionality using a "manifest error" or "manifestly inappropriate test" and that instead it was for the court to decide whether the scheme was disproportionate.

65. However, the Supreme Court dismissed the appeal. It considered, in analysing the proportionality of the LSB's decision, that QASA was indeed a proportionate measure to redress the potentially serious implications of poor advocacy [109-117] and the question of whether a comprehensive, precautionary scheme such as QASA was required was the kind of question about which the national decision maker is allowed to exercise its judgment within a margin of appreciation.

LASPO – Exceptional Case Funding Scheme – Article 6, 8 and 14 ECHR

***IS (by the Official Solicitor as Litigation Friend) v (1) The Director of Legal Aid Casework and (2) The Lord Chancellor* [2015] EWHC 1965 (Admin), 15 July 2015**

66. The Claimant was a Nigerian national who has lived in this country for over 13 years and is blind, has profound cognitive impairment and is unable to care for himself. He sought legal aid to enable him to apply to the Home Office to recognise his position in this country but it was refused on the ground that Article 8 ECHR was not engaged in immigration cases.

67. The refusal of legal aid was challenged on three grounds: (1) the operation of the exceptional case funding (ECF) scheme frustrated the purpose of the Legal Aid Sentencing and Punishment of Offenders Act 2012 (LASPO) in putting obstacles in the path of applicants which were not required and which bore particularly severely on persons such as the Claimant leading to an unacceptable risk of Article 6 and 8 ECHR breaches; (2) the refusal of funding breached the Claimant's rights under Articles 8 and 14 ECHR; and (3) there had been a failure to comply with section 149 of the Equality Act 2010.

68. The third ground was considered in *R (Gudanaviciene) v DLAC and Lord Chancellor* (upheld by the Court of Appeal [2014] EWCA Civ 1622, [2015] 1 WLR 2247) where the guidance issued by the second defendant indicating how an ECF application should be considered was held to be unlawful as it wrongly indicated that Article 8 ECHR considerations did not apply in immigration cases so that a refusal of legal aid would not breach Article 8 ECHR rights and it also wrongly indicated that the discretion to grant ECF was severely circumscribed and a refusal would only amount to a breach of ECHR rights in rare and extreme

cases. As a result, the Claimant has now obtained legal aid but the importance of the remaining issues in the claim justified their further consideration.

69. The basic question on the first ground was whether the scheme was sufficiently accessible (at [30]). The prescribed forms were far too complex and the information required excessive; for those without legal assistance they were almost impossible to understand and complete satisfactorily. A particularly adverse effect of the 2012 Act reforms had been the effect on family cases and the increase in litigants who had to appear in person: see *MG v JF (Child Maintenance: Costs Allowance)* [2015] EWHC 564 (Fam), [2015] Fam Law 514 considered at [35]. Moreover, a contested family case involving children in which there was no interference with Article 8 ECHR rights was unlikely (at [40]). Only rarely, subject to means and merits if properly applied, should legal aid be denied in such cases: the scheme was therefore deficient as it was now applied (at [40]).

70. As to whether the amended guidance met the concerns raised in *Gudanaviciene*, the 2012 Act should not be construed to limit grants of legal aid to the highest priority cases (at [66-67]). Legal aid had to be granted if, without it, an individual would suffer a breach of his Convention or EU law rights, and might be granted if there was a risk of such breach.

71. The scheme was not providing the safety net s.10 of LASPO was supposed to provide and the difficulties applied with greater force where children or adults lacking capacity were concerned.

72. As to the second ground, which was essentially an attack on the merits criteria, the state was entitled to apply them but there were two difficulties with how they were applied (at [96]). The first was the requirement that in all cases there had to be a greater than even chance of success was unreasonable. The second was that the manner in which the agency assessed the prospects of success was erroneous.

73. The whole point of representation was that it would produce the chance of success which would not exist without representation. If a case turned on issues of fact, the ability to challenge apparently unfavourable material and to cross-examine adverse witnesses effectively could turn the case in a party's favour. What hat to be assessed was therefore not the present untested material but

material that was the subject of competent cross examination and legal submission. The removal of borderline cases from those that can succeed on merits grounds was therefore unreasonable (at [96]).

74. As to the third ground, the obligation under s.149 was a continuing duty to have due regard to the material need (at [99]). Provided that the court was satisfied there had been a rigorous consideration of that duty, that there had been a proper appreciation of the potential impact of the policy on equality objectives and the desirability of protecting them, it was for the decision-maker to decide how much weight should be given to various factors informing the policy: see *R (Greenwich Community Law Centre) v Greenwich LBC* [2012] EWCA Civ 496, [2012] EqLR 572 and *R (Bracking) v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345, [2014] EqLR 60. The Lord Chancellor had produced an equality impact assessment in May 2012, and the necessary due regard had been had whether or not the conclusions about provider behaviour were correct (at 101-104]).

75. There had to be changes to the scheme. The application forms were far too complex for applicants in person. The test in *Gudanaviciene* could be set out in the form and applicants or solicitors/providers could be required to give full details of the need for legal assistance. Consideration had to also be given to the provision of Legal Help to enable solicitors/providers to decide whether legal assistance should be granted because a case qualified within s.10 of LASPO (at 105]). The system was also defective in failing to provide a right of appeal to a judicial body where an individual lacking capacity would otherwise be unable to access a court or tribunal (at [107]).

Retention of 'communications data' – compatibility with EU Charter

***R (Davis & Watson) v Secretary of State for the Home Department* [2015] EWHC 2092 (Admin), 17 July 2015**

76. The challenge was to the data retention powers under the Data Retention and Investigatory Powers Act 2014 (DRIPA) and related Regulations, taken together with the regime for acquisition and use of data under the Regulation of Investigatory Powers Act 2000 (RIPA). DRIPA confers on the Home Secretary a power by notice to require public telecommunications operators to retain communications data about a person for 12 months, for any of the broad

purposes set out in s.22(2) of RIPA. 'Communications data' does not include the content of a communication, but includes who was communicating, with whom, when, from where and for how long.

77. The claimants argued that the DRIPA power is contrary to EU law, specifically the EU Charter right to respect for private and family life, home and communications (Article 7) and the right to protection of personal data (Article 8), as expounded by the CJEU in *Digital Rights Ireland (Case C-293/12)*. In that case, the CJEU held that the Data Retention Directive 2006/24/EC was invalid.

78. The Government accepted that data protection fell within the scope of EU law, but argued that the CJEU merely held that the Directive taken as a whole was invalid, and had not been laying down requirements that must be complied with in order for data retention and access regimes to comply with EU law. It also argued that the interpretation of Articles 7 and 8 which the claimants contended had been applied by the CJEU went beyond the Article 8 ECHR jurisprudence of the ECtHR, which the CJEU could not be taken to have intended.

79. The Divisional Court (Bean LJ and Collins J) upheld the claim. The Court noted that Article 8 of the Charter clearly goes further than Article 8 ECHR, is more specific, and has no counterpart in the ECHR; it therefore rejected the Government's argument that EU law required it to interpret *Digital Rights Ireland* so as to accord with ECtHR decisions on Article 8 ECHR [80]. In any event, the ECtHR cases relied on did not concern a general retention regime [81].

80. Further, although the CJEU was ruling on the Charter compatibility of a Directive, it must follow that an identically worded domestic statute would have been judged against the same principles [83]. Legislation establishing a general retention regime for communications data infringes Articles 7 and 8 of the Charter unless it is accompanied by an access regime which provides adequate safeguards for those rights [89]. Some of the CJEU's observations must be read as laying down mandatory requirements of EU law [90]. In particular, access to and use of data must be restricted to the purpose of preventing, detecting or prosecuting serious offences, and access must be dependent on a prior review by a court or an independent administrative body [91]. The Government's concerns about the practicalities of these requirements were misplaced [93]-[99].

81. The Court rejected the Government's request for a reference to the CJEU. The Government had declined to ask for a reference at the hearing, but did so thereafter following a reference being made on related issues by a Swedish court. However, numerous other Member State courts had been able to apply the *Digital Rights Ireland* principles without the need for a reference [105]. A reference was not likely to promote uniform application of the law throughout the EU [110], the request had been made far too late [112], and DRIPA contains a 'sunset clause' which means that the Act will expire on 31 December 2016, so it was most unlikely that an answer to a reference would be received before DRIPA has expired or been repealed and replaced by a new statute [113].

82. The Court made an order disapplying section 1 of DRIPA to the extent that it permits access to retained data which is inconsistent with EU law, but suspended that order under 31 March 2016 in order to give Parliament sufficient time to enact compliant legislation in place of DRIPA.

83. The Court of Appeal will hear an expedited appeal in October 2015.

Student Loans – Higher Education – A1P1 and Article 14 ECHR - Justification

***R (Tigere) v Secretary of State for Business, Innovation and Skills* [2015] UKSC 57, [2015] 1 WLR 3820, 29 July 2015**

84. The Appellant was a national of Zambia who had lived in the UK since she was six, initially as a lawful dependent and then as an over-stayer. She was later offered several places to read International Business Management at university for which she needed a student loan.

85. To qualify for a loan, the Education (Student Support) Regulations 2011 required that a student had to be (a) resident in England when the academic year began; (b) have been lawfully ordinarily resident in the United Kingdom for three years before that and (c) settled in the United Kingdom on that day. The Appellant did not meet criterion (b) as her residence had not been lawful, nor did she meet criterion (c) as 'settlement' was defined to include those with indefinite leave to remain which she did not currently have.

86. The issue was whether (b) and (c) breached the Appellant's right to education under Article 2 of the First Protocol to the ECHR or unjustifiably discriminated against her in the enjoyment of that right contrary to Article 14 ECHR.

87. The Secretary of State accepted that eligibility for financial support was capable of coming within A1P1 in certain circumstances and that immigration status was an 'other status' for the purposes of Article 14. The issue was therefore the justification for the restriction of those like the Appellant.

88. Lady Hale (with whom Lord Kerr agreed) noted at [27] that states were typically given a wide margin of appreciation for measures of political, economic or social strategy and the court generally respects the legislature's policy choice unless it is manifestly without reasonable foundation: *Gogitidze v Georgia* (Application No 36862/05), (unreported), 12 May 2015 at [97]. However, she also noted at [28-32] that unlike some other public services, education was a right which enjoys direct protection under the Convention; it was also a very particular type of public service, being indispensable to the furtherance of human rights and playing a fundamental role in a democracy: *Ponomaryov v Bulgaria* (2011) 59 EHRR 799 at [55]. Lord Sumption and Lord Reed (dissenting) did not agree (at [77-79].

89. Applying the four-fold test for justification:

(i) The evidence suggested that the measure had a legitimate aim sufficient to justify the limitation of a fundamental right, including targeting those part of the community who are likely to remain in England so that the public benefits from their tertiary education (Lady Hale at [34] and Lord Hughes at [53].

(ii) The Appellant contended that the measure was not rationally connected to that aim as she was just as integrated and likely to remain, but even if this were so, the Secretary of State was in principle entitled to adopt a bright-line rule (Lady Hale at [35-37] and Lord Hughes at [64-67];

(iii) However, a less intrusive measure could have been used as the settlement rule went further than necessary to achieve its objectives excluding people like the Appellant who was a member of UK society and could be expected to remain here indefinitely (Lady Hale at [38] and Lord Hughes at [57]-[58]);

(iv) A fair balance had not been been struck between the rights of the individual and the interests of the community, whether the test was manifestly without reasonable foundation or some less stringent criterion as the harm to such individuals had not been expressly considered (Lady Hale at [39-41] and Lord Hughes at [57-58]).

The application of the settlement rule was not therefore justified (Lady Hale at [42]).

90. As to the lawful ordinary residence rule, it was accepted that it was reasonable to restrict benefits to those who are genuinely integrated into society and a period of residence could be a reasonable proxy for such belonging: *R (Bidar) v Ealing London Borough Council* [2005] QB 812 at [57]. Such residence had to be lawful as a person should not be permitted to benefit from their own unlawful conduct: *Shah* [1983] 2 AC 309, p.343. Lady Hale considered at [46] that there was ample justification for the rule, whether or not lawful residence was a status for the purposes of Article 14. Lord Hughes agreed at [56].

91. The Appellant was entitled to a declaration that the application of the settlement criterion to her is a breach of her rights under Article 14 read with A2P1 of the ECHR, leaving it open to the Secretary of State to devise a more carefully tailored criterion [49] and [68].

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Agenda

- Introduction
- Relying on EU law in domestic proceedings
- Domestic treatment of the EU Charter
- Interveners: securing a role in Luxembourg
- Conclusion

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Relying on EU law in domestic proceedings

Section 1

EU law in judicial review

- Impact on grounds of review
  - More intrusive review
- Impact on remedies
  - More effective remedies
- Case study: *R(Countryside Alliance) v Attorney General* [2007] UKHL 52

Identifying a point of EU law

- Does the measure under challenge “fall within the scope of EU law”?
- Does it implement EU law?
- Does it derogate from EU law?
- Does it otherwise fall within its scope?
  - C-617/10 *Ackerberg Fransson*
  - C-399/11 *Melloni*

Grounds of review: the general principles

- Proportionality
- Fundamental rights / the EU Charter
- Equal treatment
- Legal certainty / legitimate expectations

Proportionality: what is the test?

- Different to ECHR? c.f. *Bank Mellat*
- *R (Sinclair Collis) v SS for Health* [2011] EWCA Civ 437
- *R (Lumsdon) v Legal Services Board* [2015] UKSC 41
- Case C-333/14 *Scotch Whisky Association*, AGO, 3 September 2015

Remedies

- Principles of effectiveness/ non-discrimination
- Challenging procedural rules
- Damages against the State
  - *Negassi v SS Home Department* [2013] EWCA Civ 151
  - *AD v Home Office* (sufficiently serious breach)
- References to the CJEU

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Domestic treatment of the EU Charter

Benkharbouche v Embassy of the Republic of Sudan and Janah v Libya

Section 2

CJEU case law on the application of the Charter

Stage 1

- Gateway for the application of EU law rights: the case must fall within the scope of EU law

Stage 2.1

- Then the EU law right must be **directly effective**
- From 1 December 2009 the Charter has the same legal status as the Treaties, which are directly effective provided they meet *Van Gend en Loos* criteria
- *Hennigs* – age discrimination is precluded by the principle of non-discrimination on the ground of age "proclaimed in Article 21 of the Charter of Fundamental Rights of the European Union and given specific expression in Council Directive 2000/78/EC of 27 November 2000"

Stage 2.2

- *Kükükdeveci*: A Charter right can be **horizontally** directly effective but unclear whether this is only because that right is a "general principle" of EU law
    - *c.f.* Opinion of AG Trstenjak in *Dominguez*

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Recent clarification of both stages of the test

***Hernández* C-198-13 (stage 1)**

- In order for Charter rights to be directly effective and lead to the disapplication of national law, the national law must come within the scope of EU law (Article 51)
- Where a Directive establishes minimum protections or standards for a certain group (here, employees with insolvent employers) but reserves Member States' right to establish further protections, those further protections do not come within the scope of EU law

***Association de mediation sociale* C-176/12 (stage 2)**

- CJEU states that Charter rights can apply horizontally by virtue of their status as primary law – and that this is what happened in *Kükükdeveci* (stage 2.2)
- But in order to be directly effective, a Charter right must be, like Article 21(1), "sufficient in itself to confer on individuals an individual right which they may invoke as such"
- Article 27 must be given "more specific expression" in EU or national law so is not directly effective

Janah v Libya

- Moroccan employees at the Sudanese and Libyan embassies in London claimed for breach of their English law and EU employment rights, including those under the Working Time Regulations
- The Sudanese and Libyan states argued that state immunity rules, notably those in the State Immunity Act 1978 (***SIA***), precluded the English courts from hearing the claims
- The claimants argued that the SIA:
  - insofar as it applied to their claims, infringed Article 6 ECHR; and
  - insofar as it applied to their EU law claims, infringed Article 47 Charter
- The Court of Appeal found that the SIA infringed both provisions
- Article 47 has horizontal direct effect and could be relied on by the claimants against the embassies, who for these purposes were private parties, and the SIA should and must be disapplied
- It was possible simply to disapply the SIA and to do so did not involve the court redesigning a legislative scheme

The Court of Appeal's reasoning in *Janah*

- "A question which remained after *Kükükdeveci* was whether the CJEU's statement about the status of the EU Charter means that the Lisbon Treaty had elevated all the rights, freedoms and principles in the EU Charter to a level equivalent to *Mangold* general principles… the CJEU held that Article 27 could not be invoked horizontally because it required specific expression in Union or national law… The same objection does not apply to Article 47, which does not depend on its definition in national legislation to take effect"

- "In our judgment… Article 47 must fall into the category of Charter provisions which can be the subject of horizontal direct effect. It follows from the approach in *Kükükdeveci* and *AMS* that EU Charter provisions which reflect general principles of EU law will do so"

Janah – application in *Vidal-Hall v Google*

The Court of Appeal followed *Janah* in another case heard by Lord Dyson MR:

"As this court stated in the *Benkharbouche* case…

(i) where there is a breach of a right afforded under EU law, article 47 of the Charter is engaged;

(ii) the right to an effective remedy for breach of EU law rights provided for by article 47 embodies a general principle of EU law;

(iii) (subject to exceptions which have no application in the present case) that general principle has horizontal effect;

(iv) in so far as a provision of national law conflicts with the requirement for an effective remedy in article 47, the domestic courts can and must disapply the conflicting provision; and

(v) the only exception to (iv) is that the court may be required to apply a conflicting domestic provision where the court would otherwise have to redesign the fabric of the legislative scheme."

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Interveners: securing a role in Luxembourg

Section break subtitle

Section 3

Intervener or interested party?

- An interested party is a party "directly affected" by a claim – CPR 54.1
- An intervener is present to "assist the court"
- CJCA 2015:
  - Interveners should bear their own costs
  - A party cannot be required to pay an intervener's costs except in "exceptional circumstances"
  - An intervener may have to pay costs of a party

Intervention in English law proceedings

- CPR 54.17: “Any person may apply for permission… to make representations at the hearing of the judicial review”
- CPR 1.2: obligation to deal with cases justly and at proportionate cost
- *R (on the application of BAT)* – consideration of **factors in favour of intervention in the specific context of a preliminary reference**

Intervening in a preliminary reference to the CJEU

- Article 23 Statute of the Court of Justice of the EU
  - Right to submit statements of case or observations to the Court limited to parties, Member States, EU bodies etc.
- Article 97 CJEU Rules of Procedure
  - “The parties to the main proceedings are those who are determined as such by the referring court or tribunal in accordance with national rules of procedure”
- CJEU has no discretion to extend the right to make observations to non-parties (*Order of the President, Football Association Premier League Ltd v QC Leisure)*

Recognition of interveners as "parties"

- *R (on the application of BAT)*: an intervener in English law proceedings is not necessarily a party for the purposes of Article 97
- Domestic courts should show restraint in the categorisation of interveners as parties
- *R (on the application of Philip Morris Brands)*: domestic courts should not be "mechanistic" in their categorisation of interveners as parties but should consider the merits of the interveners' cases and the "level of experience and expertise" interveners can bring to bear

Trends and best practice

- Grayling reforms
- CJEU Rules
- English courts seeking to limit intervention

Interveners should:

- Intervene early
- Seek the domestic court's recognition as parties
- Differentiate themselves from the other parties to the reference in order to demonstrate value-add

Practical tips for Luxembourg

Questions?

Thank you

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5

Time for the burial rites?

Is common law proportionality about to replace *Wednesbury*, in all cases involving fundamental rights and interests, or not at all?

John Halford, Bindmans LLP

The starting point

1. Justification to proportionality standards will be demanded by:

    a. a legal scheme of which it is an established feature – e.g. HRA or EU law; and

    b. a statutory scheme which recognises the pursuit of a legitimate aim must be proportionate to the impact on individual interests – e.g. Equality Act 2010 section 19:

> "Indirect discrimination
>
> (1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.
>
> (2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—
>
> (a) A applies, or would apply, it to persons with whom B does not share the characteristic,
>
> (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
>
> (c) it puts, or would put, B at that disadvantage, and
>
> (d) A cannot show it to be a proportionate means of achieving a legitimate aim."

    and also, e.g. Schedule 7 to the Counter-Terrorism Act 2008, which was at issue in *Bank Mellat v Her Majesty's Treasury (No 2)* [2013] UKSC 39 [2014] AC 700.

2. It will also be required by the common law, in the context of:

    a. sanctions and penalties - e.g. *R v SSHD Ex parte Benwell* [1985] Q.B. 554 "in an extreme case an administrative or quasi-judicial penalty can be successfully attacked on the ground that it was so disproportionate to the offence as to be

perverse" and *Arfan Zia Dad v General Dental Council Appeal from the Professional Conduct Committee of the General Dental Council* [2000] 1 W.L.R. 1538 "…the consequences of the suspension of the dentist's name from the register… could be regarded when compared with the nature and gravity of the offences as so severe as to be Draconian"; and

c. costs – e.g. *R. v Northallerton Magistrates Court Ex p. Dove* (1999) 163 J.P. 657: "the costs ordered to be paid should not in the ordinary way be grossly disproportionate to the fine."

Wednesbury: Lord Greene and the limits of discretionary power

3. In *Associated Provincial Picture Houses Ltd. v Wednesbury Corporation* [1948] 1 KB 223 the Court of Appeal identifies three main bases for judicial review:

> "a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider.… Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority."

GCHQ: Lord Diplock looks ahead

4. *Council of Civil* Service *Unions v Minister for the Civil Service* [1985] AC 374 at p. 410:

> "Judicial review has I think developed to a stage today when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call "illegality," the second "irrationality" and the third "procedural impropriety." That is not to say that further development on a case by case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of "proportionality" which is recognised in the administrative law of several of our fellow members of the European Economic Community."

Brind: the House of Lords takes a stand

5. *R v Secretary of State for the Home Department ex p Brind* [1991] 1 AC 696 involved a challenge to the Secretary of State's directives to the British Broadcasting Corporation and the Independent Broadcasting Authority prohibiting the broadcasting of speech by representatives of proscribed terrorist organisations.

6. Lord Roskill noted at p. 749:

"the present is a not a case in which the first step [to recognise common law proportionality] can be taken for the reason that to apply that principle in the present case would be for the court to substitute its own judgment of what was needed to achieve a particular objective for the judgment of the Secretary of State upon whom that duty has been laid by Parliament. But so to hold in the present case is not to exclude the possible future development of the law in this respect, a possibility which has already been canvassed in some academic writings."

7. Lord Ackner said at 761:

"Unless and until Parliament incorporates the Convention into domestic law, a course which it is well known has a strong body of support, there appears to me to be at present no basis upon which the proportionality doctrine applied by the European Court can be followed by the courts of this country."

and Lord Lowry added at p. 766:

"there is no authority for saying that proportionality in the sense in which the appellants have used it is part of the English common law and a great deal of authority the other way."

<u>Common law proportionality inches forward</u>

8. *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532 , 548-549, *per* Lord Cooke of *Thorndon* at para. 32:

"…the day will come when it will be more widely recognised that *Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223 was an unfortunately retrogressive decision in English administrative law, in so far as it suggested that there are degrees of unreasonableness and that only a very extreme degree can bring an administrative decision within the legitimate scope of judicial invalidation. The depth of judicial review and the deference due to administrative discretion vary with the subject matter. It may well be, however, that the law can never be satisfied in any administrative field merely by a finding that the decision under review is not capricious or absurd."

9. *Alconbury Developments Ltd) v Secretary of State for the Environment* [2001] UKHL 23 [2003] 2 AC 295 *per* Lord Slynn at para. 51:

"…without reference to the Human Rights Act 1998 the time has come to recognise that this principle is part of English administrative law, not only when judges are dealing with Community acts but also when they are dealing with acts subject to domestic law. Trying to keep the *Wednesbury* principle and proportionality in separate compartments seems to me to be unnecessary and confusing."

10. See also *Somerville v Scottish Ministers* [2007] UKHL 44 [2007] 1 WLR 2734 at para. 56 (Lord Hope) and para. 147 (Lord Rodger) (with which the rest of the Court agreed: Lord Scott at para. 82, Lord Walker at para 167, Lord Mance at para. 198.

<u>*ABCIFER*: the mantra is challenged and doubted, but left intact</u>

11. In *R (Association of British Civilian Internees: Far East Region) v Secretary of State for Defence* [2003] QB 1397 ('*ABCIFER*') the claimant association challenged a 'bloodlink criterion' preventing those with an insufficient family link to the UK from accessing an ex gratia compensation scheme for WWII internees.

12. Amongst other things, they argued the criterion now had to be justified to a proportionality standard (as well as a rationality one). The Court of Appeal held at 34-37:

> "It seems to us that the case for this is indeed a strong one. As Lord Slynn points out, trying to keep the *Wednesbury* principle and proportionality in separate compartments is unnecessary and confusing. The criteria of proportionality are more precise and sophisticated: see Lord Steyn in the Daly case, at pp 547-548, para 27. It is true that sometimes proportionality may require the reviewing court to assess for itself the balance that has been struck by the decision-maker, and that may produce a different result from one that would be arrived at on an application of the *Wednesbury* test. But the strictness of the *Wednesbury* test has been relaxed in recent years even in areas which have nothing to do with fundamental rights: see the discussion in Craig, Administrative Law, 4th ed (1999) , pp 582-584. The *Wednesbury* test is moving closer to proportionality and in some cases it is not possible to see any daylight between the two tests: see Lord Hoffmann's Third John Maurice Kelly Memorial Lecture 1996 "A Sense of Proportionality", at p 13. Although we did not hear argument on the point, we have difficulty in seeing what justification there now is for retaining the *Wednesbury* test.
>
> 35 But we consider that it is not for this court to perform its burial rites. The continuing existence of the *Wednesbury* test has been acknowledged by the House of Lords on more than one occasion…
>
> 37 Finally, the passages in the speeches of Lord Slynn in *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 AC 295 , 320-321 and Lord Cooke in the Daly case [2001] 2 AC 532 , 548-549 to which we have referred, themselves imply a recognition that the *Wednesbury* test survives, although their Lordships' clearly expressed view is that it should be laid to rest. It seems to us that this is a step which can only be taken by the House of Lords. We therefore approach the issues in the present appeal on the footing that the *Wednesbury* test does survive, and that this is the correct test to

apply in a case such as the present which does not involve Community law and does not engage any question of rights under the Convention."

13. ABCIFER's challenge was not successful. Permission to appeal to the House of Lords was refused.

Kennedy and *Pham:* the door finally begins to open?

14. In *Kennedy v Information Commissioner* [2014] UKSC 20 [2014] 2 WLR 808, a case primarily about a HRA compatible interpretation of FOIA, the Supreme Court took the opportunity to make some important remarks about the significance of the common law principle of open justice and the justification needed to abrogate it. Lord Manse commented at para 51:

> "The common law no longer insists on the uniform application of the rigid test of irrationality once thought applicable under the so-called *Wednesbury* principle … The nature of judicial review in every case depends on the context."

and paras. 54 and 55 (with which Lord Neuberger of Abbotsbury PSC, Lord Clarke of Stone-cum-Ebony JSC and Lord Toulson JSC agreed):

> "As Professor Paul Craig has shown (see eg "The Nature of Reasonableness" (2013) 66 CLP 131), both reasonableness review and proportionality involve considerations of weight and balance, with the intensity of the scrutiny and the weight to be given to any primary decision maker's view depending on the context. The advantage of the terminology of proportionality is that it introduces an element of structure into the exercise, by directing attention to factors such as suitability or appropriateness, necessity and the balance or imbalance of benefits and disadvantages. There seems no reason why such factors should not be relevant in judicial review even outside the scope of Convention and EU law. Whatever the context, the court deploying them must be aware that they overlap potentially and that the intensity with which they are applied is heavily dependent on the context….
>
> Speaking generally, it may be true (as Laws J said in a passage also quoted by Lord Bingham from *R v Ministry of Agriculture, Fisheries and Food, Ex p First City Trading Ltd* [1997] 1 CMLR 250 , 278-279) that " *Wednesbury* and European review are two different models—one looser, one tighter—of the same juridical concept, which is the imposition of compulsory standards on decision-makers so as to secure the repudiation of arbitrary power". But the right approach is now surely to recognise, as de Smith's Judicial Review , 7th ed (2013), para 11-028 suggests, that it is inappropriate to treat all cases of judicial review together under a general but vague principle of reasonableness, and preferable to look for the underlying tenet or principle which indicates the basis on which the court should approach any administrative law challenge in a particular situation. Among the categories

of situation identified in de Smith are those where a common law right or constitutional principle is in issue. In the present case, the issue concerns the principles of accountability and transparency, which are contained in the Charities Act and reinforced by common law considerations and which have particular relevance in relation to a report by which the Charity Commission makes to explain to the public its conduct and the outcome of an inquiry undertaken in the public interest."

15. In *Pham v Secretary of State for the Home Department* [2015] UKSC 19 at para. 59, Lord Carnwath amplified what was said in Kennedy at 51 and 54 in the context of a citizen deprivation challenge:

> "Those considerations apply with even greater force in my view in a case such as the present where the issue concerns the removal of a status as fundamental, in domestic, European and international law, as that of citizenship."

at para. 98. Lord Manse said:

> "Removal of British citizenship under the power provided by section 40(2) of the British Nationality Act 1981 is, on any view, a radical step, particularly if the person affected has little real attachment to the country of any other nationality that he possesses and is unlikely to be able to return there. A correspondingly strict standard of judicial review must apply to any exercise of the power contained in section 40(2) , and the tool of proportionality is one which would, in my view and for the reasons explained in Kennedy v Information Comr [2014] 2 WLR 808 , be both available and valuable for the purposes of such a review. If and so far as a withdrawal of nationality by the United Kingdom would at the same time mean loss of European citizenship, that is an additional detriment which a United Kingdom court could also take into account, when considering whether the withdrawal was under United Kingdom law proportionate. It is therefore improbable that the nature, strictness or outcome of such a review would differ according to whether it was conducted under domestic principles or whether it was also required to be conducted by reference to a principle of proportionality derived from Union law."

<u>*Keyu*: the Supreme Court gets its chance</u>

16. In *Keyu*, the Appellants challenge decisions to take no action to inquire further into the killing of 24 unarmed civilians by British soldiers in December 1948, in the rubber plantation village of Batang Kali, Malaya. The 24 men killed were the male Chinese, registered and permanent workforce of a British-owned rubber plantation. The first was shot and wounded on 11 December 1948 then "finished off" at close range after the soldiers surrounded and took control of a plantation village during the Malayan Emergency. The other villagers—women, men and children—were then detained as prisoners in their own huts and interrogated throughout the night using mock

executions. In the morning, the women, children and one man are taken away by lorry. The remaining unarmed men are ordered out of the hut where they are held and within minutes all have been shot dead. The incident is explained at the time as a necessary prevention of a mass escape attempt. In 1970 six of the soldiers confess to murder, but the investigation is aborted part way through. In 2010, the families' lawyers marry the products of this investigation with another undertaken in Malaysia in 1993 and press for an inquiry or investigation to displace the official account and reveal the truth. Both are refused by the Secretaries of State.

17. The Divisional Court ([2012] EWHC 2445 (Admin)) recognised that the decision of the Respondents in this context "that the inquiry would be an inquiry into why 24 men were killed [was] an inquiry involving the most fundamental rights – the right to life" (DC Judgment para. 136). It then erred in law in setting what the Court of Appeal ([2014] EWCA Civ 312; [2015] Q.B. 57) called "too high a threshold" by determining that the impossibility of an inquiry reaching definitive conclusions about the alleged decision to execute the male villagers was a sufficiently compelling reason to refuse to conduct any form of inquiry into the events at Batang Kali (CA Judgment para. 109). Having corrected the assumption that such an inquiry could not reach meaningful conclusions by reference to different degrees of evidential satisfaction (see the approach in the Bloody Sunday Inquiry, the Shipman Inquiry and the Baha Mousa Inquiry) (CA Judgment paras. 110-112), the Court nevertheless dismissed this part of the claim by pointedly characterising it as a *Wednesbury* challenge, and holding that not only had the Secretaries of States reached rational decisions that were open to them, but that the Court did "not think any other Secretaries of State would have reached a different conclusion at this stage".

18. Permission to appeal to the Supreme Court is granted by the Court of Appeal on the issues the case raises about application of Article 2 ECHR inquiry duties to pre-ECHR killings when new evidence has come to light. The Supreme Court grants permission to appeal to itself on the question of whether the more exacting standard of proportionality should now operate as a general ground of judicial review and/or as special protection in the field of fundamental rights at common law; and if so, what difference that would have made in this case.

<u>The first battlefront: a step too far for English law, or at least the Courts, to take?</u>

19. Lord Lowry's four objections in *Brind* at p. 767:

> "This, so far as I am concerned, is not a cause for regret for several reasons: 1. The decision-makers, very often elected, are those to whom Parliament has entrusted the discretion and to interfere with that discretion beyond the limits as hitherto defined would itself be an abuse of the judges' supervisory jurisdiction."

and see, similarly, Wade & Forsyth (p. 317):

"These conceptual differences between the two concepts point to issues of legitimacy. *Wednesbury* is consistent with the doctrine of separation of powers but proportionality is not. And a change of such a radical nature surely requires some statutory warrant".

20. Lord Lowry continued:

> 2. The judges are not, generally speaking, equipped by training or experience, or furnished with the requisite knowledge and advice, to decide the answer to an administrative problem where the scales are evenly balanced, but they have a much better chance of reaching the right answer where the question is put in a *Wednesbury* form. The same applies if the judges' decision is appealed.
>
> 3. Stability and relative certainty would be jeopardised if the new doctrine held sway, because there is nearly always something to be said against any administrative decision and parties who felt aggrieved would be even more likely than at present to try their luck with a judicial review application both at first instance and on appeal.
>
> 4. The increase in applications for judicial review of administrative action (inevitable if the threshold of unreasonableness is lowered) will lead to the expenditure of time and money by litigants, not to speak of the prolongation of uncertainty for all concerned with the decisions in question, and the taking up of court time which could otherwise be devoted to other matters. The losers in this respect will be members of the public, for whom the courts provide a service."

21. Sir Philip Sales, writing extra-judicially ((2013) LQR 129 (Apr) 223-241), has elaborated on these arguments arging that, without stautory mandate, the extension of proportionality as a general ground of judical review:

> "would be a significant substantive change in the law, directly adjusting the distribution of power between the courts, Parliament and executive public authorities with retrospective effect (since it will apply to statutes already enacted)"

22. In *Keyu*, the appellants' answers were:

    a. As to Lord Lowry's first, 'constitutional legitimacy' objection, proportionality is compatible with the supervisory jurisdiction on judicial review and does not involve the Court substituting its own judgment as to the substantive merits of the public authority's action. As Lord Reed pointed out in *AXA General Insurance Ltd v HM Advocate* [2011] UKSC 46 [2012] 1 AC 868 at §131, in cases where "the courts must decide whether, in their judgment, the requirement of proportionality is satisfied" that involves "nothing" which "requires the courts to substitute their own views for those of other public authorities on all matters of policy, judgment and discretion". The forbidden

function of "in effect, retaking the decision on the facts" is the "merits review" from which judges continue to "abstain": see Kennedy at para. 52.

b. In any event, proportionality acknowledges the public authority's latitude (area of judgment) and confronts, by reference to recognised features, the contextual assessment of its width. The latitude, whose acknowledgment is built-in to proportionality standards, is what prevents the forbidden substitutionary approach. It is approached overtly, and contextually. Lord Steyn's famous maxim that "[i]n law context is everything" was stated in reference to the proposition (from *Mahmood*) "that the intensity of review in a public law case will depend on the subject matter in hand" (*Daly* per Lord Steyn at para 28). As Lord Mance explained in *Kennedy* (at para 54): "proportionality itself is not always equated with intense scrutiny" and "proportionality review may itself be limited in context to examining whether the exercise of a power involved some manifest error".

c. As regards his second and third, 'legal uncertainty' objections, proportionality is a structured test enhancing the effectiveness and transparency of practical judicial supervision of executive action. The "contours of the principle of proportionality" which are "familiar": see *Daly* per Lord Steyn at para 27 provide "criteria … more precise and more sophisticated than the traditional grounds of review". As Lord Reed pointed out it *in Bank Mellat v Her Majesty's Treasury (No 2)* [2013] UKSC 39 [2014] AC 700 at §74, proportionality's "attraction as a heuristic tool is that, by breaking down an assessment of proportionality into distinct elements, it can clarify different aspects of such an assessment, and make value judgments more explicit."

d. By contrast, the current position under reasonableness is "notoriously imprecise", subject to tautology and partially overlapping with the proportionality questions having infiltrated all domestic decision making in any event (De Smith, paras 11-002). Craig would go further: "60 years since Wednesbury, and over 250 years since the advent of some form of rationality review in the UK" have not "produc[ed] a modern definition of rationality review which is legally authoritative and where the mode of application coheres with the legal test" (Proportionality, Rationality and Review [2010] NZLR 265, 284).

e. As to the remaining objections, the recognition of proportionality now commands informed support. In *Brind*, Lord Lowry observed that there was a lack of judicial support. Thirty years on, as the Courts have become more familiar with the principle of proportionality as a practical and effective public law doctrine, and as the standard of reasonableness has itself evolved, this is a development if anything long overdue. By 2001, Lord Slynn—a judge with very considerable experience of the operation of the principle of proportionality—was able to say in *Alconbury* (at para51) that it should be

recognised in English law outside of the EU and rights based context and that trying to keep the *Wednesbury* principle and proportionality in separate compartments seems to be unnecessary and confusing.

f. By 2003, the Court of Appeal in *ABCIFER* had seen enough of the operation of proportionality as an EU and ECHR standard to conclude (at para. 34) that there was clear "support for the recognition of proportionality as part of English domestic law in cases which do not involve Community law or the Convention". *Kennedy* and *Pham* only serve to reinforce this.

The second battlefront: applicable to fundamental rights and interests, or across the board?

23. Here the Secretaries of State maintained that proportionality review is not apt as a control on general public law decision-making in the absence of any framework of protected rights and qualifications upon those rights. As Lord Sumption put the point in Rotherham MBC) v Secretary of State for Business [2015] UKSC 6 at para. 47:

> "The appellants advance an alternative case based on proportionality, which I can deal with quite shortly … The appellants say that the effect of the Secretary of State's decision was to impose upon them a disproportionate burden. The problem about this submission is that it fails to answer the question: disproportionate to what? Proportionality is a test for assessing the lawfulness of a decision-maker's choice between some legal norm and a competing public interest. Baldly stated, the principle is that where the act of a public authority derogates from some legal standard in pursuit of a recognised but inconsistent public interest, the question arises whether the derogation is worth it."

24. See also the judgment of the Court of Appeal in *Rotherham* [2014] PTSR 1387, §49:

> "The proportionality doctrine measures the relationship between two variables. Under the traditional proportionality formula summarised by Lord Sumption [in *Bank Mellat*], these variables are (i) the objective pursued by the decision and (ii) the claimant's fundamental right(s). It is difficult to see how the proportionality principle can be applied unless there is an appropriate reference point against which the legality of the decision can be measured. The problem can be tested by considering the "least restrictive means" stage of the proportionality analysis. If there is no legal reference point (such as the right of free movement) against which the decision can be measured, what is being "restricted"?"

25. This position is not exclusively taken by those opposed to the development of proportionality at common law. One school of commentators argue for "bifurcation"; that standards of reasonableness must be fused with proportionality in the field of fundamental rights: Michael Taggart, Proportionality, Deference, Wednesbury [2008] NZLR 423, 465-466, Tom Hickman, Public Law After of the Human Rights Act, Ch. 9, 264-267; Jeff King, Proportionality: A Halfway House [2010] NZLR 327, 359-367. Their

key argument concerns the importance of making sure that proportionality plays its most significant role where it most matters, which is to protect such rights, and that the introduction of a general test, does not prohibit continuing clarification as to what rights should be fundamental under the common law (See Taggart, 470 and 479, Hickman, p 294 and King p 362). In citing "fundamentality" as the key that unlocks the proportionality door, Taggart at p 466 cited "history, societal context, and international law norms" as having "important roles to play".

26. The Appellants' answers in *Keyu* ware:

    a. The recognition of proportionality promotes clarity and transparency in the law, avoiding unnecessary and confusing "facets of reasonableness" and freestanding "sliding scales". The Court of Appeal in *ABCIFER* (at para. 34) agreed with Lord Slynn in Alconbury (at para. 51) that it is "unnecessary and confusing" to keep separate the principles of reasonableness (generally applicable) and proportionality (applicable in EU and ECHR cases).

    b. Craig's *Proportionality, Rationality and Revie*w [2010] NZLR 265 answers the "bifurcation thesis". Proportionality is not intrinsically dependant on a rights based anchor, either in origin or in its EU manifestation (pp.296-297). Modified rationality review could not be undertaken without "much the same inquiry as that done explicitly via proportionality, albeit not so overtly or clearly" (p.298) and the expanding scope of EU power via the Lisbon Treaty means that the non-right/non-EU terrain will increasingly diminish.

<u>The third battlefront: if fundamental rights or interests are what's needed, they are certainly engaged in the context of an unexplained massacre</u>

27. The *Keyu* Appellants' alternative submission was that:

    a. Proportionality at common law in a human rights context commands strong support from commentators and the authorities. The reserve towards proportionality formally expressed in *Brind* was not shared in *R v Secretary of State for the Home Department* ex p *Leech* [1994] QB 198, 212, where the constitutional right of a prisoner to have access to Court, could not be qualified without demonstration of a "self-evident and pressing need". In Daly Lord Bingham applied the common law (see para. 23) to hold that an interference with a common law right (para. 16) was "greater than is justified by the objectives the policy is intended to serve, and so violates the common law rights of prisoners" (at para. 21). Laws LJ has emphasised the same in *R (Miranda) v Secretary of State for the Home Department* [2014] EWHC 255 (Admin) [2014] 1 WLR 3140, para. 83 ("where a discretionary power touches a fundamental right, its use must fulfil the proportionality principle").

b. The obligation to investigate the wrongful deprivation of life—especially for those who die in custody—is deeply entrenched in common law heritage and today finds support as an obvious norm in all civilised legal systems: see *R (Amin) v Secretary of State for the Home Department* [2003] UKHL 51 [2004] 1 AC 653 paras. 16 and 31. It provides a means of ensuring that the rule of law itself is practical and effective rather than theoretical and illusory.

c. To this must be added the common law value of human dignity, to which Lord Reed has drawn attention in *R (Osborn) v Parole* Board [2013] UKSC 61 [2014] AC 1115 at §68, and which in modern times has underscored the importance of procedural rights and the access of all persons everywhere to them. See Jeremy Waldron, How the Law Protects Dignity (2012) Cambridge Law Journal 200, 212

Proportionality: how much of a difference?

28. In *Daly*, Lord Steyn comments at para. 27:

> "What is the difference for the disposal of concrete cases? Academic public lawyers have in remarkably similar terms elucidated the difference between the traditional grounds of review and the proportionality approach: see Professor Jeffrey Jowell QC, "Beyond the Rule of Law: Towards Constitutional Judicial Review" [2000] PL 671; Professor Paul Craig, Administrative Law, 4th ed (1999), pp 561-563; Professor David Feldman, "Proportionality and the Human Rights Act 1998", essay in The Principle of Proportionality in the Laws of Europe edited by Evelyn Ellis (1999), pp 117, 127 et seq.
>
> The starting point is that there is an overlap between the traditional grounds of review and the approach of proportionality. Most cases would be decided in the same way whichever approach is adopted. But the intensity of review is somewhat greater under the proportionality approach. Making due allowance for important structural differences between various convention rights, which I do not propose to discuss, a few generalisations are perhaps permissible. I would mention three concrete differences without suggesting that my statement is exhaustive.
>
> First, the doctrine of proportionality may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions.
>
> Secondly, the proportionality test may go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations.
>
> Thirdly, even the heightened scrutiny test developed in *R v Ministry of Defence, Ex p Smith* [1996] QB 517 , 554 is not necessarily appropriate to the protection of

human rights. It will be recalled that in Smith the Court of Appeal reluctantly felt compelled to reject a limitation on homosexuals in the army. The challenge based on article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms (the right to respect for private and family life) foundered on the threshold required even by the anxious scrutiny test. The European Court of Human Rights came to the opposite conclusion: *Smith and Grady v United Kingdom* (1999) 29 EHRR 493 . …

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

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

29. And, for example, contrast the Court of Appeal in *ABCIFER* testing the 'bloodlink criterion' to rationality standards at para 42:

> "What is in controversy is whether it is rational to limit the beneficiaries of the scheme to those British subjects who had close links with the UK at the time of internment. In our view, it is impossible to say that the close link criterion is irrational. At the time of internment, large numbers of British subjects had no links with the UK save for their being British subjects by reason of the 1914 Act [British Nationality and Status of Aliens Act 1914]. By the time the scheme came to be set up, the UK had become a medium-sized European country which had lost its empire. The situation was very different from what it was at the time of the war when Britain controlled a huge empire. No doubt, the Government could have decided to include in the scheme all those who were British subjects at the time of their internment who were not entitled to compensation from their home countries. But its failure to do so was not irrational."

with the approach of the same (though differently constituted) court in *R (Elias) v Secretary of State for Defence* [2006] EWCA Civ 1293, [2006] 1 W.L.R. 3213 applying a proportionality standard in the context of a race discrimination argument at paras. 164 to 181.

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5 October 2015

PROPORTIONALITY & INTENSITY OF REVIEW
Or

Fags, Gambling, Music and the Law: Insights provided by recent EU law cases in the English Courts

A. Proportionality: the two key questions

The content of the proportionality principle is pretty settled, whether from an ECHR/HRA or domesetic perspective

For the content of the principle as applied in fundamental rights cases English lawyers probably only need Lord Sumption's concise formula from *Bank Mellat* at [20] (emphasis added):[1]

> *The requirements of rationality and proportionality, as applied to decisions engaging the human rights of applicants, inevitably overlap. The classic formulation of the test is to be found in the advice of the Privy Council, delivered by Lord Clyde, in* de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing *[1999] 1 AC 69, 80. But this decision, although it was a milestone in the development of the law is now more important for the way in which it has been adapted and applied in the subsequent case law… [Those cases] effect can be sufficiently summarised for present purposes by saying that the question depends on an* ***exacting analysis of the factual case*** *advanced in defence of the measure, in order to determine (i) whether its objective is sufficiently important to justify the limitation of a fundamental right; (ii) whether it is rationally connected to the objective; (iii) whether a less intrusive measure could have been used; and (iv) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community. These four requirements are logically separate, but in practice they inevitably overlap because the same facts are likely to be relevant to more than one of them.*

Whilst *Bank Mellat*, *de Freitas*, *Quila* and the various other cases cited by Lord Sumption are fundamental/human rights cases, nothing much turns on this.

The rubric employed by EU law is to all intents identical, calling for like identification of legitimate aim (typically as either provided by the wording of the relevant Treaty Article or as judicially supplied through "mandatory considerations" or other like euphemisms for legitimate aims), rational connection, least intrusive means and overall proportionality. The only substantial difference is that steps 3 and 4 are often elided. So whilst Lord Reed was right to point out in *Lumsdon* that the tests differ somewhat I suspect that this masks the real difference – a different philosophy and a different controlling court for the key question of intensity of review.

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1 *Bank Mellat v HM Treasury (No2)* [2014] UKSC 39; [2014] AC 700

In fact, in my view the main two interesting groups of questions about the proportionality principle are:

- What are the limits of its potential application, both in terms of precedent but more intriguingly in terms of theory? Can proportionality be applied to domestic cases, and if so which? Does it meaningfully apply as a principle to all ECHR and EU cases?

- How do I know how intensely to apply the test? What factors influence that intensity "dial" and why?

Intriguing as the first question is to explore the analytical limits of proportionality (as shown by the *Rotherham* case for instance)[2] I am going to concentrate upon the latter question (not least because I think it contains the seeds of the answers to the first question).

The second question is critical, because the more intensely the test is applied, the closer it comes to intense view substitution. The genius of the *Wednesbury* test I would suggest lies in the fact that its very simple formulation operates to convey a clear idea of precisely the intensity with which questions of rationality are scrutinized, by forcing the reviewing judge to recognize and engage with the world of disagreement, rather than his or her own internal rationality. What *Wednesbury* (at least at the second stage – the classic irrationality test) is all about is patrolling the terrain of review, telling judges to intervene only in the starkest of cases.

This simple and consistent message has been replaced with very considerable complexity, a world of ever-more subtle variable intensity of review. Somewhat perversely, the more structured world of the proportionality test conveys no unifying message as to intensity of review, save perhaps a "not *Wednesbury*" meeage. A cynical person might say that it is a largely unarticulated promise of some sunnier upland of substantive review, but just how much more intense the review is remains to be seen.

B. The conventional view and *Countryside Alliance's* endorsement of it

If the language of the test does not tell you the required intensity of review, what does? The conventional view is that the appropriate place on the sliding scale of intensity of review is tolerably easily identified if one asks the right questions. The appropriate questions in a human rights context are conventionally these, and they proceed in **four** broad stages.

The **first** thing you must do is gauge the importance of the right being infringed. Fundamental rights charters have their own scale of importance, with absolute rights coming above qualified rights, and qualified rights having their own

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[2] See *R (Rotherham MBC) v Secretary of State for Business Innovation and Skills* [2015] 3 CMLR 20, esp at [47] per Lord Sumption.

ranking, with free speech being somewhere near the top, economic rights like the right to property near the bottom and other rights falling in the spectrum between those two (with privacy somewhere close to the middle).

The **second** thing you must do is work out the relative importance of the competing interest, for again there is a hierarchy (though a much more complex one), comprising of competing fundamental rights (the privacy /free speech conundrum is the classic) and a variety of legitimate aims of varying importance (national security, environmental protection etc).

Thirdly you must assess the degree of intrusion into the terrain protected by the fundamental right. The more there is a loss of the essence of the right under protection the harder it will be to justify.

Finally, you may have to ask yourself if you must recalibrate your answer because of some deference factor to who the decision maker is and with what subject-matter they are grappling. This is a reflection of constitutional institutional limitations. On this account deference is due to the legislator because of their constitutional position, their democratic accountability and special power to comment on or form or shape opinion on certain issues; and to expert or technocractic decision-makers precisely because they have insight and understanding of a subject-matter a Court cannot hope to replicate, as well as being designated (even designed) to take the type of decision at issue.

Once you have done these four things, and have set your intensity dial to the appropriate point, you can apply your proportionality test. But of course even these four steps are a mask for very extensive value-judgment and do not really grapple with the "apples & pears" incommensurability of some of things being measured against one another; and even within any one of these four topics where problems of incommensurability do not arise, concepts that look straightforward (e.g. absolute rights are 'stronger' or more important than qualified rights)[3] are not.

Lord Brown's speech in the *Countryside Alliance* is a near perfect case-study for this approach,[4] as he indicates that: (a) given the lower tier nature of property rights and the relatively slight nature of the interference, he considered moral/ethical objections to supply a legitimate aim capable of supporting the outright ban; but (b) had Article 8 interests been engaged (which he concluded they were not) such legitimate aims would have been quite insufficient to justify the ban.[5]

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3 Article 6 and the absolute right to a fair trial is a simple example. For the absolute right is ultimately no more than the conclusion that the trial is fair. All of the subordinate rights or means by which such fairness is to be secured – representative, privilege against self-incrimination etc – are themselves qualified and of varying importance.

4 It is near perfect because Lord Brown's views on the significance of the fact that the views are formed by Parliament are highly nuanced and by no means amount to axiomatic deference of the kind, say, evidenced by the speeches in *Sinclair Collis*.

5 *R(Countryside Alliance* at [150]-[161].

This conventional world view is matched by the assumption – and it is nothing if not a reasonable one – that the basic exercise identified above should not need to vary depending on the source of the protected rights (ECHR/HRA, common law fundamental rights, EU law rights); and, moreover, such rights can be fed in to form a wider hierarchy, one with EU rights near the bottom of the pile.

This thinking is most evident in *Countryside Alliance*, again in the speech of Lord Brown at [163] where he stated:

> *"If anything, indeed, I would have thought interferences with the fundamental rights and freedoms guaranteed by the Convention more, rather than less, di–cult to justify than restrictions on the merely economic rights of free movement of goods and services provided for by the Treaty. If anything, these economic rights seem to me more akin to the property rights protected under article 1 of the First Protocol than to the core rights guaranteed, for example, under articles 8—11 and therefore to be more readily overridden in the broad public interest than the Convention's core rights."*

This approach undoubtedly has common sense appeal, and has much appealed (for understandable reasons) to Government lawyers. The rights provided by EU law are, after all, economic rights. Why should their kind receive better protection than ECHR property rights, when ECHR are rights are supposed to be fundamental?

C. ***Sinclair Collis***

The trend that *Countryside Alliance* started, *Sinclair Collis* completed.[6] The case is perhaps proof positive of the fact that cases about tobacco make bad law. The case involved the proposed ban on tobacco vending machines on the footing that they were sources of supply for under 18 smokers and sources of temptation for relapsing smokers after a drink or two. The challenge was mounted on both EU free movement and A1P1 grounds (given the disastrous impact of the ban on the goodwill of vending machine manufacturers).

In a wide-ranging proportionality challenge that contested, amongst other things, the quality of the evidence about under age usage of vending machines, there was a nicely bounded question about less restrictive measures. The vending machines could be modified so as to be capable of operation after use of a remote control had provided authorisation to dispense. The proposal was that before using a vending machine the smoker would have to present themselves to give an opportunity to bar staff to verify age and then turn the machine on for dispensing purposes. What little evidence there was from a trial of the system had shown it produced compliance rates similar to or better than those obtained in convenience shops or garages (which was unsurprising one might think because the scope for human error was the same).

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6 *R (Sinclair Collis Ltd) v Secretary of State for Health* [2011] EWCA 437; [2012] QB 394.

The case obviously provoked difficulty, resulting as it did in three very different judgments, and in one judge Lord Neuberger MR (as he then was) confessing he had changed his mind between majority and minority several times. The one thing all three judges were agreed upon, however, was that, following *Countryside Alliance*, the analysis required by A1P1 or EU free movement was exactly the same.[7]

The lead speech of the majority of Arden LJ, which came to be much cited (again being beloved of Government lawyers) effectively defeated the very strong "least restrictive means" argument by reversing the burden of proof, and watering key aspects of the proportionality test down to a *de facto* Wednesbury test, or one of manifest error/manifest inappropriateness, a test taken from the *FEDESA* case (a challenge to the legality of EU legislation) but held to apply to all forms of proportionality challenge, including, notably, challenges to the legality of national legislation.[8] Arden LJ held that the "least restrictive means test" either did not apply to an Act of Parliament or it did so only in the attenuated *Wednesbury* sense; and that since the Claimants had not shown that the decision to impose the ban was "on its face manifestly inappropriate" the Claimants had the burden of showing there were other equally effective means of achieving the ends.[9]

However one cuts it, the practical effect of *Sinclair Collis* was and is to resubordinate the proportionality test to English conceptions of deference and thus to apply, in substance, a *Wednesbury* approach to intensity of review. This is "hands off max", in which both intensity of review and burden of proof are recalibrated so as set an exceedingly high (if not practically impossible) threshold for substantive review.

Strangely, for such a self-evidently important case, and one that had only produced three very different opinions, with one Judge candidly admitting a substantial degree of indecision, the Supreme Court did not accept an appeal. *Sinclair Collis* became the lead authority on the topic of EU intensity of review; but an uncomfortable lead case since, to complicate matters further, the Court of Session, Inner House, had in a parallel case of *Sinclair Collis v Lord Advocate*, declared all of the 3 judgments in the English case to be flawed.

D. *Gibraltar Betting & Gaming*

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7 See [54] per Laws LJ; [147] per Arden LJ; [12]-[194] per Neuberger MR.

8 The very argument that prevailed in *Lumsdon*, namely that the CJEU applied differing intensities of review to challenges to the legality of EU Community actions – most obviously to EU legislation - and to challenges to national measures based on EU Treaty rights was considered and rejected. The *FEDESA* case, and its test of manifest inappropriateness, was a "Community Action" case, but Arden LJ held its approach equally valid for "Treaty Rights" cases.

9 See [85](d) and (h); and [115] and following. *Countryside Alliance* had featured prominently in May P's judgment at first instance too.

The first case in the ebbing of the tide from the "hands off" high mark that was *Sinclair Collis* was the *Gibraltar Betting & Gaming* case ("GBG").[10]

The case entailed a challenge, amongst other things, to the proportionality of UK legislation that regulated on-line gaming so as to capture offerings that were not just based in the UK but which targeted UK gamblers over the internet. GBG's challenge was put on the basis of EU free movement rights, contending that the UK measures were a disproportionate interference with such rights. What is immediately in Green J's impressive and extensive judgment – full of EU learning – is the careful and systematic treatment of proportionality, and in particular his willingness to engage in that very "exacting analysis of the factual case" that Lord Sumption identified as necessary in *Bank Mellat*.

More to the point Green J was not afraid to wrestle with the heart of the case, namely the threshold test (for substantive intervention) of "manifest inappropriateness". What Green J has to say on this topic is, I would suggest, of continuing value even if post-*Lumsdon* it requires very careful application (since *Sinclair Collis* continues to taint some of the reasoning). His starting point was to assume (correctly, as a matter of precedent at the time) that he had to apply a test of "manifest inappropriateness" by dint of the approach of Arden LJ in *Sinclair Collis*. Such test in fact appeared nowhere in the CJEU case-law, though the CJEU has itself repeatedly recognised the particular need to modulate the intensity of review in certain 'maximum discretion' areas of which the most clearly identified are gambling, public health and public morality. To this end it should be noted that the recentness of the CJEU decision in *Pfleger*, its relatively fulsome nature in terms of instructions to national courts when dealing with proportionality issues, and the extent to which it was directly on point all constituted a clear basis to supplant the more general guidance supplied by *Sinclair Collis*.

His analysis breaks "manifest error" challenges down into two different types as follows in a passage at [99]-[112] that deserves full repetition:

> *[99] I turn now to the somewhat vexed issue concerning the extent or breadth of the discretion which the Court should confer upon the decision maker. It has become almost trite to say that the intensity of judicial review is context driven. It is almost equally trite to say that when the issue involves deep and complex issues of political judgment the courts will exercise self-restraint. The evaluation by a court of the nature of the underlying issue of substance is hence a starting point which leads to an instruction to judges viz., the more political and value-laden an issue the less the courts will interfere. But how this then translates into an actual and practical test that the Court then applies is far from clear. In cases where judicial deference to the decision maker is warranted courts talk about a wide margin of appreciation and translate this into expressions such as "manifestly inappropriate" or its converse "manifestly appropriate". But this is a*

[10] *R (Gibraltar Betting & Gaming Association) v Secretary of State for Culture, Media & Sport* [2014] EWHC 3236 (Admin); [2015] 1 CMLR 28.

conclusion not a test. It begs the question as to when the inappropriateness of the measure is "manifest" and how this is determined. What does the expression mean?

[100] In neither EU nor domestic law is there an articulation of what is understood by "manifest". The phrase is defined in dictionaries as something which is: readily perceived, clear, evident, clearly apparent, obvious or plain. The etymology is from the Latin "manifestus" — palpable or manifest. These definitions are helpful only to a degree. What has to be "manifest" is the inappropriateness of a measure. There are two broad types of case where inappropriateness is put in issue. First, where it is said that a measure is vitiated by a clearly identifiable and material error. These are the relatively easy cases because the error can be identified and determined and its materiality assessed. The error may be a legal one, e.g. the measure is on its face discriminatory on grounds of nationality (as in R. v Secretary of State for Transport Ex p. Factortame Ltd (C-221/89) [1991] E.C.R. I-3905; [1991] 3 C.M.L.R. 589). It may be a glaring error in logic or reasoning or in process. But even here there are complications since whilst it is true that an error which is plain or palpable or obvious on the face of the record may easily be termed "manifest" that cannot be the end of the story. An error which is clear and obvious may nonetheless not go to the root of the measure; it might be peripheral or ancillary and as such would not make the disputed measure manifestly inappropriate. Equally an error which is far from being obvious or palpable may nonetheless prove to be fundamental. For instance a decision or measure based upon a conclusion expressed mathematically might have been arrived at through a serious error of calculation. The fact that the calculation is complex and that only an accountant, econometrician or actuary might have exclaimed that it was an "obvious" error or a "howler", and even then only once they had performed complex calculations, does not mean that the error is not manifest. An error in the placing of a decimal point may exert profound consequences upon the logic of a measure. This suggests that manifest in/appropriateness is essentially about the nature, and, or centrality/materiality of an error. An error will be manifest when (assuming it is proven) it goes to the heart of the impugned measure and would make a real difference to the outcome.

[101] But a measure might also be manifestly inappropriate, not because it is possible to pinpoint errors in reasoning or process, but simply because the end result fails the proportionality test to a sufficient degree to warrant the grant of relief. In these cases determining when the measure crosses the Rubicon and becomes manifestly inappropriate is a much more illusive process. This is essentially the invitation made to me by the claimant in this dispute. Here it is not said that the GA 2005 or the decision to reject the passporting proposal is manifestly inappropriate because there is some identified howling error at the core of the logic or reasoning. Here the claimant argues that upon the application of the proportionality (and discrimination) test the ultimate answer is that the measure fails one or more parts of the test to such a degree that I would be justified in declaring the licensing system set up by Parliament to be unlawful.

The judgment, having set out and summarized *Sinclair Collis*, then proceeds at [111] and following to conduct an impressively detailed analysis of the factors affecting the intensity with which the Court will police proportionality.

The analysis relating to both types of error is highly revealing.

What is immediately notable about the Judge's approach to the first type of error is the indication of a far greater willingness than usual to roll ermine sleeves up to wrestle with those facts necessary to comprehend and grasp the alleged error or perversity. As we shall see it was precisely this kind of exercise in which the same Judge engaged extensively in *BASCA*. This is a welcome development; historically it has been far too easily to meet a rationality challenge with complexity, in effect to invite the Court to conclude that the problem is too complex to understand such that the Court cannot pass judgment on manifest error. Whether it is a trend, or whether the reality is that the ability to discharge this sort of task will be a function of judicial and pre-judicial expertise, enthusiasm and competence is one for the Scandinavian realists to pore over.

What is notable about the Judge's approach to the second issue is the extensive list of factors he was willing to consider before reaching conclusions as to where to set the intensity dial. [112] to [131] will be used as a check list of factors modulating intensity of review for some time to come, albeit in combination with *BASCA*'s own checklist and albeit that the analysis in relation to such factors will require revision now that some of the *Sinclair Collis* based reasoning in relation to such check list is suspect. Of the non-gambling/non-EU specific factors to which the Judge paid close attention the most significant were:

- The fact that the measure was an Act of Parliament (suspect for EU cases after *Lumsdon*)
- The risks associated with activity being regulated (essentially, the extent to which the "precautionary principle" is engaged)
- The degree of precise guidance on intensity of review from EU level jurisprudence
- The inability to achieve 100 per cent regulatory efficiency
- Willness to review a policy in the light of additional evidence (i.e. is the policy likely to form a step on continual evidence-based regulation).
- The breadth of narrowness of the scope of the challenge (contrast the breadth of the challenge in *GBG* with the relative narrowness in *Lumsdon*)
- The potential for quantitative evidence, whether studies are always possible or useful, and the extent to which the action was pre-emptive

- Justiciabilty of facts underlying policy choices, and the extent to which a "right or wrong" analysis is possible in relation to them.

The Judge then applied these factors and concluded, after an impressively full analysis of the evidence, that the measure was justified, whether on a manifest error basis or upon a stricter analysis of proportionality.

E. ***BASCA***

The *BASCA* case is further proof, if such be required, of the extraordinary industry of Green J.[11] The case entailed a challenge to the legality of UK Regulations which took advantage of the optional provisions in the Copyright Directive enabling a Member State to provide for a "private copying exception" so long as fair compensation was paid to the affected rightsholders. The UK implemented such an exception but made no provision for compensation, contending that no more than minimal harm was caused (essentially because such private copying had been going on for years, unchecked) such that no compensation was due. The case was not a proportionality case, strictly so-called but raised very similar issues since the critical feature in the case was the Secretary of State's evaluation or judgment that rightsholders would suffer no material harm were private copying legalised. It is essentially this form of predictive judgment that underpins most judgments on "least intrusive means" disputes in proportionality battles. If this judgment were flawed, it followed that the Regulations were invalid since this was a necessary and central judgment in any scheme in which no compensation was paid. Thus one of the central questions in the case was the intensity with which the Court would review this judgment.

Once again Green J adopted a two stage approach, looking for narrow evidence-based material error as well as more broadly drawn overall flawed judgment. Once gain both features of the case are striking.

As to the first type of error, the Claimants prevailed on this basis and the Regulations were struck down, as they established that the Secretary of State simply had no sufficient evidential basis to reach the conclusion that the measure would cause no harm.[12] Such evidence as he did rely upon was either flawed, incomplete/underpowered, or showed no such thing. The Regulations were struck down as being, in effect, entirely unevidenced, an extraordinary thing for Regulations some 4 years or more in gestation.

On the second type of error, at Section F(i) of his judgment (again not for the faint-hearted)[13] Green J added to his list of factors in *GBG* to point to a variety of case-specific factors that led him to conclude (even before *Sinclair Collis* was

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11 *R (British Association of Songwriters, Composers & Authors) v Secretary of State for Business, Innovation & Skills* [2015] EWHC 1723 (Admin).

12 See Section I, Issue IV, [232] and following.

13 See [127] et seq.

overruled) that the intensity of review required by the case was short of full blown merits review but considerably more intrusive than manifest error.

The Judge expressed his conclusion as to the task he had to undertake summarily as follows at [135](iii):

> *The discretion over the evaluation of the evidence (Issues III and IV) is however a modest one which indicates that the Court must conduct a relatively intensive and thorough review of the fact finding and reasoning. This does not, however, imply that the Court is substituting its own view of the merits for that of the Secretary of State.*

For the review of secondary legislation amending primary legislation this is a material development indeed. In part it is a function of special factors which included:

- The nature of the dispute, the decision challenged being not the primary policy decision that an exception was needed but rather the downstream evaluation that an exception of the chosen width would generate no material harm. This led to its characterisation (see [142]) as raising micro-policy issues rather than macro-policy issues.

- The nature of the decision-maker (which was not Parliament)

- The context which was of recognised private rights (copyright) and exceptions thereto (narrowly regulated even in international law), which thus gave rise to an A1P1 analysis.

- The legislative context in which the UK power to make the Regulations was conferred and controlled by the terms of an EU Directive.

- The nature of the evidence (essentially economic, see [144]) and the extent to which it was susceptible to forensic investigation. Refreshingly, the Judge concluded that technical evidence is precisely the sort of evidence with which the Court *can* and *should* engage, puncturing the myth that technical or scientific disputes are non-justiciable.[14]

F. ***Lumsdon***

If *Sinclair Collis* was the high water mark of assimilating and subordinating EU intensity of review sensibilities to domestic ones, and if *GBG* and *BASCA*

[14] The Judge makes the very good point at [144] that were such the approach clinical negligence cases would be untriable; much the same could be said for a great welter of IP cases, particularly patent cases.

represented a push against that approach (so far as a first instance judge could do so, consistently with precedent), then *Lumsdon* has slain that approach altogether, albeit very politely and in a way that seeks to preserve, so far as possible, the many useful insights in *Sinclair Collis* and all that followed it on factors affecting the intensity of review.

The facts of the Lumsdon case can be shortly stated. The claimants sought to challenge the proportionality of the Quality Assurance Scheme for Advocates ("QASA") by contending that such scheme would give rise to a disproportionate interference with their entitlement to provide services, as enshrined in Services Directive. The Supreme Court parked the difficult questions of whether the Services Directive applies to purely internal situations and whether the situation was indeed purely internal,[15] and proceeded straight to wrestling with the questions about EU proportionality. Front and centre in this debate was the question of whether *Sinclair Collis* was correctly decided.

The clear answer supplied by Lords Reed & Touslon (in a judgment with which the rest of the Court agreed) was "no". The judgment was particularly clear about the following key matters:

First, EU law proportionality is different to domestic proportionality; and the ultimate arbiter of the correct intensity of review is the CJEU not domestic courts, such that questions of intensity of review cannot be subordinated to domestic approaches.

Secondly, there were at least three distinct strands of EU cases that raised distinct proportionality issues that in turn called for distinct starting points in terms of calibrating the appropriate intensity of review.

Thirdly, the manifest inappropriateness test devised by the CJEU was devised for cases in the first category, that is challenges to Community actions (e.g. alleged invalidity of a Directive or of a Commission Decision); but no such test was evident in the second category of case, that is use of EU Treaty Rights to challenge the legality of national legislation. There were sound reasons of theory as to why there was such a marked variation in intensity of review.

Fourth, it followed that the use of the manifest error approach in Sinclair Collis (a Treaty Rights case, just like Lumsdon itself) was wrong and to be discontinued: see [75]-[82] and [98]

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15 The CJEU's already liberal case-law on what is required to give rise to a cross-border element has taken a further step towards making the old "purely internal situation" caselaw irrelevant in Case C-340/14 *Trijber* 1 October 2015. Essentially, any service provided by provider A in state A which incidentally leads to nationals from state B receiving such services as clients (e.g. as tourists, as cross-border shoppers, as EU nationals lawfully resident in State A) will generate a cross-border situation. On this analysis the professional rules are obviously caught given the profusion of EU nationals practising as lawyers in the UK; and given the profusion of EU nationals receiving such services, including by way of representation in criminal trials. This probably constitutes the dashing of the hopes expressed by Lord Brown in *Countryside Alliance* as to the application of some form of *de minimis* test.

Fifth, the approach in Sinclair Collis to the 'least restrictive means' test was also disapproved of. Instead, Lords Reed and Toulson directed attention to the various CJEU dicta that explained how such test was to be operated, and in particular how there was no obligation on the part of the state to prove the non-existence of black swans. As to how this test was to be applied, see [67], where it was stated that:

> *"it is necessary to have regard to all the circumstances bearing on the question whether a less restrictive measure could equally well have been used. These will generally include such matters as the conditions prevailing in the national market, the circumstances which led to the adoption of the measure in question, and the reasons why less restrictive alternatives were rejected. The court will be heavily reliant on the submissions of the parties for an explanation of the factual and policy context."*

This is straight out of the "Green J playbook".

Sixthly, the putatively special status of acts by Parliament (in terms of deference due) was ducked to a degree (strictly anything said would have been *obiter* in any event) though the strong steer was that such considerations were irrelevant.

Finally, the Court went on itself to review the proportionality of the QASA scheme, treating that as an inevitable question tied up with the scheme's legality.

Having so recast the law the Court concluded that, on the facts, the scheme was proportionate. Two factors seem to feature very prominently in the very brief reasoning of the Court; first, the fact that the scheme was precautionary in nature and was being implemented in a situation of self-admitted paucity/absence of relevant data as to precisely where and what the risk was in terms of poor criminal advocacy. The Court accepted the argument that it was permissible, given the risks posed by poor advocates to those accused of crime, to set the initial scheme broadly precisely in order to generate data necessary to make is subsequent application more focused. That led to the second feature seen to be especially significant, namely the commitment promptly to review the scheme when such data had been received.

G. Conclusions

The legacy of the *GBG*, *BASCA* and *Lumsdon* is in my view fourfold. Of these insights, at least two apply to domestic review.

First, the cases establish the special or distinct status of EU proportionality cases. EU proportionality cases merit careful analysis in their own right, and an EU rights analysis cannot simply be dismissed as "adding nothing" to an existing HRA analysis. There are essentially three reasons for this:

- It is ultimately the CJEU which controls the appropriate intensity of review, not domestic courts.

- The CJEU has generated at least 3 distinct branches of case-law on intensity of review, and it is necessary to see into which branch a domestic case falls. This will have a very significant bearing upon the intensity of review set. Lord Reed has grappled with why this is so in *Lumsdon*, building on the careful academic work of Profs Tridimas, Craig and Barnard (which are required reading for anyone seek to push an EU proportionality argument).

- That distinction leads to the important insight that for "Treaty rights" cases the intensity of review required is markedly higher than provided by domestic analysis. That is because the very rationale of the EU is, in many ways, to ensure uniform and effective protection of Treaty rights. It is a regime specifically dedicated to the protection of certain identified economic rights; that being so it is evidently fallacious to assume that the protection offered to such Treaty rights will in all circumstances be equivalent to that provided by Article 1 Protocol 1 or other economic freedoms protected by the ECHR. It is the very fact that very detailed and specific guarantees have been provided, and then built upon by EU legislation that merits more intensive review, as *BASCA* clearly shows. Once you have accepted this, you must reach the conclusion that Lord Brown's dictum in *Countryside Alliance* is wrong.

Secondly, the cases, and most obviously *Lumsdon*, have banished the *Sinclair Collis* conflation of EU intensity of review with *Wednesbury*. The gloss of 'manifest error' and the notion that the 'least intrusive means' test adds little have been dispensed with, as has the reversed burden of proof. Teasingly, the precise relevance of the identity of decision-maker to the intensity of review applied has been left open.

Thirdly, the adoption of the *Sinclair Collis* approach in other areas of law must be suspect. Chief amongst the suspects must be the case of *Kennedy*[16] where Lord Mance (obiter) approved the approach in *Sinclair Collis*. But if and to the extent that there are reinvigorated common law fundamental rights, and if, as seems inevitable such rights must be mediated by a proportionality doctrine (as they are in every other like comparable constitutional system of rights adjudication), then it would seem best to start with a clean slate rather than the confusion of *Sinclair Collis*. Any manifest error test, if such is to be employed in fundamental rights adjudication (and it is suspect terminology in such context) should be arrived at by conclusions of principle rather than precedent.

Finally, we should begin to talk honestly again about the interaction between judicial personnel and effective substantive review. The reason why arguments of irrationality or manifest error, where they truly arise, present insuperable hurdles is because the "bafflement defence" so often works. For a claimant's advisers the keys to an effective substantive argument, beyond the obvious and

16 Kennedy v Information Commissioner [2014] UKSC 20; [2015] AC 455, at [54].

time-honoured considerations of "shot selection" (choose your best point, manage complexity so far as possible), are a candid engagement with the forms of specialist knowledge required to appraise a point; and a step by step consideration as to how to equip the judge with such expert knowledge so that he or she can begin to exercise informed judgment in a confident fashion. Part and parcel of this has to be greater use of Administrative Court allocation of cases to judges based upon their areas of expertise or desired expertise, in technical areas such as: competition law, IP law, medicine and human health, commercial issues and so forth.

But there are obvious limitations to such approach and any information panel systems that might result from it. Beyond that there has to be, in appropriate cases, renewed judicial willingness to engage with expert evidence and contested factual evidence in an appropriate case and the development of a new approach to such issues that is neither the classic JR approach (as a caricature "admit no expert evidence, refuse to adjudicate upon contested facts") and the full blown civil trial alternative. The only sensible way for this to be achieved is more and earlier case-management of cases raising substantive challenges.

6

Victims, suspects and convicts

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Compensation for miscarriage of justice

R (Nealon); R (Hallam) v Secretary of State for Justice [2015] EWHC 1565 (Admin)

Issue

1. The claimants, whose cases were unrelated, were each convicted of a serious criminal offence (murder in Mr Hallam's case and attempted rape in Mr Nealon's). Their original appeals against conviction were dismissed but both cases were later referred back to the Court of Appeal by the Criminal Cases Review Commission. At that stage the appeals were allowed and the claimants' convictions were quashed.

2. Each claimant subsequently made an application to the Secretary of State for compensation on the ground that he had been the victim of a miscarriage of justice. However, the Secretary of State refused to pay such compensation on the ground that the statutory test was not met.

3. The claimants applied for judicial review, arguing that the statutory test for compensation was incompatible with the presumption of innocence as guaranteed by article 6(2) ECHR.

The statutory test

4. Historically, ex gratia payments were made by the Home Secretary on a discretionary basis for individuals who had suffered a miscarriage of justice. An applicant did not have to meet any formal criteria in order to qualify but from time to time public statements would be made about the principles that were applied. The courts also decided that the discretion was amenable to judicial review. This ex gratia scheme survived alongside the statutory scheme introduced by the

Criminal Justice Act 1988 until 2006 when it was abolished. Since then, compensation has been paid only to those who can meet the statutory test in the 1988 Act.[1]

5. As a party to the International Covenant on Civil and Political Rights, the UK is obliged to give effect to article 14(6), which provides as follows:

   When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.[2]

6. The 'legislative response' of the UK to this international obligation was to enact s.133 of the Criminal Justice Act 1988. This provision was amended by the Anti-social Behaviour, Crime and Policing Act 2014 and now reads, insofar as is relevant, as follows:

   (1) Subject to subsection (2) below, when a person has been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows beyond reasonable doubt that there has been a miscarriage of justice, the Secretary of State shall pay compensation for the miscarriage of justice to the person who has suffered punishment as a result of such conviction or, if he is dead, to his personal representatives, unless the non-disclosure of the unknown fact was wholly or partly attributable to the person convicted.

   (1ZA) For the purposes of subsection (1), there has been a miscarriage of justice in relation to a person convicted of a criminal

[1] See JR Spencer, 'Compensation for Wrongful Imprisonment' [2010] Crim LR 803.
[2] A similar provision appears at article 3 of Protocol 7 to the ECHR. The UK has not ratified this provision.

offence in England and Wales or, in a case where subsection (6H) applies, Northern Ireland, if and only if the new or newly discovered fact shows beyond reasonable doubt that the person did not commit the offence (and references in the rest of this Part to a miscarriage of justice are to be construed accordingly).

Domestic case law on statutory test

7. In **R (Mullen) v Secretary of State for the Home Department** [2005] 1 AC 1 the House of Lords considered the meaning of s.133 as originally enacted - ie without the definition in s.133(1ZA). The facts of the case are well-known, but in outline Mr Mullen's conviction was quashed on the basis that having fled to Zimbabwe he had been brought back into the jurisdiction to stand trial by operation of a gross abuse of executive power. After the House of Lords decision in **R v Horseferry Road Magistrates' Court ex p Bennett**[3] to the effect that such executive action would render the subsequent proceedings an abuse of process, he appealed out of time to the Court of Appeal and his conviction was quashed. Mr Mullen's subsequent application for compensation was refused and his case ended up in the House of Lords, where Lord Steyn and Lord Bingham expressed different views as to the correct interpretation of the phrase 'miscarriage of justice'.

8. On the unusual facts of **Mullen** it was not necessary for these differences to be resolved: neither Lord Steyn nor Lord Bingham considered that Mr Mullen had suffered a miscarriage of justice for the purposes of the 1988 Act. However, their difference of opinion paved the way for a series of further cases. Lord Steyn was of the view that the term extended only to cases which were 'clear' in the sense that there would be an acknowledgment that the person concerned was innocent (para 56). Lord Bingham on the other hand set out (at para 9) a number of reasons why he would hesitate to accept the submissions of the Secretary of State to that effect. Notably, he commented that the term could be and had been used to describe cases in which defendants, whether guilty or not, certainly should not have been convicted.

[3] [1994] 1 AC 42

9. The issue was subsequently determined in **R (Adams) v Secretary of State for Justice** [2012] 1 AC 48. Mr Adams' conviction was quashed following a referral by the CCRC on the basis that his legal representatives had failed to discover and deploy pieces of evidence from the unused material and therefore the jury's verdict was unsafe. An application for compensation under s.133 was refused and Mr Adams' subsequent judicial review proceedings reached the Supreme Court. His case was joined to two Northern Irish cases, **Macdermott** and **McCartney**, in which the convictions were based on confessions which were alleged to have been procured by ill-treatment by police. New information had undermined the credibility of the relevant police officers and as a result the convictions were quashed. In their cases, too, a subsequent application for compensation was refused.

10. By a 5:4 majority the Supreme Court held that the true meaning of 'miscarriage of justice' was not confined to circumstances where conclusive proof of innocence was demonstrated. It extended also to cases where a new or newly discovered fact showed that the evidence against the defendant had been so undermined that no conviction could possibly be based on it. The term did not include other cases, such as those in which new evidence rendered a conviction unsafe because a reasonable jury might not have convicted if the evidence had been available at trial.

11. Subsection (1ZA) was enacted after the judgment in **Adams** and subsequent decisions applying it, including **R (Ali and others) v Secretary of State for Justice** [2014] 1 WLR 3202.[4] It effectively reverses **Adams**.[5]

[4] See explanatory note to s.175 of the Anti-social Behaviour, Crime and Policing Act 2014
[5] See Bailin and Craven, 'Compensation for miscarriages of justice – who now qualifies?' [2014] Crim LR 511 for discussion of the parliamentary debate on this provision.

Relevance of article 6(2)

12. Article 6(2) ECHR provides as follows:

    Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

13. The jurisprudence of the ECtHR has established that in order for the protection afforded by article 6(2) to be practical and effective, it must in certain circumstances extend beyond the criminal proceedings themselves. In its 'second aspect' article 6(2) operates to prevent individuals who have been acquitted of a criminal charge from being treated by the State as though they are in fact guilty of the offence. As Lord Hope put it in **Adams**, the principle is that it is not open to the state to undermine the acquittal.[6] If there is sufficient connection to the criminal proceedings, this principle may be applicable to subsequent judicial decisions including, in certain circumstances, applications for compensation.

14. One of the arguments advanced in **Adams** was that to withhold compensation to an applicant whose conviction had been quashed on the ground that s/he was not considered to be 'innocent' would violate the presumption of innocence as guaranteed by article 6(2) ECHR in its second aspect. However, seven members of the court held (albeit on different reasoning) that there was no infringement of article 6(2). Lord Hope, for example, concluded that article 6(2) had no impact on s.133 of the 1988 Act[7]; Lord Clarke on the other hand proceeded on the basis that article 6(2) could apply but found no infringement.[8]

[6] para 111
[7] ibid
[8] paras 230 - 235

Allen v UK (2013) 36 BHRC 1

15. Mrs Allen's conviction of the manslaughter of her baby son was quashed by the Court of Appeal on the basis of new expert evidence about 'shaken baby syndrome' which, had it been before the jury, might have led them to acquit her. Considering her subsequent claim for judicial review of the decision to refuse her compensation, the Court of Appeal expressed the view, inter alia, that such refusal did not violate the presumption of innocence in article 6(2). The claimant was refused leave to appeal to the House of Lords.

16. Mrs Allen's case was heard by the Grand Chamber of the ECtHR in 2013. It was argued that the reasons given for the refusal of compensation in her case, including for example a remark in the High Court that there was still 'powerful evidence against her' violated the presumption of innocence because they gave rise to doubts about her innocence. The ECtHR was not called upon to decide whether the refusal of compensation *per se* violated her right to be presumed innocent.

17. The Strasbourg Court concluded that article 6(2) was applicable to decisions regarding compensation under s.133, contrary to the reasoning of at least some of the majority on this point in **Adams**. However, there had been no violation in the applicant's case. It was significant that her conviction had been quashed because it was unsafe and that there had been no determination of the merits. This was akin to cases where criminal proceedings had been discontinued - in such circumstances the Court had found no violation of article 6(2) where the domestic courts had voiced suspicion when refusing applications for costs or compensation.

18. Significantly for present purposes, the Strasbourg Court considered the House of Lords decision in **Mullen** during the course of its judgment. In doing so it suggested that it would be inconsistent with article 6(2) to require an applicant for compensation to satisfy Lord Steyn's test of demonstrating innocence. These remarks provided the

foundation for the judicial review applications on behalf of Mr Nealon and Mr Hallam.

The claimants' cases

19. After reviewing the facts and the domestic case law, Burnett J (with whom Thirlwall J agreed) held that, contrary to the claimants' submissions, **Adams** was binding authority for the proposition that article 6(2) had no bearing on a decision whether to award compensation under s.133 of the 1988 Act. In those circumstances, it was not open to the Divisional Court to make a declaration of incompatibility, irrespective of what the ECtHR may have decided after **Adams** in **Allen**.

20. Nevertheless, the court went on to consider the decision in **Allen**. Having noted the particular premise of the applicant's case in the Strasbourg Court and the Court's conclusions, it then examined the passage, relied upon by the claimants, in which the Strasbourg Court discussed the divergence of opinion in **Mullen** on the interpretation of 'miscarriage of justice' for the purposes of s.133.

21. In that passage the Strasbourg Court noted that reference had been made in the domestic courts to the Council of Europe's Explanatory Report to Protocol 7, which indicated that the intention of article 3 of Protocol 7 had been only to provide compensation where it was acknowledged that the applicant was innocent[9] However, the Court observed that the Explanatory Report did not amount to an authoritative interpretation of the text and its references to the need to demonstrate innocence had to be considered to have been overtaken by the Court's intervening case law on article 6(2). What had been 'important above all' in the applicant's case was that the domestic courts had not required her to satisfy Lord Steyn's test of demonstrating her innocence (para 133).

[9] Accessible at http://conventions.coe.int/Treaty/EN/Reports/HTML/117.htm. Para 25 provides that "*The intention is that States would be obliged to compensate persons only in clear cases of miscarriage of justice, in the sense that there would be acknowledgement that the person concerned was clearly innocent. The article is not intended to give a right of compensation where ail the preconditions are not satisfied, for example, where an appellate, court had quashed a conviction because it had discovered some fact which introduced a reasonable doubt as to the guilt of the accused and which had been overlooked by the trial judge.*"

22. Dealing with these remarks, Burnett J indicated that he readily accepted that they provided a foundation for the claimants' arguments on article 6(2). He doubted the applicability of article 6(2) but nevertheless went on to consider compatibility on the assumption that article 6(2) was engaged.

23. On his analysis the argument would rest on the following propositions:

    a. That s.133(ZA) amounts to a requirement that an applicant for compensation must prove his innocence;
    b. That s.133(ZA) is indistinguishable from Lord Steyn's test in **Mullen**, which the Strasbourg Court disapproved;
    c. That by implication the Strasbourg Court can be taken to have decided in **Allen** that Lord Steyn's test was objectionable.

24. He concluded that the argument fell at proposition (a) in that there was no requirement for an applicant to prove his innocence. Instead, what was critical was that the Secretary of State should be satisfied of the link between the 'new or newly discovered fact' and the applicant's innocence. As to (b), caution was needed to ensure that Lord Steyn's comments in **Mullen** were not divorced from the particular circumstances of that case (ie that the applicant did not maintain his innocence but rather relied on executive abuse of power as the basis for his claim to be a victim of a miscarriage of justice). As to (c), again caution was needed. It was necessary to bear in mind the fact that the Strasbourg Court had not heard argument on the compatibility of the statutory test with article 6(2).

25. In all the circumstances Burnett J concluded that the decision in **Allen** did not lead to the conclusion that the ECtHR would necessarily consider s.133(ZA) to violate the presumption of innocence in article 6(2). On the contrary, there was no incompatibility.

26. The court went on to refuse the claimants' application for a 'leapfrog' appeal to the Supreme Court and to dismiss Mr Nealon's

public law challenge to the decision in his case. An appeal against the decision is pending.

Conclusions

27. The complexity of the domestic legal history on this issue is indicative of the restrictive legislative approach taken to compensation for miscarriage of justice in this jurisdiction. As with many other cases alleging injustice arising from the criminal justice system, the claimants ultimately looked to the ECHR to mitigate the harshness of domestic law.

28. Obviously the underlying policy issue is the extent to which we should provide compensation for those who suffer as a result of the inevitable deficiencies of the criminal justice system. As commentators have noted, the current regime means that only a fraction of those who may properly be described as victims of a miscarriage of justice will receive anything.[10] This sparse provision was specifically remarked upon by the Grand Chamber in **Allen**.[11]

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[10] Spencer, n1; Bailin and Craven, n5
[11] See para 76: *"The vast majority of surveyed States operate compensation schemes which are far more generous than the one in place in the United Kingdom. In many of the surveyed States, compensation is essentially automatic following a finding of not guilty, the quashing of a conviction or the discontinuation of proceedings (for example, in Bulgaria, Croatia, the Czech Republic, Denmark, Finland, Germany, Montenegro, Romania, the former Yugoslav Republic of Macedonia, Turkey and Ukraine)."*

PLP BREAKOUT SESSION

CURRENT DEVELOPMENTS IN PRISON LAW

1. Will prison law continue to exist?

1.1 Since 3 December 2013, there has been a significant reduction in the subject areas that are in the scope of prison law funding.

1.2 The only areas of prison law that remain in in the scope of public funding are

- Parole Board hearings where the Boards has the power to direct release
- Adjudications before independent adjudicators who have the power to award additional days
- Adjudications before prison governors where the Governor has decided that the prisoner requires representation under the *Tarrant* criteria
- Sentence calculation cases concerning the correct release date for a prisoner

1.3 The changes are the subject of a legal challenge by two charities, the Howard League and Prisoners' Advice Service. The challenge argues that the following areas should all be brought back into the scope of funding to prevent there being a significant risk of unfairness.

- Parole Board: advice cases where someone has been returned from open conditions and pre-tariff reviews for lifers.
- Eligibility for Mother and Baby Units: where mothers have been refused places on the Mother and Baby Units.
- Segregation and Close Supervision Centre cases: where a decision has been made to segregate or a referral has been made (or should have been made) to a Close Supervision Centre.
- Category A reviews.
- Sentence planning and access to Offending Behaviour Courses.
- Resettlement and licence conditions: where a prisoner wants to challenge license conditions or reporting requirements after release.

- All adjudications before prison governors

1.4 On 28 July 2015 the Court of Appeal granted an appeal against a refusal of permission in the judicial review with a full hearing to be held in 2016. Leveson LJ stated:

> "On the face of it, based on the present material, I am prepared to accept that there could be a significant number of individuals subject to these types of decisions for whom it may be very difficult to participate effectively without support from someone. It is arguable, therefore, that without the potential for access to appropriate assistance, the system could carry an unacceptable risk of unfair, and therefore unlawful, decision making. The question of inherent unfairness concerns not simply the structure of the system which may be capable of operating fairly, but whether there are mechanisms in place to accommodate the arguably higher risk of unfair decisions for those with mental health, learning or other difficulties which effectively deprive them of the ability effectively to participate in, at least, some of the decisions to which Ms Kaufmann refers. Such mechanisms may not necessarily include access to a lawyer (or legal aid), but the question will necessarily require a more detailed examination of the support that will be available in practice."[1]

1.5 In the absence of legal aid, is there a real risk that prisons fall outside of the effective rule of law. As Stephen Sedley has observed:

> "Frequently enough to carry conviction, a prisoner will recount how somebody in authority has said 'I'm the law in here'. The sense of impotence and isolation the phrase creates if designedly chilling. In many instances the officer is right: he or she is in sole control and there is no recourse to any legal authority. Such absolute power is the antithesis of the rule of law."[2]

2. Segregation: procedural fairness and the rule of law

2.1 Issues concerned with the administration of prisons and prison sentences have always been at the forefront of the wider developments on requirements of procedural fairness in public law.[3]

[1] *(R (Howard League and PAS) v Lord Chancellor* [2015] EWCA Civ 819, para 25).
[2] Foreword to the first Edition of *Prison Law*, Livingstone and Owen, OUP 1993
[3] Eg: *R v Secretary of State for the Home Department Ex p. Doody* [1994] 1 A.C. 531

2.2 In 2013, the leading case on the requirements of fairness arose in the context of parole reviews: *Osborn & Booth v Parole Board* [2014] AC 1115. This case found that the need to hold oral hearings in a context where liberty was at stake did not just depend on the prospects of success, but also had to reflect the prisoners' legitimate interest in participating in proceedings.

2.3 In July in the case of *R (Bourgass and Hussain) v Secretary of State for Justice* [2015] UKSC 54, the Supreme Court examined the requirements of fairness in the context of segregation decisions. The first aspect of the decision making that was found to be unlawful concerned a question of vires. The Prison Rules authorise segregation for 72 hours by prison governors and thereafter, authority is required from the Secretary of State.[4] The practice of delegating the Secretary of State's authority back to prison governors was found to be unlawful.

2.4 The Court went on to examine what fairness requires in terms of the procedural safeguards where segregation was being extended by the Secretary of State. The decision to segregate is not a punishment or the determination of a charge against the prisoner but is concerned with ensuring good order and discipline in a prison. However, the effects of segregation are serious and the Court no longer considered that old authority[5] stating that reasons did not have to be given for segregation decisions could be sustained:

> "Whatever the position may have been in the past, the approach described in Doody and Osborn requires that a prisoner should normally have a reasonable opportunity to make representations before a decision is taken by the Secretary of State under rule 45(2). That follows from the seriousness of the consequences for the prisoner of a decision authorising his segregation for a further 14 days; the fact that authority is sought on the basis of information concerning him, and in particular concerning his conduct or the conduct of others towards him; the fact that he may be able to answer allegations made, or to provide relevant information; and, in those circumstances, from the common law's insistence that administrative power should be exercised in a manner which is fair." [98]

[4] Prison Rule 45
[5] *R v Deputy Governor of Parkhurst Prison Ex p Hague* [1990] 3 WLR 1210

2.5 The final question was whether the segregation decision also involved the determination of a civil right within the meaning of Article 6(1) ECHR. The Court had to answer the question of whether there is such a right recognised in domestic law? Unfortunately, the answer to that question was that prisoners do not enjoy any residual liberty[6] and have no right to enjoy the company of other prisoners.[7] Article 6(1) does not, therefore, apply to this decision making process but if it had, judicial review would have provided sufficient remedy in any event.

2.6 The Secretary of State's response to the *Bourgass* judgment has been to introduce a proposed amendment Prison Rule 45 that will give governors the power to segregate prisoners beyond 72 hours and up to 42 days before requiring approval from the Secretary of State.[8] Furthermore, a revised segregation policy is being circulated for out for consultation until end October 2015.

3. Under-explored areas – prison conditions and European caselaw

3.1 One of the impacts of the legal aid changes has been to drastically reduce the number of challenges being brought to prison conditions. By contrast, across Europe and particularly in the eastern European countries there have been a series of cases exploring the ambit of Article 3 to prison conditions.

3.2 One of the key areas under examination by the ECtHR is the question of overcrowding, alongside related Article 8 issues. Recent cases include:

> *Costel Gaciu v Romania* (no.39633/10) – overcrowding / material conditions of detention / private and family life / discrimination: The applicant had a personal space of less than 4m² (violation of Article 3); because he was not a convicted prisoner, his requests for conjugal visits were refused (violation of Article 8).
>
> *Lutanyuk v Greece* (no.60362/13) – overcrowding: The applicant had a living space of less than 3m² (violation of Article 3).

[6] As decided in *Hague*, supra
[7] Referred to as 'association'
[8] Statutory Instrument No. 1638/2015, laid before Parliament on 3 September 2015

Serce v Romania (no.35049/08) – overcrowding / material conditions of detention: The applicant had available less than 4m², which, given his poor state of health that made him vulnerable, caused him distress that exceeded the unavoidable level of suffering inherent in detention. The Court used the report of a Romanian NGO (APADOR-CH) to support the applicant's allegations (violation of Article 3).

Khoroshenko v Russia [GC] (no.41418/04) – private and family life: Because he is a life-sentenced prisoner, the applicant endures specific restrictions on contact with his family members. Russia is the only Contracting State to have specific rules for life-sentence prisoners regarding visits. The Court considered that that situation narrows Russia's margin of appreciation. Therefore it concluded that the measure is disproportionate as to the aims invoked (violation of Article 8).

Martzaklis and Others v Greece (no.20378/13) – healthcare / discrimination / overcrowding / effective remedy: the applicants are HIV-positive persons. As such they were placed in a specific wing of the prison hospital, which was in fact overcrowded: their living space was of less than 2m² and they could not benefit from an adequate medical treatment (violation of Article 3). Moreover, their confinement due to their illness was not justified since an appropriate treatment was lacking (violation of Article 3 in conjunction of Article 14). Moreover, they had no remedy that could have enabled them to complaint of their conditions of detention (violation of Article 13).

Gégény v Hungary (no.44753/12) – overcrowding / material conditions of detention / effective remedy: The applicant spent several months in overcrowded cells (violation of Article 3) and had no effective available to complaint (violation of Article 13).

Ciprian Vlăduț and Ioan Florin Pop v Romania (nos. 43490/07 and 44304/07) – overcrowding: the applicant was held in overcrowded cells with less than 2m² of living space (violation of Article 3).

Sanatkar v Romania (no.74721/12) – overcrowding: the applicant was held in overcrowded cells with less than 2m² of living space (violation of Article 3)

Temchenko v Ukraine (no. 30579/10) – healthcare / effective remedy: In spite of his state of health which was well known to the authorities, the applicant did not benefit from adequate medical treatment until the Court enforced an interim measure (violation of Article 3). Moreover, the applicant had no effective remedy available to complain about the situation (violation of Article 13).

Patranin v Russia (no. 12983/14) – healthcare, effective remedy, interim measures: Because of the gravity of the applicant state of health, the Court ask the Russian government to enable the applicant to be examined by independent experts. The Russia government failed to comply with this obligation (violation of Article 34). The Court further noted that the applicant did not benefit from an adequate medical treatment (violation of Article 3) and that he had no effective remedy available to complain about the situation (violation of Article 13).

3.3 In the case of *Muršić v Croatia* (Application no. 7334/13) (12 March 2015), the First Section heard a case concerning the detention of a prisoner in cells of less than 3 sq m for varying periods totalling 50 days between April 2010 and February 2011. Although this fell below the space recommended by the CPT, the existence of other facilities led the Court to hold that:

> "..while it is true that the personal space afforded to the applicant fell short of the CPT's recommendations (see paragraph 35 above) and the requirements of the Enforcement of Prison Sentences Act (see paragraph 34 above), the Court does not consider that it was so extreme as to justify in itself a finding of a violation of Article 3 of the Convention." [62]

This case is now to be heard by the Grand Chamber.

3.4 Although the conditions of detention in the UK are largely considered to be superior to all of the countries that make up the bulk of these applications, this does disguise a raft of problems that remain un-litigated or unsuccessfully litigated domestically. Recent examples include the ongoing practice of "slopping out" and the Prisons Ombudsman most recent annual report has returned to the failure of the prison service to provide privacy screens around toilets.

4. Whole life sentences and the limits of the ECHR

4.1 The parameters of Article 3 and the extent to which domestic law can influence or determine the thresholds of a pan-European standard are also being explored in the debate on whole life sentences. In *Hutchinson v UK* (App. No.57592/08, 3 February 2015) the Fourth Section concluded that the legal regime for prisoners sentenced to a whole life tariff in the UK was compatible with Article 3 ECHR. This issue will now be the subject of further consideration by the Grand Chamber.

4.2 *Vinter v UK* (2013) 34 BHRC 605 was the case where the Grand Chamber (applying the decision in *Kafkaris v Cyprus* (2009) 49 EHRR 877) held that in order to comply with the procedural requirements of Article 3 a whole life sentence must be subject to a review in order to consider whether detention continues to be justified on penological grounds. The discretionary power of compassionate release in the UK was held to be insufficient to discharge the procedural obligations of Article 3. The Grand Chamber identified the following necessary features of an Article 3 compliant review mechanism:

- The review mechanism must be in place at the outset of the life sentence;
- The prisoner must be told when the review will take place;
- The prisoner must be told what s/he must do to have a prospect of release and the criteria that the review will apply when considering release.

4.3 A series of cases followed that appeared to uphold that position:

Öcalan v Turkey (App. Nos 24069/03, 197/04, 6201/06 and 10464/07, judgment of the Second Section of the ECtHR, 18 March 2014), in which it was held that release on humanitarian grounds does not satisfy Article 3.

Magyar v Hungary (App. No.73593/10, judgment of the Second Section of the ECtHR, 20 May 2014) in which it was held that the power of Presidential pardon is insufficient to comply with the *Vinter* requirements.

Trabelsi v Belgium (App. No.140/10, judgment of the Former Fifth Section of the ECtHR, 4 September 2014) in which it was held that, in the context of an extradition case, the power of a governor's pardon in the United States does not satisfy Article 3.

Harakchiev and Tolumov v Bulgaria (App. Nos 15018/11 and 61199/12, judgment of the Fourth Section of the ECtHR, 8 October 2014) where the Court found that the amended power of Presidential pardon does comply with Article 3.

Bodein v France (App. No.40014/10, judgment of the Fifth Section of the ECtHR,13 November 2014) in which the Court held that the Presidential pardon does not satisfy Article 3 but a full review of the sentence after 30 years is sufficient to comply with the *Vinter* requirements.

4.4 Following the Grand Chamber decision in *Vinter v UK*, the UK Court of Appeal considered the issue of whether or not the UK regime is compatible with Article 3: *R v McLoughlin* [2014] 1 WLR 3964. The Court of Appeal concluded that, contrary to the view taken by the Grand Chamber, the domestic regime is compatible with Article 3 ECHR because the executive power of compassionate release on exceptional, discretionary grounds had to be exercised in a manner that complied with Article 3.

4.5 The Fourth Section of the European Court reconsidered the position in *Hutchinson v UK*. The applicant submitted that the UK Court of Appeal had failed to apply *Vinter* correctly and that the UK regime remained incompatible with Article 3. The Court concluded that it was bound to accept the Court of Appeal's conclusion and therefore held that the discretionary power of compassionate release was capable of discharging the Article 3 obligations. There is therefore now a tension in the European Court's case law which it falls to the Grand Chamber to resolve.

4.6 Although the question of whole life sentences may appear to be at the extreme edge of imprisonment, affecting only tiny numbers of people, it requires an examination of the core philosophical issue of the purpose of imprisonment. The Inter-American Court of Human Rights noted, when holding that life sentences imposed upon children without the right to review by a court was in breach of the American Convention on Human Rights[9]:

> "In the area of international human rights law, most relevant treaties only establish, by fairly similar formulas, that "no one shall be subject to torture or to cruel, inhuman or degrading treatment." However, the dynamic nature of the interpretation and application of this branch of international law has allowed a requirement of proportionality to be inferred from norms that make no explicit mention of this element. The initial concern in this regard, focused on the

[9] *Mendoza v Argentina* [2013] IACH http://www.corteidh.or.cr/docs/casos/articulos/seriec_260_ing.pdf

prohibition of torture as a form of persecution and punishment as well as other forms of cruel, inhuman and degrading treatment has extended to other areas, including those of State punishments for the perpetration of offenses. Corporal punishment, the death penalty, and life imprisonment are the main sanctions that are of concern from the point of view of international human rights law."

4.7 The question of what purpose is served by imprisonment and the extent to which a sentence of imprisonment can ever be wholly punitive directly affects a whole raft of decisions ranging from living conditions to the right to a family life[10] through to the right to vote.[11]

Simon Creighton
Bhat Murphy Solicitors
5 October 2015

[10] *Dickson v UK* (2008) 46 EHRR 41
[11] *Hirst v UK* (2006) 42 EHRR 41

7

Landmark CHAMBERS

CHALLENGING NHS DECISIONS: DECISION MAKING OBLIGATIONS

TIM BULEY

SOURCES OF OBLIGATIONS

- National Health Service Act 2006
  - Section 242, providers, public involvement and consultation
  - Section 14Z2, CCGs, public involvement and consultation
  - Section 14T, reduction of inequalities
- Equality Act 2010
  - Section 149, PSED
  - Reasonable adjustments
- Human Rights Act 1998?

ARGUMENTS TO BE MADE

- Consultation
- Other "public involvement"
- Equality duties – PSED and patient's rights
- Reasonable adjustments
- Discrimination

RECENT CASES

- At least 6 challenges to NHS service reconfiguration in between 2012 and 201
  - Arguments about consultation feature in every case
  - Arguments about PSED feature in most cases
- 2 challenges succeed, both on consultation grounds:
  - *R (Save our Surgery Ltd) v Joint Committee of PCTs* [2013] EWHC 439 (Admin) (consultation unfair because insufficient information supplied to consultees)
  - *R (Lewisham BC and Save Lewisham Hospital Campaign Ltd) v SSH* [2013] EWHC 2381 (Admin) (turned on statutory construction relating to extent of obligation to consult)

CONSULTATION AND PUBLIC INVOLVEMENT

- SECTION 242, PROVIDERS
- SECTION 14Z2, CCGs
- SECTION 13Q, NHS ENGLAND ("THE BOARD")
- NB SECTION 14U, "each patient"

- NB other duties to consult (do not pretend to be exhaustive):
  - Chapter IV of the Water Industry Act 1991 (water fluoridation)

- NB duties to consult other bodies, note role of local authorities, Health and Wellbeing Boards, other.

CONSULTATION AND PUBLIC INVOLVEMENT SECTION 242, 14Z2, 13Q

- Formulation of duty:

242 (1B) Each relevant English body must make arrangements, as respects health services for which it is responsible, which secure that users of those services, whether directly or through representatives, are involved (whether by being consulted or provided with information, or in other ways) in–

(a) the planning of the provision of those services,

(b) the development and consideration of proposals for changes in the way those services are provided, and

(c) decisions to be made by that body affecting the operation of those services.

- Not identical to e.g. 14ZS, but basic shape very similar:
  - "must make arrangements to secure …"
  - Service users must be "involved (whether by consulted or provided with information or in other ways)" in

    (a) planning, (b) "development and consideration of proposals and (c) decisions.

CONSULTATION AND PUBLIC INVOLVEMENT EXTENT OF OBLIGATION

- These provisions do not always require "consultation"
  - *R (Fudge) v SWSHA* [2007] EWCA Civ 803:

    51. … The arrangements which bodies responsible for health services must make must be designed both to secure public involvement and public consultation. Whether mere involvement or something more, namely ublic consultation in the full Gunning sense, is required, will be depend on the circumstances identified in [subsections (a) to (c)]

    NB *Fudge* is authority that duty arises even where provider is not the "decision maker", for example because change imposed by Secretary of State – but in such cases extent of duty may be very limited.
  - *R (Copson) v Dorset HU NHS Foundation Trust [2013] EWHC 732 (Admin)*

- No real authority directly on when section 242 or new provisions require "consultation" rather than something less, but note the approach of the Supreme Court to "public participation" in *R (Moseley v Haringey LBC* [2013] 1 WLR 3947

EXTENT OF CONSULTATION?

- General principle: where a public body chooses to consult, must do so lawfully – absence of pre-existing duty is no defence to illegality
- Does not make absence of duty irrelevant: HHJ Keyser QC in *Copson:*

  51(9) … no duty as such to consult. The defendant chose to discharge its duty by means of a process of involvement that included a period of consultation …it had to be real and meaningful consultation … not to say .. that the scope of the consultation was required to be unlimited or even wider than it was …
- *Moseley* in SC emphasises flexible nature of duty
- Extent of consultation required may also vary according to whether service is being withdrawn or new services contemplated

GUNNING PRINCIPLES

- Well-established principles endorsed by SC in *Moseley:*

> *… First, that consultation must be at a time when proposals are still at a formative stage. Second, that the proposer must give sufficient reasons for any proposal to permit of intelligent consideration and response. Third … that adequate time must be given for consideration and response and, finally, fourth, that the product of consultation must be conscientiously taken into account in finalising any statutory proposals*

IMPLICATIONS OF *MOSELEY*

- Re-invigorates duty to provide sufficient information to consultees (compare e.g. *Copson*)
- Makes clear that there will be some contexts in which decision maker must explain alternatives (over-turning or narrowing Court of Appeal and earlier cases such as *R (Forest Heath) v Electoral Comm* [2010] PTSR 1227)
- All turns on statutory context (for Lord Reed, with agreement of Hale, Clarke and Kerr). Query whether will read across automatically to statutory context of public involvement duty
- Extent of consultation required may also vary according to whether service is being withdrawn or new services contemplated

THE CASES

- *Save our Surgery* – challenge to withdrawal of paediatric congenital cardiac services from Leeds General infirmary. Claim succeeded on basis of failure to disclose sub-scores that were key to understanding differences between centres considered (*Gunning* P3)
- Compare *Copson* - reconfiguration of mental health services, argued that D failed to disclose financial information permitting informed response to consultation. Claim failed: reconifiguration seen as cost neutral by D, no need to consult on correctness of that belief.
- *Ealing v NHS England* [2013] EWHC 3255 (Admin) – complaint that NHS England had closed mind because it narrowed options pre-consultation. Query whether same result following *Moseley*, but gives some support to the idea that *Moseley* cannot be read across to public involvement under 2006 Act
- *Flatley* – challenge to Welsh LHB (roughly equivalent to PCT) about reconfiguration of A & E and neo-natal services in South West Wales, and to decision of Welsh Minister for Health about that reconfiguration. Consultation and PSED challenges to LHB and Minister, did not succeed.

EQUALITY DUTIES

- PSED in section 149 of Equality Act 2010

- CCGs have published "Clinical Commissing Groups: Compliance with the Legal Equality Duties" http://www.england.nhs.uk/wp-content/uploads/2013/03/psed-guidance-ccg.pdf.
  - Sets up obligations to publish information to demonstrate compliance with PSED annualy, starting with 31 Jan 2014, and equality objectives every four years
- See also NHS England, "Guidance for NHS commissioners on equality and health inequalities legal duties" (which also addresses the duty relating to health inequalities in section 14T)

SECTION 14T: DUTIES AS TO REDUCING INEQUALITIES

- Section 14T provides as follows:

  14T Duties as to reducing inequalities

  Each clinical commissioning group must, in the exercise of its functions, have regard to the need to—
  (a) reduce inequalities between patients with respect to their ability to access health services, and
  (b) reduce inequalities between patients with respect to the outcomes achieved for them by the provision of health services.

- NOTE: not a duty to have "due" regard (contrast PSED)
- Duty relates to inequalities "between patients" in relation to:
  - "access" to health services
  - "outcomes"
- No need to identify "protected characteristic" (contrast PSED)
- Like PSED, "process" not outcome driven.

REASONABLE ADJUSTMENTS

- Those exercising public functions or providing a service to public under have to duties under EA, including duty to make "reasonable adjustments" for disabled persons under section 29 of the 2010 Act.
- Historic context is duty on employers
- Cannot be used to challenge legislation but applies to any "policy, criterion or practice" of a public body
- Duty of substance rather than process – court is judge of whether
  - (a) disabled persons are at a "substantial disadvantage"
  - (b) if so, whether reasonable adjustments can / should be made to remove that disadvantage

MM AND DM V SSWP

- Not a healthcare case, but example of use of reasonable adjustments duty to force change in general policy in the context of mentally disabled people. Challenge did not ultimately succeed but that was partly a result of change of position by SSWP during course of litigation:
  - *MM v SSWP* [2013] UKUT 259 (AAC)
  - [2014] 1 WLR 1716, CA
  - Final judgment of UT, [2015] UKUT 107 (AAC) (arguably wrong on "standing" requirements).

Landmark CHAMBERS

CHALLENGING NHS DECISIONS: DECISION MAKING OBLIGATIONS

TIM BULEY

Talk to PLP Public law conference: October 2015

Challenging decisions to make changes to NHS services

1. The purpose of this talk is to provide some guidance to lawyers who wish to challenge decisions taken in the NHS, and in particular to challenge changes to local health services, caused by the financial pressures affecting the NHS or where changes being driven through to suit the interests of those who deliver the services to the detriment of those who receive the services. There are particular issues about consultation where hospitals and other services are proposed to be closed, downgraded or otherwise subject to major change. Tim Buley will cover this area in his contribution. The aim of this talk is to outline the ways in which patients and the public are supposed to be able to influence changes to the health service they rely upon and, of course, pay for through their taxes.

2. But first, a health warning. The way in which the NHS delivers services to patients changes all the time and has done since the commencement of the NHS in 1948. However well established a clinical service may appear to be, large or small changes will be occurring in the way the service is delivered all the time. The causes of these changes are many and varied but they include:

    - New drugs and new methods of medical treatment which increase the range of possible medical treatments and thus change the way that medicine is delivered
    - Changes in the types of patients seeking help, and in particular the impact of more elderly patients with multiple medical problems
    - Financial pressures which mean that NHS bodies are having to deliver more care to more patients on a fixed or reducing budget
    - The widely held consensus that services should be moved out of hospitals and into the community wherever this is clinically appropriate

- Changes in service provision imposed by commissioners (CCGs and NHS England) which change the services that NHS providers are required to deliver.

3. The management of change is thus an integral part of the management of the NHS and proposed changes to clinical services do not necessarily back to the detriment of patients.

4. The broad scheme of the Health and Social Care Act 2012 is that the management of change within the NHS is required to involve 3 interest groups, namely:

    - NHS Commissioners;
    - NHS Providers; and
    - Patients.

5. NHS commissioners are the NHS Commissioning Board, which operates under the name "NHS England", and local Clinical Commissioning Groups. NHS England commissions a range of community services including primary medical care from GPs, dental care and pharmaceutical services. It commissions a wide range of specialist services from acute hospitals, including treatment for patients with rare specialist conditions. Finally there are a range of services which are inappropriate to commission a local basis such as prison medicine and services for the Armed Forces which are commissioned by NHS England. CCGs commission the majority of services outside of a GP practice for their area. CCGs entering to acute services contracts with their local hospitals which provide for a wide range of emergency and elective services and define how those services are to be provided.

6. The term "NHS Providers" covers everything from the largest university teaching hospital NHS foundation trust through to a single-handed GP practice. Some NHS providers are public bodies, notably NHS trusts and NHS foundation trusts, but a large number of NHS providers are - and have always been - private sector businesses that work and commissioning contracts. These providers deliver services which are largely

free at the point of use to patients, but charge the NHS commissioner delivering those services according to the terms of the contract.

7. Patients form the third leg of the three legged stool which ought to govern how decisions are made in the NHS. Patients are supposed to be at the heart of NHS decision-making and there are a series of legal duties and policy announcements which emphasise the key role that patients ought to take in decision-making within the NHS. Regrettably the reality of patient involvement is often very far from aspirations set out in policy documents or the requirements of the legal structures under which NHS bodies are supposed to operate. NHS senior managers have long recognised that a failure properly to engage patients leads to supplier interests dominating decision-making. Decisions made without patient involvement are very often bad decisions because they exclude the perspective of the users of the health service.

8. The term "patients" here does not just mean individual service users but also the powerful lobby groups which support individual groups of patients such as the RNIB for patients with ophthalmic needs, the Alzheimer's Society which lobbies for the interests of patients with dementia and many other support groups for patients. Over the last three months Tim and I have been involved in a fascinating case concerning access to life-saving drugs for patients with Mucopolysaccharide who were left high and dry after the end of a clinical trial. The input from the MPS Society, which has expert knowledge about treatment protocols for this patient group was invaluable. I'm pleased to be to report that the patients have had access to the drugs reinstated though we have been assured that the threat of a carefully formulated legal challenge was entirely coincidental. However very often decisions are effectively made as a result of discussions between NHS commissioners and providers. Patient involvement is often seen as a series of hoops to jump through after decisions are made up before they are implemented.

9. Final decision making about the shape of NHS services rest with NHS commissioners and providers but patients are entitled by law to have their voice heard in influencing

decisions about change through a variety of mechanisms. Understanding the legal obligations which drive those mechanisms and using them to ensure the patient voice is heard is essential for lawyers working in this fascinating area.

Annual Business and Commissioning Plans.

10. The National Health Service Act 2006 ("the NHS Act") is principal statute governing the NHS and is a complete legislative mess. The NHS Act was a consolidating Act when passed in 2006 but has been very substantially amended by a series of Acts passed since 2006, and in particular by the Health and Social Care Act 2012 which created NHS England and CCGs.

11. Section 13T of the NHS Act imposes a duty on NHS England to publish "*a business plan setting out how it proposes to exercise its functions in that year and each of the next two financial years*". The business plan must be published in advance of each financial year and must, in particular, explain how NHS England proposes to discharge its duties under sections 13E, 13G and 13Q. There is no specific duty on NHS England to consult in advance of the publication of its business plan.

12. Section 13E imposes duties on NHS England to "exercise its functions with a view to securing continuous improvement in the quality of services provided to individuals for or in connection with (a) the prevention, diagnosis or treatment of illness, or (b) the protection or improvement of public health". This is process duty, not an outcome duty, and may be one of the harder to rely on in any legal action unless it proposes changes is clearly detrimental to patients.

13. Section 13G places a specific duty when NHS England around health inequalities. It provides that "The Board must, in the exercise of its functions, have regard to the need to (a) reduce inequalities between patients with respect to their ability to access health services, and (b) reduce inequalities between patients with respect to the outcomes achieved for them by the provision of health services".

14. There are stark inequalities in health outcomes between affluent and less affluent communities served by the NHS. For example NHS England published document about the future of health services in London in July 2013 "*London: A Call for Action*"[1]. This document makes numerous points about how poor communities have poor health outcomes and how they place extra demands on the NHS. It says at page 14:

> "Londoners are living longer than ever before. Figures from the Office for National Statistics show men and women have a life expectancy of 79.3 years and 83.6 years respectively, which is higher than the national average. However, this masks significant variation not just in life expectancy but in the length of time people can expect to live healthy lives, free from serious illness. In Tower Hamlets, women have a healthy life expectancy of 54.1 years, compared to 72.1 years for women in Richmond-upon-Thames: a gap of 18 years"

15. However there are approximately twice as many NHS funded GPs per capita in affluent areas of London than in areas of social deprivation. Despite the duty, virtually nothing has been done to equalise GP provision across the capital.

16. NHS England has published Guidance[2] about the meaning of the duty to have regard to the need to reduce health inequalities. It says:

> "The World Health Organisation (WHO) defines health inequalities as "Differences in health status or in the distribution of health determinants between different population groups". Reducing health inequalities can improve average life expectancy and reduce illness and disability across the social gradient. Tackling health inequalities is therefore core to improving access to services, health outcomes, improving the quality of services and the experiences of people. It is also core to the NHS Constitution and the values and purpose of the NHS"

[1] See http://www.england.nhs.uk/london/wp-content/uploads/sites/8/2013/11/ldn-cta.pdf
[2] See http://www.england.nhs.uk/wp-content/uploads/2014/12/hlth-inqual-guid-comms.pdf

17. This is another process duty because the obligation on NHS England is to "have regard to the need to" reduce health inequalities. The Guidance rightly notes that this duty:

> " … means health inequalities must be properly and seriously taken into account when making decisions or exercising functions, including balancing that need against any countervailing factors"

18. The Guidance treats the model of the Public Sector Equality Duty as defining how the duty should be discharged states that decision-makers in the NHS must be able to show that:

- They are fully aware of the duty;
- the duty was considered during the appropriate stages of work, from the beginning of the decision-making process and throughout,
- the appropriate amount of weight has been given to factors which would reduce health inequalities in the decision-making process
- they have actively considered whether integration would reduce inequalities and act with a view of securing such integration where it would do so
- accurate records have been kept to show that the need to reduce health inequalities was taken into account throughout decision-making processes.

19. The NHS has its own Equality template known as EDS2, details of which are on the NHS England website. Use of this equality tool has been mandatory for both NHS providers and CCGs, as part of the assurance framework since April 2015. It remains to be seen whether this will deliver decisions which comply with the duty to have regard to health inequalities and actually make any difference to decisions on the ground.

20. Finally, the NHS England annual business plan is supposed to explain how NHS England is delivering on its patient and public involvement duties, as required by section 13Q of the NHS Act. Tim is going to talk more detail about public patient involvement.

21. In March 2015 NHS England published its business plan for 2015/16[3]. In November 2014 in *R(Curry) v NHS England*[4] Mr Justice Popplewell made a Declaration that NHS England were acting unlawfully because they have no patient involvement arrangements in place to explain how patients of primary care services would be involved in decision-making about the services they received. NHS England assured the court that it was working to put such arrangements in place. However the business plan said as follows regarding the patient involvement arrangements concluded by NHS England:

> "More broadly, we need to engage with our diverse communities and citizens in new ways, involving them directly in decisions about the future of health and care services. The NHS Citizen programme is putting citizens at the centre of the design process of NHS services and for new care models. NHS Citizen is currently developing the technical prototype which will enable citizens and staff to get involved in the improvement of NHS services and support"

22. The NHS Citizen programme allows members of the public to provide feedback on NHS services and arranges a citizens day when 10 topics on discussed emerging from the feedback. As Tim will explain this was this initiative may be well meant, it completely fails to discharge the duty to involve patients and the public in decisions about their health services.

23. There are reasonably well established patient involvement processes in some areas of NHS England's business, and in particular in specialist services. There are no patient involvement arrangements in place for ensuring that the patient voice is heard before decisions are made about primary care, dental care, pharmaceutical services or services within prisons. Further changes to the services are routinely made by agreement between commissioners and providers without any patient voice intruding into the professional conversation.

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[3] See http://www.england.nhs.uk/wp-content/uploads/2015/03/business-plan-mar15.pdf

[4] A decision of Mr Justice Popplewell of 18 November 2014. The case is unreported but a copy of the final order can be obtained from David Lock QC or Richard Stein of Leigh Day & Co.

24. Any challenge to a decision by NHS England to make changes to a GP practice, prison health service or any other tea service could start by complaining that the relevant decision was not in the Business Plan and/or had not been subject to a proper process of public and patient involvement. It is also highly likely that no processes will have been followed to comply with the duty to reduce health inequalities.

25. The position with CCGs is slightly different. Section 14Z11 of the NHS Act, as introduced by the Health and Social Care Act 2012, imposes a legal duty on every clinical commissioning group to prepare a plan setting out how it proposes to exercise its functions in the coming financial year, namely from 1 April each year. In particular, the CCG annual commission plan is required to explain how the CCG proposes to have regard to the need to improve services to patients (section 14R), tackle health inequalities (section 14T) and to involve patients in its decision-making when taking commissioning decisions (section 14Z2).

26. Appreciating the existence of this legal duty I invite you to undertake a Google search to see how many CCGs have published an annual commissioning plan for 2015/16. It may be surprising to note that very few CCGs have an annual commissioning plan. The relevant NHS England guidance[5] (published in December 2013) recommends CCGs to develop five-year commissioning plans with the first two years being operational plans. Thus many CCGs around the country only have commissioning plans for the period 2014 to 2019 but have not complied with their legal obligation to have a commissioning plan for each financial year.

27. There is an important difference between the annual business plan produced by NHS England and CCG annual commissioning plans. Section 14Z13 of the NHS Act requires the CCG to "consult individuals for whom it has responsibility" when it is preparing its annual plan. This specific consultation duty exists in addition to the duty under section 14Z2 to have arrangements in place to "involve" patients in commissioning decision-making about the services they use.

[5] See http://www.england.nhs.uk/wp-content/uploads/2013/12/5yr-strat-plann-guid-wa.pdf

28. In broad terms the legal duty to consult patients means that each CCG is required to publish a draft annual commissioning plan well in advance of the start of each financial year, seek views from patients and the public about its commissioning proposals for the coming year and then conscientiously take those views into account before publishing its final annual commissioning plan. The importance of undertaking consultation in an intelligent way which properly considers all viable options, not just those proposed by the public body, was emphasised by the Supreme Court in *R (on the application of Moseley) v London Borough of Haringey* [2014] UKSC 56.

29. What are the legal consequences for a CCG which does not engage in an annual consultation exercise or even ignores its legal obligations to prepare an annual commissioning plan. In one recent case the answer from the CCG to a complaint about the absence of an annual commissioning plan was that NHS England no longer required such a plan to be developed, therefore the CCG was acting lawfully because it was following NHS England Guidance. That is, of course, what might happen in practice but it is no answer to a legal complaint.

30. It is difficult to see how a CCG can lawfully take commissioning decisions in year which are not set out in an annual commissioning plan (which itself has been the subject to public consultation). Although this is untested legal water (because on every occasion that a challenge of this sort has been mounted the CCG has backed down) it seems to me that a CCG which attempts to put through substantial changes to the shape of its local health services which are not set out in its annual commissioning plan will be acting unlawfully. A CCG which has no annual commissioning plan can relatively easily be challenged by way of Judicial Review.

Funding challenges to decisions by NHS commissioners.

31. How should a campaigning and committed solicitor respond when there appears to be a clear failure by an NHS commissioning body to comply with its legal obligations but equally there is no money available to fund litigation? Is sometimes sensible to clarify with clients how important the proposed change actually is for the clients. There is little point in commencing litigation over a series of changes which have advantages

and disadvantages for patients, and where the balance of disadvantage is not clear. There can be a temptation to label any changes to NHS services as "cuts" which should be opposed whereas many consolidations of NHS services are aimed at delivering higher quality services, albeit at a more distant location. Litigation is only likely to be seen by the Court to be appropriate where changes are clearly detrimental to patient interests.

32. Having established the importance of the case for the clients, there are three main funding alternatives. First, there may be a representative litigant who is eligible for legal aid. Patients with serious long-term conditions are often unable to work and reliant on state benefits which will passport them into legal aid eligibility. They are also individuals who will lose most by changes to NHS services. It is, of course, likely that the Legal Aid Authority will seek a "community contribution" because the interest of the legally aided individual is held by others who might be expected to make a contribution. This is usually set at between £5,000 and £10,000, depending on the proportion of those who would benefit who would qualify for Legal Aid. Fundraising to meet the community contribution can often galvanise community support for a campaign must raise the political pressure to add to the legal pressure.

33. Secondly, some solicitors and counsel are prepared to act on a Conditional Fee basis, coupled with an application for a Protective Costs Order. The can be difficulties over disbursement funding and the clients will need to raise money for the PCO but this is a serious option for community action.

34. Thirdly, there can be occasions when a wealthy "League of Friends" or other wealthy supporters enable the case to be funded on a private basis. I include this as a theoretical option but it rarely arises in practice.

35. I have undertaken a number of challenges successfully - and occasionally unsuccessfully - both on a CFA basis and with legal aid. The NHS bodies are generally incredulous that being challenged, fight their corner aggressively and rarely concede before the issue of proceedings. That, paradoxically, has the benefit that when the NHS bodies do concede they are required to face cost liability.

Landmark CHAMBERS

Challenging decisions to concerning changes to NHS services

David Lock QC

October 2015

A starter for 10 ….

- Change is constant in the NHS – and always has been
- Changes to NHS services may be clinically necessary even if unpopular
- Key parties are:
  - Commissioners
  - Providers
  - Patients

The legislation

- National Health Service Act 2006
- .. As amended by the Health Act 2009
- … and by the Health and Social Care Act 2012
- .. and it is a complete mess

The duties on NHS England

- The National Health Service Commissioning Board
  - Aka NHS England
- Section 13T: Duty to have an annual business plan
- Must say how it will comply with:
  - Section 13E: Duty of continuous improvement
  - Section 13G: Health Inequalities
  - Section 13Q: PPI duties

The duty around Health Inequalities

- What is the problem?
- What is the solution?
  - "Have regard" duty
  - Excellent Guidance published in 2014
  - Rarely if ever followed in practice
  - Process duty modelled on PSED and *Brown* criteria

The duties on a Clinical Commissioning Group

- Legal duty on each CCG to prepare an annual commissioning plan
- Plan is required to explain how the CCG proposes to:
  - have regard to the need to improve services to patients (section 14R),
  - tackle health inequalities (section 14T) and
  - involve patients in its decision-making when taking commissioning decisions (section 14Z2).

Duty to consult about the annual commissioning plan

- Specific duty on CCG to consult about its annual commissioning plan in section 13Z13
- Must follow *Sedley* rules as part of a public consultation
- Also must consult on discarded options:
  - *R (on the application of Moseley) v London Borough of Haringey* [2014] UKSC 56.

What happens in practice?

- Most CCGS do not prepare annual commissioning plans
- NHS England Guidance now says CCGs produce 5 year plans
- No reference to requirement for public consultation (but there is in equalities guidance)
- Does this leave CCGs' exposed to a JR claim
  - Duty of consultation is arguably far more extensive than PPI duties

Funding a Judicial Review

- This is often the most serious problem
- Three options:
  - Legal aid + Community Contribution
  - CFA + PCO
  - Wealthy community, financial backer or League of Friends

Questions?

(but maybe fewer answers)

8

9

PLP Judicial Review Trends and Forecasts 2015

Judicial Review of the Regulators

Herbert Smith Freehills LLP

The following definitions are used throughout:

"**A1P1**"	ECHR Protocol 1, Article 1
"**CAT**"	Competition Appeal Tribunal
"**CMA**"	Competition and Markets Authority
"**CPR**"	Civil Procedure Rules
"**CJEU**"	Court of Justice of the European Union
"**ECHR**"	European Convention of Human Rights
"**FOS**"	Financial Ombudsman Service
"**GDC**"	General Dental Council
"**GMC**"	General Medical Council
"**HMRC**"	Her Majesty's Revenue & Customs
"**SOS**"	Secretary of State
"**Tribunal**"	First Tier Tribunal (Tax Chamber)

EU law

1. *R (on the application of British American Tobacco UK Ltd) v Secretary of State for Health; R (on the application of Philip Morris Brands Sarl and another) v Secretary Of State For Health* [2014] EWHC 3515 (Admin)

The applicant, a Polish tobacco growers' association, applied for permission to intervene in a judicial review claim brought by tobacco companies challenging the transposition into UK law of Directive 2014/40 and the related reference to the CJEU, pursuant to CPR r.54.17. The applicant submitted that it was well positioned to assist, any intervention would be targeted and modest, and by operation of Polish law it was unable to effectively participate in the Directive challenge from within Poland. The court noted that its powers under CPR r.54.17 permitted limited participation in proceedings by an intervener but did not automatically lead to an entitlement to participate in any reference to the CJEU. The court explained that even if permission was given, under art.97 of the amended Rules of Procedure of the CJEU, acquiring the status of intervener under CPR r.54.17 did not automatically provide entitlement to participate in the reference procedure as a party. The court refused the application on the basis that the applicant's intervention would not have any significant impact on the

drafting of the reference and that the applicant's involvement would be wholly disproportionate to the practical value of its contribution as an intervener. Furthermore, the applicant failed to satisfy the connection between its legitimate interest and the UK. The court noted that those from other EU Member States should not be encouraged to use UK procedures to circumvent the adverse consequences of restrictive rules of review in their own courts.

2. ***R (on the application of Philip Morris Brands Sarl and others) v Secretary of State for Health*** **[2014] EWHC 3669 (Admin)**

The claimants challenged the SOS's intention and obligation to implement Directive 2014/40 in the UK and a reference was made to the CJEU. The key issue was whether organisations that were permitted to intervene in the UK judicial review proceedings could be categorised as parties in the CJEU pursuant to CPR r.54.17. The court held that the fact a person is granted status as an intervener in English judicial review proceedings does not automatically result in them being a "party" to proceedings for the purpose of subsequent reference to the CJEU for a preliminary ruling. The definition of "party" contained within the Senior Courts Act 1981 section 151(1) was held to be relevant to the interpretation of "party" within the CPR, but was subject to the condition that the context of the case did not require a different interpretation, for which the court supported adopting a flexible approach. In contrast to the above British American Tobacco ("**BAT**") decision, the interveners in the instant matter were able to demonstrate a firmer relationship with the UK than those interveners in the BAT proceedings. It was doubtful whether the interveners' concerns would be given fair priority if they were unable to participate in the reference and the interveners were able to bring a higher level of experience and expertise compared to those in the BAT proceedings. On these grounds, the court held that the interveners had a sufficiently strong interest to be "parties" to the CJEU proceedings.

3. ***R (on the application of) UK Power Networks Services (Contracting) Limited v The Gas and Electricity Markets Authority*** **[2014] EWHC 3678 (Admin)**

The claimant, an operator of the electricity network at Heathrow Airport, sought judicial review of a decision by the local authority that it had a duty to secure third party access to the network. Under Directive 2009/72 any customer can switch electricity networks, requiring the claimant to open its network to provide "third party access" to rival electricity suppliers. The scheme was implemented under the Electricity Act 1989 Sch.2ZA and there were numerous contentious issues relating to the supply, access and identification of the electricity network at hand. The court noted the local authority had made a number of errors in its interpretation and application of the Directive and scheme, including that it failed to consider who was responsible for the network and wrongly viewed the test as relative, and additionally, there was no requirement in the application of the test to determine which party exercises a greater degree of operation or control over the network. The local authority further erred in

concluding that there could only be one person with the duty to secure third party access. The local authority's errors were found to be material and the case was remitted.

Rationality/Proportionality

4. ***Gibraltar Betting & Gaming Association Ltd v Secretary of State for Culture, Media and Sport and others*** **[2014] EWHC 3236 (Admin)**

The claimant, a trade association representing Gibraltar-based gambling operators providing services to the UK, applied for judicial review of the introduction of the Gambling (Licensing and Advertising) Act 2014. The Act extended the reach of the UK Gambling Commission to those operators whose facilities could be accessed in the UK. At issue was whether this was unlawful under UK domestic law or a disproportionate restriction on the freedom to provide services provided by the Treaty on the Functioning of the European Union art.56. Member States have a wide margin of appreciation specifically in respect of gambling and a court could only interfere if there were fundamental errors or choices which were unsupported by evidence or unconnected with a lawful objective. The court held that the government had a sufficient evidential basis for its position and that there were no flaws in its logic or policy procedure. The new regime served a number of legitimate objectives. The court held that the new regime was not unlawful, disproportionate, discriminatory or irrational.

5. ***R (on the application of Lumsdon) v Legal Services Board*** **[2015] UKSC 41**

The appellants challenged the lawfulness of the Legal Services Board's decision to approve the introduction of the Quality Assurance Scheme for Advocates ("**QASA**") which provides for the assessment of the performance of criminal advocates. The court dismissed the appeal and held that the objectives of QASA (the protection of consumers and recipients of services, and safeguarding the sound administration of justice) were legitimate and important. The Supreme Court considered the EU principle of proportionality and concluded that the application of a scheme on a consistent basis to all criminal advocates was proportionate to the objectives pursued.

6. ***R (British Academy of Songwriters, Composers and Authors and others) v Secretary of State for Business, Innovation and Skills*** **[2015] EWHC 1723 (Admin)**

The claimant applied for judicial review the SOS's decision to introduce a new section into the Copyright, Designs and Patents Act 1988, which had the effect of permitting any person who legitimately acquires content (music, film, books) to copy that work for his or her own private use without infringing copyright. The new provision did not contain any compensation scheme. After reviewing the facts, the SOS came to the

conclusion that the harm to right-holders was minimal. The court granted the application and held that the SOS was wrong to conclude on the facts that the harm to right-holders was minimal. The court carried out an intensive and thorough review of the fact-finding and reasoning of the SOS and concluded that the inferences drawn by the SOS about minimal harm were not remotely supported by the evidence. The court concluded that the decision to introduce the new provision in the absence of a compensation mechanism was unlawful.

7. *Solar Century Holdings Ltd v Secretary of State for Energy & Climate Change* [2014] EWHC 3677 (Admin)

The claimant, a small scale solar photovoltaic generator, sought judicial review of a change of policy by the SOS resulting in the premature closure of a levy support scheme for large scale renewable electricity. The Treasury introduced the "Control framework for Department for Energy and Climate Change levy-funded spending" (the "**LCF**") to limit the financing of levy schemes, supported by repeated public statements that the original scheme would not be closed until 2017. This date was subsequently changed to 2015 and adopted by inserting section 32LA and section 32LB into the Electricity Act 1989. The court rejected the claimant's allegation that section 32LA and section 32LB were unlawful as the sections were not introduced to ensure the continuation of the levy until 2017, but rather to address the lack of clarity on the existing statutory power to close the previous scheme. In ascertaining Parliament's intention the court set out guidance on when and how external documents such as explanatory notes should be used. The government statements on the scheme's closure date were policy statements capable of change and were not to be considered as assurances that bound the SOS to maintain the levy scheme until 2017. The nature of the LCF and its dependence upon other departments spending made its expenditure unpredictable and subject to the systemic risk of curtailment. The claimant therefore had no legitimate expectation that the scheme would continue to 2017. Although there was an element of retrospectivity in the measures, when balanced with competing considerations the retrospectivity did not give rise to unacceptable unfairness.

Appeal pending.

8. *R (on the application of David Rapp) v Parliamentary and Health Service Ombudsman* [2015] EWHC 1344 (Admin)

The claimant applied for judicial review of the decision of the Parliamentary and Health Service Ombudsman (the "**Ombudsman**") to refuse to uphold one of his complaints on the basis of an alleged material error of law. The claimant complained to the Ombudsman about Ofqual's decision to cancel his qualification. The Ombudsman found maladministration which had given rise to injustice to the claimant. The Ombudsman made recommendations to Ofqual and required Ofqual to pay the claimant compensation. Ofqual accepted and implemented all those recommendations.

The court dismissed the claimant's application and held that the Ombudsman was not under an obligation to determine questions of law. The Ombudsman acted within its statutory powers to determine the complaint of maladministration. The court stated that a finding of maladministration was distinct from a finding of unlawfulness. The Ombudsman had discretion to formulate and apply a standard of review. The court would not interfere unless there was irrationality.

9. *R (on the application of RWE Generation UK Plc) v Gas and Electricity Markets Authority* [2015] EWHC 2164 (Admin)

The claimant was an electricity generation company who challenged the decision of the Gas and Electricity Markets Authority (the "**Authority**") to approve a modification to the methodology for recovery of electricity transmission costs. The claimant alleged that the effect of the decision was that generators who relied on non-conventional methods such as wind and solar power would pay fewer transmission charges. The claimant alleged that the decision was discriminatory, involved state aid and was contrary to the relevant EU Directive. The court considered that conventional and non-conventional generators were not in a comparable situation and therefore differences in treatment were objectively justifiable. There was no unlawful state aid as the decision did not confer an advantage on any generator or class of generator. Furthermore, the Authority had not misinterpreted the Directive. The application for judicial review was refused.

Human rights

10. *Department for Energy and Climate Change v Breyer Group plc and others* [2015] EWCA Civ 408

The government department appealed against a High Court decision that the respondents were entitled to damages under A1P1 as a result of the government's proposal to bring forward the end date for a feed-in tariff scheme for installation of solar panels which entitled the respondents to be paid at a particular rate for the energy produced. As a result of this government's proposal, the respondents claimed that installations which would have been carried out were abandoned. The Court of Appeal dismissed the appeal and held that there was a disproportionate interference with the respondents' possessions. The court accepted that the government's proposal was not itself unlawful but rather that the balance struck between public interests and the effect on the respondents was disproportionate. However, the respondents could only claim damages for loss from existing contracts which were abandoned. Possible future contracts were not possessions under A1P1 and therefore the respondents were not entitled to damages with respect to future income.

11. Bank Mellat v HM Treasury [2015] EWHC 1258 (Comm)

The claimant commenced proceedings for damages under section 8 of the Human Rights Act 1998 ("**HRA**") for loss and damage caused by government sanctions on the bank which the Supreme Court had held to be unlawful. The court held that only the bank, which was directly affected by the unlawful act, had victim status for the purposes of A1P1. Therefore, only the bank could claim under section 8 of the HRA. The subsidiary was only a secondary victim and therefore could not bring a claim under section 8 of the HRA. The court accepted that the rule against reflective loss (preventing shareholders recovering for a loss which was merely reflective of a loss suffered by the company in which they held a shareholding) was recognised by the European Court of Human Rights with the exception of a case where the subsidiary company had no standing to bring the claim. As the subsidiary did not have standing to bring the claim under section 8 of the HRA, the rule against reflective loss was not applicable in this case and the bank was free to claim for the diminution in the value of its shareholding. Finally, the court noted that once an unlawful interference with possessions had been established which amounted to a breach of A1P1, damages would not be restricted to only those possessions. Rather, damages were recoverable for all losses caused by the breach "including consequential losses such as loss of future earnings or profits".

Appeal pending.

Procedural unfairness

12. *Bank Mellat v HM Treasury* [2014] EWHC 3631 (Admin)

The court was required to assess the level of disclosure to be made by the Treasury in an application by the claimant Iranian bank to set aside two financial restriction decisions in the Financial Restrictions (Iran) Order 2011 and 2012 (the "**Orders**"). The Treasury relied upon material it was not prepared to disclose, on the grounds of national security, to freeze the claimant's funds under the Orders. The claimant argued that he was entitled to have sufficient information to mount a defence. The court held that although the claimant's liberty was not infringed in the same manner as that of an individual, the restrictions had an utterly damaging effect on its ability to function in London. In light of these circumstances, the claimant was entitled under ECHR art.6 to the disclosure of sufficient information to enable effective instructions to be given to their special advocates.

Judgment on appeal pending.

13. Rainbow Insurance Co Ltd v Financial Services Commission [2015] UKPC 15

The claimant applied for judicial review of the decision by the Financial Services Commission of Mauritius ("**FSC**") to suspend the registration of the claimant as an insurer for general insurance and life insurance business. The claimant challenged the decision on the grounds of (i) procedural unfairness because the decision to suspend registration was made without proper consultation; (ii) illegality and abuse of power as the FSC had no lawful basis to suspend the claimant's registration and because of an improper delegation of powers; (iii) irrationality because the claimant was treated in a discriminatory manner; and (iv) breach of the claimant's legitimate expectation that it would be given sufficient time to adapt to the FSC's new regulatory requirements. The Privy Council rejected the appeal on all four grounds. The Board held that there was no duty to consult and that there was also no legitimate expectation that the FSC would act in a way that was contrary to its statutory obligations as it was exercising its regulatory powers in the interest of third parties.

Jurisdiction

14. R (on the application Fisher) v Financial Ombudsman Service (unreported) Queen's Bench Division (Administrative Court) 15 October 2014

The claimant sought judicial review of a decision by the FOS that a home insurance company had acted reasonably in refusing to fund the claimant's legal proceedings on the grounds that she had no real prospect of success. The claimant was successful in her legal proceedings and complained to the FOS whose final decision was that the insurer had acted reasonably in relying upon in-house legal advice. The court dismissed the claimant's submission that the FOS should have sought independent legal advice when resolving her complaint. The court declared that there was no obligation on the FOS to investigate a matter on its own behalf, rather its remit was solely to determine disputes based on the evidence presented before it. On this basis, it was reasonable for the FOS to rely upon the conclusions made by the insurer's in-house solicitor.

15. *R (on the application of Bluefin Insurance Services Ltd) v Financial Ombudsman Service Ltd* [2014] EWHC 3413 (Admin)

The claimant, an insurance broker, sought judicial review of a decision by the FOS that the interested party, a company director, was eligible to bring a complaint against the claimant to the FOS. The FOS thought that the company director was an "eligible" consumer under the Financial Services and Markets Act 2000 section 226. At issue was whether the FOS has jurisdiction to decide the consumer status of the company director and whether they had correctly done so. The court held that the decision was

one of precedent fact. This meant that the court undertaking judicial review could decide the consumer status issue for itself without being constrained by the more limited traditional judicial review grounds. The court quashed the decision as the FOS had misdirected itself.

Tax

16. *Michael Bruce-Mitford v Revenue & Customs Commissioners* [2014] UKFTT 954 (TC)

The appellant, the owner of a travel company, challenged a decision by HMRC to refuse to apply a concessionary practice outlined in an HMRC document. The publication of a concessionary practice in one of HMRC's own publications was not found to constitute a valid ground for granting the appeal. The Tribunal dismissed the appellant's argument and held that it does not have jurisdiction to decide whether the concessionary practice ought to apply to the present case. The Tribunal applied the decision in *Michael Prince & Others v HMRC* TC08152, and agreed that the discretion of HMRC to collect tax is not a tax dispute, but rather a public or administrative law dispute, and as such, is a matter to be determined only by judicial review. Furthermore, the Tribunal clearly noted that a First-Tier Tribunal does not have jurisdiction to entertain a legitimate expectation claim in relation to a VAT dispute.

17. *R (on the application of Whistl UK Ltd (Formerly TNT Post Uk Ltd)) v Revenue and Customs Commissioners and Royal Mail Group Ltd* [2014] EWHC 4118 (Admin)

The claimant sought a stay of costs proceedings pending appeals in relation to two claims concerning Royal Mail's exemption from VAT treatment for providing access to its postal infrastructure and services. The claimant argued that HMRC's central argument in its claim had failed and that a significant reduction should be made to the costs order to accommodate this. The court held that a ruling on costs should be made as parties are entitled to know where they stand in relation to any cost liability, even where the final outcome might be different if the claimant obtained permission to appeal and succeeded. HMRC did not lose on any discrete issue in the claim, rather it had advanced an argument that the court did not find convincing. Secondly, HMRC had to deal with substantial arguments that were ultimately irrelevant in relation to fiscal neutrality and competition and it would therefore be wrong to disallow any part of HMRC's costs. However, the court held that Royal Mail (an interested party) could have provided additional material without needing to actively participate in proceedings and it should not ordinarily be expected that individual taxpayers were required to support the HMRC in its defence. Royal Mail's application for costs was refused as taxpayers' intervention was viewed as a deterrent to challenges of the instant

type and would inhibit the promotion and lawful implementation and application of EU law.

18. *Aspinall (t/a Oxford Retail Consultants) v Revenue and Customs Commissioners* [2015] UKFTT 162 (TC)

The appellants made a supply to the University of Warwick which they treated as exempt from VAT. An HMRC officer had incorrectly informed the appellants that the supply was exempt as it was in respect of medical research and funded by the Wellcome Trust. The Tribunal held that while the Tribunal has jurisdiction in some cases to consider legitimate expectations arising out of the lawful exercise of its powers by HMRC that jurisdiction does not extend to a situation where HMRC acts beyond its powers, such as by giving a misdirection.

19. *R (on the application of Ingenious Media Holdings Plc) v Revenue and Customs Commissioners* [2015] EWCA Civ 173

The appellant appealed against the dismissal of his claim for judicial review which arose out of an off-the-record conversation between an HMRC official and two journalists which disclosed information about the appellant. The HMRC official's conversation with the journalists concerned tax avoidance schemes during which the appellant's name was mentioned. Although the conversation was off-the-record, a national newspaper then published an article quoting aspects of that conservation which mentioned the appellant's name. The court dismissed the appeal and held that a reasonable citizen would expect HMRC to be free to make factually correct disclosures not involving personal affairs of a taxpayer in order to raise awareness of tax avoidance schemes. There was a public interest that HMRC should let the public know its views about tax avoidance schemes. Moreover, it was a limited disclosure with no evidence of reputational damage.

Appeal pending.

20. *R (on the application of APVCO 19 Ltd) and others v Revenue and Customs Commissioners* [2015] EWCA Civ 648

The appeal concerned whether certain retrospective tax legislation should be declared incompatible with the appellants' rights under ECHR art.6 and A1P1. The government introduced new laws targeting tax avoidance schemes which were retrospective in their application. The court held that the legislative changes did not interfere with any of the appellants' possessions within the meaning of A1P1 because the money that the appellants might have used to pay the tax was already the subject of an unresolved argument or claim by HMRC. All the legislative changes did was to remove the appellants' argument that HMRC was not entitled to that money. The court dismissed

the appeal and held that the legislative changes were lawful, proportionate and compatible with the ECHR.

21. *R (on the application of Veolia ES Ltd and others) v Revenue and Customs Commissioners* [2015] EWCA Civ 747

The appeal concerned whether there should be a stay of judicial review proceedings designed to establish whether the respondent taxpayers had a legitimate expectation of being entitled to a repayment of tax, while proceedings to determine whether they were ever liable for the tax in the first place were heard and determined in the Tribunal. The court dismissed the appeal and held that although the respondents sought effectively the same relief in the two sets of proceedings, they had two separate claims. HMRC relied on *R (C) v FSA* [2013] EWCA Civ 677 but the court considered that that case was of little relevance given the profound differences between the two claims being pursued. The court noted that HMRC had not made clear what precisely their case would be in the judicial review proceedings in answer to the respondents' claims. In those circumstances the court could not be clear as to the amount of any overlap of fact and therefore the appeal was dismissed.

22. *R (on the application of Rowe and others) v Revenue and Customs Commissioners* [2015] EWHC 2293 (Admin)

The claimants applied for judicial review challenging the legality of partner payment notices ("**PPN**") given by the defendant, HMRC, to the claimants in exercise of new powers under the Finance Act 2014 ("**FA 2014**"). The court refused the application and held that the PPNs were lawfully issued and the principles of natural justice had been adhered to by the statutory scheme and by HMRC in exercise of the discretion conferred by FA 2014. There had been no breach of the claimants' procedural or substantive legitimate expectations. The decision to give PPNs was neither unreasonable nor irrational. It represented a lawful exercise of the statutory discretion conferred by FA 2014. Finally, the court held there had also been no unlawful interference with the claimants' possessions by the giving of PPNs in this case. ECHR art.6 does not apply but in any event the claimants had access to an independent and impartial tribunal on judicial review.

Disciplinary

23. *R (on the application of Ali Izzet Nakash) v Metropolitan Police Service* [2014] EWHC 3810 (Admin)

The claimant, a specialist registrar in hospital obstetrics and gynaecology, sought judicial review of the decision by the police service to disclose certain documents to

the GMC (an interested party) in respect of an alleged sexual assault. The GMC requested the claimant's police file under the Medical Act 1983 section 35A including unlawfully obtained evidence that was not adduced at trial. The claimant argued that disclosure would be unreasonable and in breach of his rights under ECHR art.8. The court was required to assess whether the disclosure was a proportionate response to a legitimate aim under art.8. The court held that the GMC's inquiry was broader than the police inquiry and the fact that the evidence was inadmissible at trial did not render it immune from disclosure to the GMC. The circumstances in which the evidence was obtained carried little weight in assessing the art.8 issues and did not unlawfully outweigh the legitimate aim of disclosure under section 35A, namely the exercise of GMC's statutory duty to protect the public health and safety and the rights of others.

24. British Dental Association v General Dental Council [2014] EWHC 4311 (Admin)

The claimant sought judicial review of the decision of the defendant, GDC, to increase the retention fee, an annual practising fee payable by dentists and dental care professionals, for 2015. The GDC conducted a consultation process in deciding to increase the retention fee which included a series of predictions on the number of future fitness to practise complaints. The claimant argued that the GDC failed to give sufficient information in that consultation process. The court held that the common law duty of fairness did not impose a duty upon the GDC to consult on the proposed fee increase. However, the GDC itself had made public announcements committing to a transparent consultation which established a legitimate expectation among consultees to such a consultation. The GDC was held to have failed to provide an adequate explanation as to why the increase in fitness to practise complaints required an additional £18 million in funding and disclosed no fitness to practise trend information during the consultation. Given the lack of clear and accessible information to test the reliability of the proposal, the court held that the consultees could not have expressed an intelligent and informed view on the proposed fee increase. In determining relief, the British Dental Association ("**BDA**") argued that the fee increase under the General Dental Council (Dentists) (Fees) Regulations 2014 should be quashed. The court refused to do so on the basis that, although the BDA had won conclusively due to the GDC's failure to adequately consult, the GDC had acted in the public interest in its decision to increase the annual retention fees and was required to do so in order to continue to do its job.

25. Law Society (Solicitors Regulation Authority) v Charles Henry and Co [2015] EWHC 552 (QB)

The applicant, the Solicitors Regulation Authority ("**SRA**"), sought orders joining the practice manager of the first respondent charity to disclosure proceedings. The SRA wanted to investigate three solicitors who were registered as practising at the charity. It had successfully applied for an order against the charity requiring it to disclose certain documents but the charity failed to comply with the disclosure order. The SRA

now sought an order in the same form against the practice manager. The court held that the statutory test for making the order had been previously satisfied and that there was no evidence of any material change in circumstances. The court noted that the proposed second respondent (the practice manager) had been involved in the unmeritorious actions in respect of which the SRA was seeking documents. While the court accepted that there was an interference with the practice manager's rights under ECHR art.8 as files were sought in respect of cases in which he was the claimant, it held that the interference was not disproportionate. The practice manager was joined to the disclosure proceedings and an order in the same form was made against him.

26. *Shanker v General Medical Council* [2015] EWHC 2421 (Admin)

The appellant doctor applied for an extension of time to appeal against a decision of the GMC's Fitness to Practise Panel (the "**Panel**"). The appellant had been subject to a number of suspensions from 2001 onwards, and in 2009 the Panel found that the appellant's fitness to practise was impaired and removed him from the register. The court rejected the appellant's argument that the finding in *Adesina v Nursing and Midwifery Council* [2013] EWCA Civ 818 (that an absolute and strict application of time limits breached ECHR art.6) applied retrospectively. The court held that judicial decisions did not have retrospective effect on decided cases but recognised that this position did not necessarily apply to on-going cases. Even if the decision in *Adesina* applied, the appellant's case and failure to appeal within the statutory time limit did not satisfy the required exceptional circumstances threshold.

27. *Damian McCarthy v Visitors to the Inns of Court* [2015] EWCA Civ 12

The appellant barrister, Mr McCarthy, had been disbarred by the Bar Disciplinary Tribunal. He appealed that decision to the Visitors to the Inns of Court (the "**Visitors**"), which dismissed his appeal. He was granted permission to apply for judicial review of the Visitors' decision but the judge refused to quash the decision. He then appealed that decision to the Court of Appeal.

The appellant barrister argued that the judge should have quashed the Visitors' decision given the unfairness arising from the Bar Standards Board's failure to disclose two statements from a primary witness. The court confirmed that where it has been established that there has been material non-disclosure, the issue is whether there is a real possibility that the relevant tribunal would reach a different conclusion had there been disclosure. Applying this test, the court concluded that the first statement had the potential to undermine the witness's credibility and given the significance of the witness's credibility to the instant proceedings, there was a real possibility that had disclosure occurred, the Bar Disciplinary Tribunal would have reached a different conclusion. The appeal was allowed as the judge had erred in concluding that the outcome of the proceedings had not been affected by the non-disclosure.

28. *R (on the application of Baker Tilly UK Audit LLP and others) v Financial Reporting Council* [2015] EWHC 1398 (Admin)

The Financial Reporting Council ("**FRC**") sent the claimants a proposed formal complaint alleging misconduct in the performance of an audit. The claimants sought to judicially review the decision of the FRC to make a formal complaint. The claimants argued that the FRC Guidance (the "**Guidance**") which allows complaints for "non-trivial failure" to act with professional competence was (i) unlawful in implying that "non-trivial failure" could amount to misconduct; and (ii) fails to recognise the need for a serious or gross breach of standards of professional competence to establish misconduct. The court held that the Guidance is not unlawful as it does not equate "non-trivial failure" with misconduct, but rather suggests a number of factors which could be taken into consideration when determining whether a complaint should be made. The court also stated that "cases such as this, in which a challenge is made to the Defendants' decision to bring proceedings before an independent Disciplinary Tribunal, should not normally be brought by way of judicial review and should proceed to go before that Tribunal".

29. *R (on the application of AM) v General Medical Council* [2015] EWHC 2096 (Admin)

The claimant applied for judicial review of the GMC's guidance on assisted suicide which stated that doctors who assisted suicide may have disciplinary proceedings brought against them, even though the Director of Public Prosecution ("**DPP**") is unlikely to prosecute them. The claimant contended that the guidance breached his rights under ECHR art.8 and that the guidance was *Wednesbury* unreasonable. The court refused the application and held that while art.8 is engaged, it was not contrary to art.8 for the GMC to take as its starting point the principle that a doctor has a duty to obey the law and to structure its guidance accordingly. The court also held that the guidance was not *Wednesbury* unreasonable as the purposes and objectives of the criminal and professional bodies are different – there is no reason to assume that the DPP's analysis of the public interest when deciding whether or not to prosecute should dictate how the GMC should determine what is required properly to protect the reputation of the profession.

30. *Norton v Bar Standards Board* [2014] EWHC 2681 (Admin)

The applicant was charged with disciplinary offences of failing to declare criminal convictions and falsely stating his academic qualifications on admission to the Bar. The Divisional Court allowed the appeal and quashed the Bar Disciplinary Tribunal's order for disbarment, remitting the case for a rehearing before a new disciplinary tribunal. The tribunal had not applied the test from *R v (Anthony) Jones* [2013] 1 AC

1 and the submissions made to the tribunal had suggested that the discretion to proceed in the absence of the subject of the charges was general and unfettered and that prejudice was not a relevant issue. In particular, the tribunal had (i) not addressed whether the reasons advanced by the applicant justified his absence; (ii) failed to consider if an adjournment would result in the applicant attending the next hearing; (iii) based its conclusion that delaying the hearing would not achieve anything on the applicant's failure to set out his defence in the application to adjourn, as opposed to a general review of the evidence in the case; and (iv) did not consider the fact that no victims or witnesses would be adversely affected by a delay.

31. *Held v General Dental Council* [2015] EWHC 669 (Admin)

The applicant failed to hold professional indemnity insurance for a six week period, during which he continued to treat patients. Subsequently, he did not attend the hearing before the GDC and was removed from the register. On appeal, the applicant sought to introduce witness statements from a number of the patients he had treated during the uninsured period. The court denied permission to adduce the statements and dismissed the applicant's appeal. The applicant could not show that the evidence could not have been obtained for use at the previous hearing and furthermore that the impact of the statements might require cross-examination or further evidence, which would result in the case being remitted to the GDC to hold a fresh hearing. Fresh evidence should not be admitted on appeal where the ultimate result would be for the case to be remitted for a new hearing, except when it is imperative to do so in the interests of justice (*Transview Properties v City Cite Properties* [2009] EVCA Civ 1255).

***32. Fajemisin v General Dental Council* [2013] EWHC 3501 (Admin)**

Disciplinary proceedings had been commenced against the appellant dentist in 2009, regarding allegations that he had fraudulently claimed for the treatment of elderly residents of nursing homes. Due to the appellant's admission to hospital the initial hearing before the GDC, which was due to take place in September 2011, was adjourned. In the meantime the applicant failed to complete his CPD hours. Several months later he was notified that his name would be removed from the register. Erroneously, an employee of the GDC informed the registrar's office that the fitness to practise proceedings relating to the appellant had been marked closed. When this mistake was later discovered, no steps were taken to remove the appellant from the register and the appellant's counsel later argued at the resumed disciplinary hearing that the GDC had no jurisdiction to embark on the hearing given that the decision to remove his name had already been taken. This argument was rejected and an order for the appellant's name to be removed due to misconduct was made. On appeal, the court concluded that the registrar did have power to revisit the initial decision to remove the appellant's name from the register. The court relied on *Porteous v West Dorset District Council* [2004] HLR 30 which provides that when a decision has been made

in ignorance of the true facts and the factual basis for it amounted to a fundamental mistake of fact, then a public body may revisit that decision.

Competition

33. *AXA PPP Healthcare Limited v Competition and Markets Authority; HCA International Limited v Competition and Markets Authority; Federation of Independent Practitioner Organisations v Competition and Markets Authority* [2014] CAT 23

HCA International Ltd v Competition and Markets Authority [2015] EWCA Civ 492

The initial combined CAT hearing concerned various case management, directions and costs matters relating to three decisions made by the CMA in the course of its investigation into the private healthcare market. At issue were the CMA's decisions that there was an adverse effect on competition ("**AEC**") in relation to insured patients and self-pay patients and its decision to order HCA International Limited ("**HCA**") to divest. Before the trial in November 2014, the CMA acknowledged errors in the Insured Price Analysis ("**IPA**") and made a concession that the AEC decision regarding insured patients and the divestment order upon HCA should be quashed and remitted until further consultation.

In [2014] CAT 23, HCA sought to have the remitted decisions determined by a different inquiry team. The tribunal found that HCA had not made out an appearance of bias or prejudgment to warrant a fresh inquiry and, on the contrary, found that a large amount of the original reasoning from the original IPA report was not being quashed and could be integrated into the final report. The tribunal acknowledged that although the CMA is a specialist administrative body, it is subject to the general law duty to act fairly and for this reason there must be no evidence of bias or pre-determination of the issues to be re-considered. After considering these requirements in respect of the CMA's actions the tribunal held that there were no grounds to indicate that the CMA or their representatives had pre-judged any issues which would fall for reconsideration upon remittal.

The [2014] CAT 23 decision to remit decisions back to the original CMA inquiry group was affirmed on appeal in [2015] EWCA Civ 492. The court accepted that the CMA had in certain respects behaved inappropriately and unfairly towards the appellant. However, it upheld the decision of the CAT that the decisions should be remitted back to the original inquiry group. The court found that a fair-minded and informed observer would not conclude that there was a real possibility that the CMA's inquiry group is (or was) biased and that the conclusion that remission to the same inquiry group would cause reasonably perceived unfairness to the appellant, or would damage public confidence in the CMA's decision-making process, could not be drawn.

34. AXA PPP Healthcare Limited v Competition and Markets Authority [2015] CAT 5

The applicant challenged parts of the report produced by the CMA on its investigation of the provision of private healthcare. The applicant challenged the CMA's assessment of anaesthetist groups, as a result of which it found that the formation and operation of such groups did not give rise to an AEC. The challenge was on the grounds that CMA acted unlawfully in concluding that there was no AEC at the initial stage and acted irrationally in its approach to the price evidence on the basis of which it reached that decision. The applicant argued that the CMA had a legal obligation to carry out a further assessment before reaching any conclusion one way or the other on the question whether any AEC existed. The tribunal held that the CMA had not behaved irrationally and was lawfully entitled to decide that it had taken its investigations far enough, and that it would be disproportionate and potentially prejudicial to the fulfilment of its overall statutory obligations to take it further.

35. Federation of Independent Practitioner Organisations v Competition and Markets Authority [2015] CAT 8

The applicant challenged parts of the report produced by the CMA on the provision of private healthcare. The CMA report concluded that (i) there was no AEC arising from the buyer power in the healthcare market of private medical insurers in relation to consultants; and (ii) that there was an AEC arising from the lack of independent publicly available performance and fee information on consultants which gave rise to the distortion of competition between consultants by preventing patients from exercising effective choice. The claimant challenged the report on the grounds that the findings were irrational, the CMA did not consult with it properly and it was not given a fair opportunity to address the findings. The CAT dismissed the claimant's application for review on all six grounds.

36. R (on the application of Gallaher Group Ltd and another) v Competition and Markets Authority; R (on the application of Somerfield Stores Ltd and another) v Competition and Markets Authority [2015] EWHC 84 (Admin)

The claimants sought judicial review of the defendant authority's refusal to pay them sums they had paid following a settlement process. The CMA had reimbursed one of the other undertakings to an early resolution agreement, but refused to do the same for the claimants. The court stated that the CMA had to act fairly and consistently. It was essential that one signatory to an early resolution agreement was not given an advantage denied to another. Anything which can act as an inducement is likely, if not limited to the particular circumstances of a party, to be material and should be put to all parties. However, the court refused to grant the claimants' reimbursement on the basis

that a mistake leading to a financial benefit being given to a particular person should not be replicated by payments to others.

Appeal pending.

37. Ryanair Holdings plc v Competition and Markets Authority and another [2015] EWCA Civ 83

The appellant appealed on the grounds of procedural unfairness and proportionality against the decision of the CAT upholding the Competition Commission's decision that its minority stake in a rival airline was anti-competitive and that it should divest itself of all but a five per cent holding. The commission took into account evidence from other airlines but refused to disclose the names of those airlines or their evidence. The court held that the commission had not erred in finding that an airline's minority shareholding in a rival airline had resulted in a substantial lessening of competition or in ordering the divestiture of most of the shareholding. Its refusal to disclose certain evidence had not prejudiced the airline and therefore did not the common law principle of fairness.

38. 1239/4/12/15 Ryanair Holdings plc v Competition and Markets Authority [2015] CAT 14

Ryanair challenged the lawfulness of the CMA decision that the public takeover bid for Aer Lingus by International Consolidated Airlines Group, S.A. ("**IAG**") was not a material change of circumstances that required it to consider remedial action different from that set out in the final report issued by the Competition Commission in 2013 (the "**Final Report**"). The CAT rejected the challenge and held that the Enterprise Act 2002 did not require the CMA to conduct a fresh proportionality assessment when considering the implementation of the remedies it had already found to be proportionate in the Final Report. The CAT considered that the first step was for the CMA to consider whether a change is material in the sense that it may result in a different decision on remedy. The second stage was to consider what the decision on remedy ought to be in the light of that material change in circumstances (if any). The CMA considered whether there had been any material changes in circumstances which would justify departing from the conclusions on remedies in the Final Report. Having found no such changes in circumstances, the CMA rightly decided to implement the remedies that it considered to be comprehensive and proportionate. The CAT also found that the CMA's conclusion that the IAG proposed bid and formal offer did not constitute a material change of circumstances was a decision it was entitled to reach in the exercise of its discretion.

39. Societe Cooperative De Production Sea France SA v Competition and Markets Authority and another [2015] EWCA Civ 487

The appellant appealed against the dismissal by the CAT of its application for judicial review of the decision of the CMA that its merger control powers extended to the acquisition of certain assets of a liquidated company by a competitor. The appellant argued that the CMA erred in law in concluding that it had jurisdiction. The employees of the liquidated company were made redundant by the liquidation and were subsequently employed by the appellant. The court concluded that the CMA's decision (that there was a "relevant merger situation") was materially flawed. The CMA's finding that the mass re-employment was in reality a transfer was irrational and that finding was central to the CMA's decision that the liquidated company's "activities" were under the appellant's control or ownership.

Duty of candour

40. Peerless Ltd v Gambling Regulatory Authority [2015] UKPC 29

The appellant challenged the decision of the Supreme Court of Mauritius to refuse leave to apply for judicial review of the decision of the Gambling Regulatory Authority ("**GRA**"). The appellant was the holder of a licence granted by the GRA which was renewed from time to time. The appellant's licence was suspended and subsequently not renewed. The appellant sought to challenge the decisions of the GRA in respect of the suspension and non-renewal. The Supreme Court of Mauritius refused leave due to the failure by the appellant to make full and frank disclosure of facts and the misleading statements made in the appellant's affidavits. The Privy Council allowed the appeal on the grounds that, despite the lack of candour and notwithstanding the appellant's conduct in the proceedings, there was a sufficiently strong arguable case to call for the grant of leave to apply for judicial review. Failure to have regard to the merits could in some cases prejudice the overall need to ensure justice is done.

Andrew Lidbetter

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October 2015

JUDICIAL REVIEW OF THE REGULATORS

JUDICIAL REVIEW TRENDS AND FORECASTS 2015

MONDAY 5 OCTOBER 2015

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INTRODUCTION: STRUCTURE OF SESSION

Discussion of notable cases from the past 12 months in the following areas:

a. Procedural unfairness;
b. Human rights;
c. Irrationality;
d. Proportionality (EU context);
e. Cases in the Competition Appeals Tribunal;
f. Professional disciplinary cases;
g. Jurisdiction; and
h. Cases dealing with judicial review procedure.

Challenges to the conventional approach to regulators

- Parameters of proportionality in regulatory JR cases involving an EU element.
- Shift towards more intensive review of decision-making regardless of complexity?
- Realistic alternatives should be consulted on where statute does not preclude the authority from doing so.

(1) PROCEDURAL GROUNDS OF CHALLENGE

Rainbow Insurance Co Ltd v Financial Services Commission [2015] UKPC 15 (Lord Neuberger; Lord Mance; Lord Kerr; Lord Clarke; Lord Hodge)

- Procedural fairness: Consultation in all circumstances not envisaged by the statutory scheme or required by fairness.
- Legitimate expectation: No legitimate expectation that the claimant would be given sufficient time to adapt to the defendant's new regulatory requirements.

British Dental Association v General Dental Council [2014] EWHC 4311 (Admin) (Cranston J)

- Duty to consult: Focusing on the impact the change had on individuals rather than the global impact led to the conclusion that the circumstances did not attract a duty to consult.

(1) PROCEDURAL GROUNDS OF CHALLENGE

Bank Mellat v HM Treasury [2014] EWHC 3631 (Collins J)

- Disclosure: Whether the standard for disclosure by the public body should be the EU law or ECHR standard.
- Resolving an inconsistency: Though EU law was in play, the higher standard under ECHR jurisprudence (see *Secretary of State for Home Department v AF (No. 3)*) was applied as ECHR art.6.1 was relevant.

Damian McCarthy v Visitors to the Inns of Court [2015] EWCA Civ 12 (Burnett LJ; Newey J; Janet Smith)

- Rehearing: The same approach is used at common law and in relation to ECHR art.6 when deciding whether a finding of non-disclosure in proceedings calls for a rehearing.
- Fairness: The main question (in both circumstances) is whether the proceedings as a whole were fair.

(2) HUMAN RIGHTS

The Department of Energy, Climate Change v Breyer Group plc and others [2015] EWCA Civ 408 (Lord Dyson MR; Richards LJ; Ryder LJ) Engaged rights: A1P1

- Possessions: Possible future contracts are not protected under A1P1.
- Damages: Should be assessed by reference to the loss of those possessions for which recovery is permissible.

Bank Mellat v Her Majesty's Treasury [2015] EWHC 1258 (Comm) (Flaux J)

Engaged rights: A1P1

- Damages: Loss and damage suffered as a consequence of the unlawful interference is recoverable. This includes consequential losses such as loss of future earnings or profits.

Practice points:

- "Possession" does not resolve the issue as to what damages may be recovered once it is established that there has been a breach of A1P1.
- Significant financial implications for Regulators found to be in breach of A1P1.

(3) IRRATIONALITY

R (British Academy of Songwriters, Composers and Authors and others) v Secretary of State for Business, Innovation and Skills [2015] EWHC 1723 (Admin) (Green J)

- Expert opinion: Court will only reject a defendant's view if it falls outside a range of different, but quite reasonable views. If a defendant's case rests upon a theory or body of expert opinion that is within the range, "the defendant will succeed even though the claimant's case also rests upon expert evidence that is reasonable and within the range".

R (on the application of RWE Generation UK PLC) v Gas and Electricity Markets Authority [2015] EWHC 2164 (Admin) (Lewis J)

- Lawful differentiation: Differentiating between different classes of users is not necessarily precluded by the obligations of the Gas and Electricity Markets Authority.

Practice points:

- Standard of review where policy content is micro and the authority's margin of discretion is limited is relatively more intensive.
- Note the importance of the basis on which any differentiation in treatment is made in relation to the relevant decision-maker's obligations.

(4) PROPORTIONALITY (EU CONTEXT)

R (on the application of Lumsdon and others) v Legal Services Board [2015] UKSC 41 (Lord Neuberger; Lady Hale; Lord Clarke; Lord Reed; Lord Toulson)

- Review of EU measures: "Manifestly inappropriate" standard of review for discretionary decisions involving political, economic or social choices.
- Review of national measures relying upon derogations from general EU rights: Court applies a strict approach where there is interference. Less strict approach generally adopted where a national measure does not threaten the integration of the internal market. Court was wrong in *Sinclair Collis* to apply "manifestly inappropriate" standard of review.
- Review of national measures implementing EU law: "Manifestly inappropriate" standard of review. Court applies stricter approach if fundamental freedoms restricted.

Gibraltar Betting & Gaming Association Ltd v Secretary of State for Culture, Media and Sport and others [2014] EWHC 3236 (Admin) (Green J)

- Manifest inappropriateness: Where a measure is vitiated by a clearly identifiable and material error or because the end result fails the proportionality test to a sufficient degree to warrant relief.

(5) COMPETITION APPEAL TRIBUNAL

Two notable cases in this area:

R (on the application of Gallaher Group Ltd and another) v Competition and Markets Authority; R (on the application of Somerfield Stores Ltd and another) v Competition and Markets Authority

[2015] EWHC 84 (Admin) (Collins J)

- General rule: Failure to take account of the principles of finality and legal certainty in a decision is open to criticism. However, the general rule is that a mistake leading to a financial benefit being given to a particular entity should not be replicated by payments to others where public funds are concerned.

Societe Cooperative De Production Sea France SA v Competition and Markets Authority and another

[2015] EWCA Civ 487 (Arden LJ; Tomlinson LJ; Sir Colin Rimer)

- Irrationality: CMA's determination that the mass re-employment of SeaFrance's former employees was in reality a transfer was irrational.

(6) PROFESSIONAL DISCIPLINARY CASES

R (on the application of Baker Tilly UK Audit LLP and others) v Financial Reporting Council [2015] EWHC 1398 (Admin) (Singh J)

- Caution: Defendants in on-going disciplinary proceedings should be wary of approaching the Administrative Court before reaching the tribunal stage.

Norton v Bar Standards Board [2014] EWHC 2681 (Admin) (Fulford LJ; Stewart J)

- Fairness to the defence: Commencing a hearing in a defendant's absence should be exercised "with the utmost care and caution" (applying *R v Jones*).

Held v General Dental Council [2015] EWHC 669 (Admin) (Judge Stephen Davies)

- Fairness to the defence: Hearing commenced in defendant's absence was fair and in the public interest (applying *R v Jones*).

Fajemisin v General Dental Council [2013] EWHC 3501 (Admin) (Keith J)

- Revisiting previous decision: Regulatory body can revisit its previous decision if that decision was made in ignorance of the true facts and the basis for it amounted to a fundamental mistake of fact (relying on *Porteous v West Dorset District Council*).

(7) JURISDICTION

R (on the application of Bluefin Insurance Services Ltd) v Financial Ombudsman Service Ltd [2014] EWHC 3413 (Admin) (Wilkie J)

- Jurisdiction / precedent fact: Court was not limited to review of the FOS's decision on conventional judicial review grounds because the decision was one of precedent fact.

(8) JR PROCEDURE

R (on the application of British American Tobacco UK Ltd) v Secretary of State for Health; R (on the application of Philip Morris Brands Sarl and another) v Secretary Of State For Health [2014] EWHC 3515 (Admin) (Turner J)

- Permission refused: Formal intervention would not add anything of further proportionate value and the refusal did not preclude the proposed intervener from assisting one of the parties.
- "Party" status: Permission to intervene does not necessarily guarantee being afforded the status of party for the purpose of the judicial review proceedings or reference to the CJEU.

R (on the application of Philip Morris Brands Sarl and others) v Secretary of State for Health [2014] EWHC 3669 (Admin) (Turner J)

- "Party" status: Interveners afforded party status due to their ability to demonstrate a firmer relationship with the UK and higher level of experience and expertise relevant to the instant issues.

(8) JR PROCEDURE

Peerless Ltd v Gambling Regulatory Authority [2015] UKPC 29 (Lady Hale; Lord Clarke; Lord Wilson; Lord Hughes; Sir Paul Girvan)

- Disclosure: Failure to comply with duty of candour not necessarily fatal.

R (on the application of Veolia ES Ltd and others) v Revenue and Customs Commissioners [2015] EWCA Civ 747 (Arden LJ; Black LJ; Floyd LJ)

- Clarity: Party seeking a stay should be explicit about the overlap in proceedings and the reasons why the stay is needed.


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10

Recent Domestic Cases concerning Public International Law

Richard Hermer QC

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October 2015

Date	Case	Keywords & Comments
30 July 2015	*Mohammed v Secretary of State for Defence* [2015] EWCA Civ 843	Act of state; Afghanistan; Applicable law; Armed forces; Compensation; Detention without charge; Insurgency; International humanitarian law; Lawfulness of detention; Military occupation
15 July 2015	*South West SHA v Bay Island Voyages* [2015] EWCA Civ 708	Carriage by sea; Contribution; International law (Athens Convention 1974 governing the liability owed by carriers to their passengers); Limitations; Personal injury
9 July 2015	*AN (Afghanistan) v Secretary of State for the Home Department* [2015] EWCA Civ 684	Afghanistan; Asylum and Immigration Tribunal; Complicity; Crimes against humanity; Refugees; Standard of proof; War crimes
8 July 2015	*Mathieson v Secretary of State for Work and Pensions* [2015] 1 W.L.R. 3250 (SC)	Care; Children; Disability discrimination; Disability living allowance; Discrimination; Hospitals; In-patients; Parents; United Nations Convention on the Rights of the Child (1989); United Nations Convention on the Rights of Persons with Disabilities (2006)
04 June 2015	*RB v DB* [2015] EWHC 1817 (Fam);	Children's welfare; Defences; Objections; Parental contact; Return orders; Wrongful removal or retention; interaction between *Hague Convention on Parental Responsibility and Child Protection*

		1996, the *Hague Convention on the Civil Aspects of International Child Abduction 1980* and EU Regulation 2201/2003 (Brussels II Revised)
18 May 2015	*Iraqi Civilians v Ministry of Defence* [2015] EWHC 1254 (QB)	Armed forces; Causation; Foreign law; Inhuman or degrading treatment or punishment; Iraq; Joint liability; Tortious liability
13 May 2015	*Harb v Aziz* [2015] EWCA Civ 481	Death; Heads of state; State immunity
1 April 2015	*Ponnusamy v Secretary of State for Foreign and Commonwealth Affairs* [2015] EWHC 1760 (QB)	Civil procedure; Constitutional Acts; Independence; Malaysia; Torts
18 March 2015	*R (SG) v Secretary of State for Work and Pensions* [2015] 1 W.L.R. 1449 (SC)	Benefit cap; Best interests; Children's welfare; Indirect discrimination; Justification; Lone parents; Peaceful enjoyment of possessions; Women; UN Convention on the Rights of the Child
17 March 2015	*R (Al-Saadoon) v Secretary of State for Defence* [2015] 3 W.L.R. 503 (QBD)	Armed conflict; Civilians; Death; Detention; Extraterritoriality; Inhuman or degrading treatment or punishment; Investigations; Iraq; Jurisdiction; Refoulement; Right to liberty and security; Right to life
2 March 2015	*Al Fawwaz v Secretary of State for the Home*	Delay; Disclosure; Fresh evidence; Intelligence services; Investigatory powers; Letters of request; Mutual assistance; Sufficiency of evidence; Terrorism; United States

	Department [2015] EWHC 166 (Admin)	
26 February 2015	*B (Eritrea) v Secretary of State for Work and Pensions* [2015] 1 W.L.R. 3150 (CA)	Asylum support; Back payments; Breach of Geneva Conventions; Income support; Refugees
5 February 2015	*Al-Malki v Reyes* [2015] I.C.R. 931 (CA)	Diplomatic immunity; Domestic workers; Forced labour; Right to fair trial; Service; Trafficking people for exploitation
5 February 2015	*Benkharbouche v Embassy of Sudan* [2015] 3 W.L.R. 301 (CA)	Direct effect; Discrimination; Embassies; Employers' liability; Right to fair trial; State immunity
19 November 2014	*Rahmatullah v Ministry of Defence* [2014] EWHC 3846 (QB)	Act of state; Afghanistan; Applicable law; Detention without charge; Foreign states; Justiciability; Right of access to court; State immunity; Torture
12 November 2014	*R (on the application of Lord Carlile of Berriew QC) v Secretary of State for the Home Department* [2015] A.C. 945 (SC)	Foreign policy; Freedom of expression; International relations; Justification; National security; Proportionality; Terrorism [NB Decision primarily about ECHR]
7 November 2014	*Iraqi Civilians v Ministry of Defence* [2015] 2 All E.R. 714 (QBD)	Aggravated damages; Choice of law; Civilians; Detention; Ill treatment; Iraq; Occupation; Right to liberty and security; Security Council resolutions

30 October 2014	*Belhaj v Straw* [2015] 2 W.L.R. 1105 (CA)	Act of state; Applicable law; False imprisonment; Foreign states; Justiciability; Right of access to court; State immunity; Torture

Other Cases of Interest

- Judgment is awaited from the Supreme Court in:

    - The appeal in *R (Bancoult No 2) v Secretary of State for Foreign and Commonwealth Affairs*: https://www.supremecourt.uk/cases/uksc-2015-0021.html. The Supreme Court heard the appeal on 22 June 2015. This seeks to reopen the British Indian Ocean Territory litigation on the basis that the British Government had breached its duty of candour and failed to disclose relevant documents.

    - The appeal against *R (Youssef) v Secretary of State for Foreign and Commonwealth Affairs* [2013] EWCA Civ 1302; [2014] Q.B. 728, in which a judicial review claim was brought against the secretary of state's decision to allow a person to be added to a list of persons subject to sanctions under United Nations Security Council Resolution 1617.

- In November 2015, the Supreme Court is due to hear the conjoined appeals in *Belhaj v Straw* and *Rahmatullah v Secretary of State for the Home Department* in relation to the doctrines of state immunity and Foreign Act of State.

International Law in the Domestic Courts:

Some key questions

Richard Hermer QC

Ravi Mehta

(1) Why should you care?

a. International law as a source of English law: duty to interpret UK legislation compatibly; a source of rights, remedies and legal standards;

b. Practical resource in domestic proceedings: goes to

i. Justiciability;
(see, e.g. state immunity/Foreign act of State – *Belhaj v Straw*)

ii. Applicable rules and standards;
(e.g. the interaction of international humanitarian law with the ECHR in *Mohammed v Secretary of State for Defence* [2015] EWCA Civ 843)

iii. Remedies
(see, e.g. limitation - *South West SHA v Bay Island Voyages* [2015] EWCA Civ 708).

(2) What are the sources of International law? Art. 38(1) of the Statute of the ICJ

a. International Conventions/Treaties;
- Multilateral/Bilateral
- International/Regional

b. Customary international law:
- Elements/evolving nature; **high** threshold
(see, e.g. CA judgment in *Mohammed* at [176])

- Peremptory norms;

- Wide-ranging sources:
  - Acts of international institutions
(e.g. UN GA resolutions/Parliamentary resolutions of the Council of Europe)

  - Guidance from expert bodies
(such as the UNHRC in the Refugee context, or the ICRC in the international humanitarian law context)

c. General Principles of Law;

d. Jurisprudence and academic writings

- Judgments of international tribunals (e.g. ICJ, ICTY, ICTR) or Regional Courts such as the ECtHR or the IACtHR;
- Judgments of national courts;
- Decisions of international treaty bodies (e.g.UNCCPR, UNCAT)

(3) <u>What does international law say?</u>

a. How to interpret international treaties? Articles 31-32 of the *Vienna Convention on the Law of Treaties*

- Good faith in the "*context*" and in light of the "*object and purpose*" of the Treaty;
- Reference to instruments of the treaty/subsequent agreements or practices/ relevant rules of international law applicable in the relations between the parties;

- Reference to supplementary resources, where there is ambiguity.

b. Other sources

(4) <u>Relationship to Domestic Law:</u>

a. English legal system: dualist
   - No presumption that international law is applicable/effective until incorporated;

   - Unincorporated principles are not justiciable

b. Presumption of compatibility of English law (statutory or common law) with international law

c. Hierarchical position? Distinguish:

   i. binding rules/incorporated sources;

   ii. unincorporated sources

   iii. something in between? (e.g. the Refugee Convention: *R (European Roma Rights Centre) v. Immigration Officer at Prague Airport* [2005] 2 WLR 1 at [40]-[42] per Lord Steyn)

d. Customary International Law

An example: the *UN Convention on the Rights of the Child (UN CRC)*

- Relied upon regularly as an interpretative tool in domestic proceedings;

- Sometimes a powerful influence on the law,
(e.g. ZH (Tanzania) [2011] UKSC 4; [2011] 2 A.C. 166, p.12 at [33] per Baroness Hale of Richmond: "[i]*n making the proportionality assessment under article 8, the best interests of the child must be a primary consideration*". See also (*Borders, Citizenship and Immigration Act 2009*, s.55)

- In *R (SG) v Secretary of State for Work and Pensions* [2015] 1 W.L.R. 1449 (the welfare benefit 'cap' case), SC majority found that as an unincorporated treaty, a breach of the UNCRC could not be relied upon to found a breach of Article 14 ECHR in relation to the mothers of children affected by the rule – see Lord Reed JSC p.1477E-1478A at [90]; Lord Carnwath JSC (p.1484E-1485F at [114]-[116] and 1489D-F at [131]-[132]; Lord Hughes JSC (pp.1490F-1494C at [137]-[147]).

(5) Relationship to the Human Rights Act 1998:

a. Generally:

i. Incorporates international rules, e.g. UNCRC incorporated into analysis of breaches of ECHR rights such as Article 8 or Article 14;

ii. In *Burnip's case* [2013] PTSR 117, at [21] Maurice Kay LJ pointed out that "[i]*n the recent past, the European Court of Human Rights has shown an increased willingness to deploy other international instruments as aids to the construction of the Human Rights Convention*".

b. Specific rules of international law may influence the context of the Convention's standards:

e.g. International humanitarian law: *Mohamed*; *Al-Saadoon*

(6) Relationship to EU law:

a. The EU's capacity to enter into international agreements and/or represent the UK at the international level:
(e.g. in the WTO)

b. Explicit incorporation of international conventions into EU law:
(e.g. the Dublin Convention in the asylum context, given effect by Council Regulation 343/2003)

c. International law as a measure of legality of EU acts:
(e.g. Case C-308/06 *The Queen, on the application of International Association of Independent Tanker Owners (Intertanko) and Others v Secretary of State for Transport* [2008] ECR I-04057 (ECLI:EU:C:2008:312), examining the effect of The United Nations Convention on the Law of the Sea, signed in Montego Bay on 10 December 1982 ('UNCLOS'), and the International Convention for the Prevention of Pollution from Ships, signed in London on 2 November 1973, as supplemented by the Protocol of 17 February 1978 ('Marpol 73/78') on EU law)

d. International law as an interpretative tool used by EU courts
(e.g. Case C-249/96 *Grant v South West Trains* [1998] E.C.R. I-621; [1998] 1 C.M.L.R. 993; [1998] I.C.R. 449: taking into account the International Covenant on Civil and Political Rights in applying the principles of EU law).

11

Social Security Salami Slicing: What's Left to Cut?

Jamie Burton (Doughty Street), Sarah Clarke (PLP) and Michael Spencer (CPAG)

Introduction

"*Austerity measures must respect the principle of equality and scrupulously avoid discrimination. They should be accompanied by the simultaneous adoption of measures to mitigate the effect of the crisis on the most vulnerable*." Navi Pillay, UN High Commissioner for Human Rights, Statement to the General Assembly (October 2012).

1. The current Government was elected on a promise to cut £12 billion from the social security budget. Detailed plans were announced post-election in the July 2015 Summer Budget and legislation has been published in the form of the Welfare Reform and Work Bill ('the Bill').

2. Social security is an area in which the domestic and European courts have traditionally been reluctant to intervene with policy decisions and have tended to accord the State a high margin of appreciation.[1] Nevertheless, recent cases have shown the importance of ensuring that cuts to social security are implemented in a way which:

    a. does not unjustifiably discriminate against protected groups, such as women[2] or the disabled;[3]

    b. complies with the UK's obligations under international law, such as those which protect children and the disabled;[4]

    c. complies with the duty under s149 of the Equality Act 2010 to have due regard to the need to eliminate discrimination and promote equality of opportunity;[5]

    d. complies with common law principles and where relevant is within the *vires* of existing legislation.[6]

3. The Government has published a memorandum (the 'Memorandum') stating that in its view the Bill complies with the European Convention on Human Rights (EHRC), the UN Convention on the Rights of the Child (UNCRC), the UN Convention on the Rights of Persons with Disabilities

[1] See for example, *Stec v United Kingdom* (2006) 43 EHRR 1017at [52] and *Humphreys v HM Revenue and Customs* [2012] UKSC 18 at [15].
[2] *R(SG and Others) v Secretary of State for Work and Pensions* [2015] UKSC 16
[3] *Burnip v Birmingham City Counci*l [2012] EWCA Civ 629; [2013] PTSR 117; *Mathieson v Secretary of State for Work and Pensions* [2015] UKSC 47
[4] Ibid.
[5] *R(Bracking) v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345
[6] *R(Reilly and Wilson) v Secretary of State for Work and Pensions* [2013] UKSC 68.

(UNCRPD), the UN Convention on the Elimination of Discrimination against Women (CEDAW), the International Covenant on the Elimination of All Forms of Racial Discrimination (CERD) and the International Covenant on Economic and Social Rights (ICESR).[7]

4. This paper considers whether the proposals as currently drafted are lawful and specifically whether certain measures in the Bill comply with domestic and international law.

The Welfare Reform and Work Bill

5. The Bill contains a series of wide-sweeping changes to social security, including:

    a. Lowering the benefit cap threshold and varying it between London and the rest of the UK (estimated saving by 2020-21: £500 million).

    b. A four year freeze on most working age benefits (£4 billion).

    c. Abolishing the Family Element of Child Tax Credit and Universal Credit for families with children born after April 2015 (£675 million)

    d. Limiting entitlement to Child Tax Credits and Universal Credit to the first two children from April 2017 (£1.4 billion).

    e. Abolishing the Work-Related Activity Component of Employment and Support Allowance (the "WRAC") and the Limited Capability for Work Component in Universal Credit (£640 million).

    f. Increasing conditionality for responsible carers of pre-school children in Universal Credit (£0 million).

    g. Replacing Support for Mortgage Interest with Loans for Mortgage Interest (£2 billion).

6. In addition, the Government also intends to make the following changes by way of regulations:

    a. Reducing the income thresholds for tax credits and Universal Credit work allowances (£3.4 billion);

    b. Increasing the tax credits withdrawal rate (taper) from 41% to 48%, so that tax credits reduce more sharply as income increases (£245 million);

[7] *Memorandum to the Joint Committee of Human Rights on the Welfare Reform and Work Bill* https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/458886/welfare-reform-and-work-bill-2015-human-rights.pdf

c. Freezing the local housing allowance and restricting entitlement to housing benefit for young people aged 18-21 from April 2017 (£50 million).

7. In this paper we will consider four of the more controversial measures in the Bill, which together account for £2.5 billion or around 20% of the cuts: (i) the reduced benefit cap; (ii) the two child limit; (iii) the abolition of the WRAC and (iv) the increase in conditionality for responsible carers of pre-school children.

The reduced benefit cap

8. Clauses 8 and 9 of the Bill will reduce the benefit cap to £23,000 per annum for families (or £15,410 for single claimants) in London and £20,000 for families (or £13,400 for single claimants) outside of London.

9. The benefit cap was introduced under the Welfare Reform Act 2012. Ss96 and 97 limit the total amount of prescribed welfare benefits a claimant can receive to the average weekly earnings of a household in Great Britain net of tax and National Insurance, currently set at £500 per week (or £26000 p.a.) or £350 per week (£18,200 p.a.) for single claimants. There are prescribed exemptions, for example for pensioners, claimants who are in work (defined as being eligible to claim working tax credit) or claimants receiving disability living allowance or in the support group for employment and support allowance.[8] However, children's benefits (including child benefit and child tax credit) are included within the cap and lone parents with young children (who are currently exempt from having to seek work) are not exempted.

10. The Bill will:

    a. remove the link with average earnings, setting instead setting the cab according to arbitrary figures in primary legislation;

    b. grant the Secretary of State a power to lower or increase the benefit cap taking into account the national economic situation and any other matters the Secretary of State considers relevant;

    c. prescribe for the first time in primary legislation the benefits that must be included within the cap.

[8] Regulations 75F and G of the Housing Benefit Regulations 2006 (as amended).

Article 14

11. In *SG and Others*[9] a divided Supreme Court came very close to finding that the regulations introducing the current benefit cap breached Article 14 ECHR in conjunction with Article 1 Protocol 1.

12. The Claimants were two single mothers and their children who had fled domestic abuse. It was not disputed that the regulations disproportionately affect lone parents, who are overwhelmingly women. The claimants also claimed the regulations discriminated against them as victims of domestic violence. The dividing issue was whether this discriminatory treatment could be justified.

13. The Court was split three ways. Lady Hale and Lord Kerr gave strongly worded dissenting judgments which would have allowed the appeal. They gave particular weight to what they saw as the Government's failure, in introducing the cap the Government to comply with its obligations under the UNCRC to treat children's best interests as a primary consideration. Lord Kerr said "it cannot be in the best interests of the children affected by the cap to deprive them of the means of having adequate food, clothing, warmth and housing" [269]. Lady Hale noted that the children "suffer from a situation which is none of their making and which they themselves can do nothing about (per Lord Kerr at [227]).

14. Seen in this light, the Government's justification for the discriminatory effects did not stack up:

> "*Families in work are already better off than those on benefits and so the cap is not necessary in order to achieve fairness between them; saving money cannot be achieved by unjustified discrimination; but the major aim, of incentivising work and changing the benefits culture, has little force in the context of lone parents, whatever the age of their children. Depriving them of the basic means of subsistence cannot be a proportionate means of achieving it*." [229]

15. Lords Reed and Hughes for the majority found that the Government had had the best interests of children in mind when introducing the cap. Further, the UNCRC was not incorporated into UK law and could not be relied upon in a case involving sex discrimination under the Human Rights Act. The courts should not interfere lightly with the decisions of Parliament on issues of socio-economic policy and the Government's aims were legitimate. Although the short–term savings are a small proportion of the total welfare budget, they would nevertheless contribute towards deficit reduction, and the cap is also intended to change behaviour over the longer term.

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[9] *R(SG and Others) v Secretary of State for Work and Pensions* [2015] UKSC 16

16. Lord Carnwath provided the swing vote. He agreed with Lady Hale and Lord Kerr that the Government had not shown compliance with the UNCRC. Children's benefits (such as child benefit and child tax credit) are intended for the children, not the parent:

> "*The cap has the effect that for the first time some children will lose these benefits, for reasons that have nothing to do with their own needs, but are related solely to the circumstances of their parents*." [126]

17. However, following post-hearing submissions, he agreed with Lord Reed and Lord Hughes that the UNCRC could not be relied on in a case involving sex discrimination under Article 14 of the European Convention. As a result, the appeal was dismissed by a majority, with Lord Carnwath stating his hope that the Government will reconsider the effect on children when it reviews the cap, but leaving such issues to "the political, rather than the legal arena" [133].

Justification

18. Far from heeding Lord Carnwath's advice to review the cap's effect on children, the Government has pressed ahead with legislation to make it more severe, albeit on the strength of a pre-election manifesto commitment.

19. Reducing the cap will intensify its effect on families already capped and increase the numbers affected, while removing one of the Government's main justifications for the cap - the link with average earnings. The Government estimates an increase in 90,000 families affected, although ironically perhaps the proposed cuts to tax credits and ESA may reduce this number.[10] Claimants who are effected will have fewer options to avoid it. Shelter estimate that even families with one child will struggle to find housing in cheaper areas of London such as Tottenham and Catford. Families who need four bedrooms to be adequately housed will find that their housing benefit will no longer cover the cost of private sector rent in any part of the country.[11] These and other effects could potentially shift the proportionality assessment of the majority in *SG and Others* (see Lord Reed at [67]-[77]).

20. Evidence from the first two years of implementation suggests that overall savings to the public purse were over-estimated, and that the cap may even have presented a net cost to date, when the cost of Discretionary Housing Payments (DHP's) and the pressures on local authority housing budgets are taken into account.[12] The reduced cap is justified in the interests of increasing work incentives and

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[10] *Welfare Reform and Work Bill: Impact Assessment on the Benefit Cap*, available http://services.parliament.uk/bills/2015-16/welfarereformandwork/documents.html

[11] Citizens Advice, *Citizens Impact Assessment: Lowering the Benefit Cap* (2015) https://www.citizensadvice.org.uk/Global/CitizensAdvice/welfare%20publications/Benefit%20Cap%20Impact%20Assessment%20(1).pdf

[12] Children's Society, Gingerbread, CPAG, *Joint Parliamentary Briefing on the Benefit Cap* (2015).

creating 'more fairness' between families in and out of work. As families in work already receive substantial benefits to top up wages, this concept of fairness is necessarily a 'broad political concept'.[13]

21. The Bill seeks to insulate the cap from further challenge by setting in primary legislation the list of benefits that must be included. The intention is no doubt to ensure that any challenge must be brought by way of a declaration of incompatibility under s4 Human Rights Act 1998, rather than as previously by way of a challenge to the regulations. Nevertheless, a new challenge might focus on the Secretary of State's failure to exercise his new power to increase the level of the cap under proposed new section 96A(1) (inserted by clause 8 of the Bill) or to exempt certain groups under existing s96(3)(c) of the Welfare Reform Act 2012.

Article 8

22. In relation to current cap, the Court of Appeal in *SG* found:

> "*having regard to the sums which are available to the appellants on a weekly basis, we are in total agreement with the Divisional Court that the circumstances of these three families (including MG's family) do not approach the level of destitution. Accordingly we conclude that the appellants fall well short of demonstrating a breach of article 8*." [105].

23. That analysis may change once evidence emerges of the effects of the reduced cap on destitution. The move to Universal Credit also increases the likelihood of destitution in larger families, as claimants can lose income directly intended for subsistence as well as housing costs.

Conclusion

24. The reduced cap shifts the proportionality assessment and so is more likely to lead to a breach of Article 14. In order to comply with the UNCRC (as recommended by Lord Carnwath in *SG*), the Government will need to (i) conduct a full review of the impact on children of both the current cap and the proposed reduction and (ii) consider whether to take child benefit and/or child tax credit as paid to lone parents out of the list of benefits included in the cap.

The two child limit

25. Clauses 11 and 12 will limit entitlement to child tax credits or the child element of universal credit to the first two children in a household. Parents will not be entitled to claim for any third or subsequent

[13] [94] of the Divisional Court judgment in *JS and Others v SSWP* [2013] EWHC 3350 (QB).

children born after April 2017, unless the child is disabled (in which case they will only be able to claim the disability element and not the child element) or a prescribed exception applies. The Government has not yet published regulations setting out these exceptions, but has controversially proposed that they include an exemption for children born as a result of rape.[14]

Articles 14

26. As with the benefit cap, the two child limit will disproportionately affect women as mothers. Article 16(e) of CEDAW guarantees women's rights:

    "*to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights*".

27. As the Government acknowledges in the Memorandum, it may be argued that the measure discriminates against large families and that large families have status for the purpose of Article 14.

28. The proposal would on its face discriminate against members of religious groups who have a conscientious objection to the use of contraception or abortion, such as Catholics or Muslims, contrary to Article 14 read with Article 9 of the ECHR. Similar laws in other countries used for the purpose of population control, for example laws denying benefits to families with more than two children in some Indian states, are often criticised for discriminating against women and religious minorities and interfering with reproductive rights.[15]

Article 8(1)

26. The Court of Appeal in *SG* found that Article 8 was engaged by the benefit cap [85] but that it would be "*a premature and pessimistic assumption to conclude that in some instances family life would not be able to continue*" [100].

27. Given that the two child limit involves an attempt by the state to discourage poor families from having more than two children, whilst impinging on the ability of larger families to support their children, it is likely to engage Article 8(1).

28. According to the 1968 proclamation of the International Conference on Human Rights:

    "*Parents have a basic human right to determine freely and responsibly the number and the spacing of their children*."

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[14] Summer Budget 2015, available https://www.gov.uk/government/publications/summer-budget-2015

[15] The Hunger Project, 'Nine Facts about Two Child Norm' http://thp.org/files/Coalition%20fact%20sheet-%20final.pdf

UNCRC

29. Unlike the benefit cap, it cannot be said that two child rule will benefit the children affected directly, as their parents cannot avoid it by moving into work. Children can only be said to benefit to the extent that parents decide not to have them in the first place. However, the Government argues the savings afforded by the Bill as a whole in reducing spending on welfare "will allow the Government to protect expenditure on education, childcare and health and the improvements to the overall economic situation will have a positive impact on children and their best interests".

Justification

30. The Government says the two child rule is motivated by:

> "*a desire to ensure families in receipt of benefits are encouraged to make the same financial decisions as families supporting themselves solely through work, to ensure fairness for the taxpayer and to secure the economic recovery of the country*".[16]

31. Further:

> "*The current benefits structure, adjusting automatically to family size, removes the need for families supported by benefits to consider whether they can afford to support additional children. This is not fair to families who are not eligible for state support or to the taxpayer*."[17]

32. This justification can be criticised on a number of grounds.

33. Firstly, this takes the concept of 'fairness' developed to justify the benefit cap to absurdity. Rather than fairness between families in work and those out of work, the two child limit seeks to ensure fairness between families receiving benefit (whether or not they are in work) and families "who are not eligible for state support". The problem with this concept is that the Government is in effect talking about the same family. If a family with two children is not eligible for tax credits (i.e. because their income is too high – currently about £36,400) but "cannot afford" a third child, then on the birth of their third child they will by definition become a family that is eligible for tax credits, and thus fall onto the other side of the fairness equation.

34. The Government might say it wants to ensure fairness between families who "choose" to have a third child and those who do not (and therefore object to having to pay for them). As an

[16] Memorandum, [41].

[17] *Welfare Reform and Work Bill: Impact Assessment of Tax Credits and Universal Credit, changes to Child Element and Family Element* (2015).

objective, however, that would come dangerously close to discriminating directly against children in larger families, as well as interfering with parents' rights to choose the number of their children. The Government haven't sought to justify the policy on population control grounds and there is no suggestion that they are concerned to ensure that families have fewer children generally. The Impact Assessment assumes there will be no behavioural response to the policy, which means any money saved will be at the expense of those children whose parents make the 'wrong' choice.

35. Secondly, the policy assumes that, rape aside, women always have a free choice over whether or not to have a child. The Government has confirmed that only a conviction for rape will be considered adequate evidence, but women may have a third child for a number of reasons and the level of 'choice' may vary greatly. Consider for example the following hard cases: women in abusive relationships who feel pressured into having a third child; women who object to the use of contraception or abortion; women who use contraception in good faith but the contraception fails; women who decide they can afford a third child but whose income is reduced a result an unforeseen event (e.g. the death or serious illness of a parent, redundancy, breakdown of relationship due to domestic violence). These will need to be carefully considered in regulations.

36. Thirdly, the policy punishes the child for the parent's supposed transgression of having a third or subsequent child. This sits badly with the concept of fairness or with the best interests principle under the UNCRC.

37. Fourthly, the measure promotes perverse incentives, i.e. a very strong incentive for larger families to split up and a very strong disincentive for new couples to re-partner if they already have children. There is also an incentive to abort a third pregnancy. The Government does not appear to have considered these impacts at all.

38. Finally, unlike the benefit cap, once a third child is born there are no practical options for mitigation, short of a significant increase in income, splitting up the family or putting the children into care. Parents cannot avoid the policy by moving house or moving into work. There is no mitigating fund equivalent to DHP's for hard cases. Where children become destitute, parents may be able to rely on local authority payments under s17 of the Children Act 1989, but no additional funding has been made available from central government to allow for this.

Conclusion

39. Introducing what is in effect a blunt population control measure on the poor raises serious human rights concerns. If the clauses are passed, any regulations will need to include extensive exceptions protecting *inter alia* women, family integrity and religious freedom. The Government

will also need to conduct a thorough assessment of the policy's impact on the best interests of children and consider how to protect children from destitution.

The abolition of the Work Related Activity Component (WRAC)

40. Clauses 13 and 14 will abolish the payments made to claimants who are found to have limited capability for work by reason of illness or disability. This is called the "work -related activity" component for employment and support allowance and the "limited capability for work" component for universal credit and amounts to £29.05 per week. As a result, claimants who are found unfit for work following assessment will receive the same amount as JSA claimants or those in universal credit found fit to work, i.e. £73.10 per week.

Article 14

41. The European Court of Human Rights in *Thlimmenos v Greece* (2001) 31 EHRR 15 ruled that:

> "*The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different*." [38]

42. In *Burnip* the Court of Appeal found on this basis that the housing benefit regulations discriminated against certain groups of severely disabled people, while in *Mathieson* the Supreme Court found that the rules preventing payment of DLA whilst in hospital discriminate unlawfully against severely disabled children.

43. The abolition of the WRAC removes the additional support relied on by disabled claimants who are found to have limited capability for work. Claimants placed in the WRAG are a distinct identifiable group and are therefore likely to have a status which falls under Article 14. The question, therefore is whether the disproportionate impact on disabled people can be justified.[18]

Justification

32. The Government's Impact Assessment states:

> "*This measure is intended to provide the right incentives and support to enable those who have limited capability, but who have some potential for work to move closer to the labour market and when they are ready, back into work*."

[18] *Mathieson* at [24].

44. It is worth stressing that a claimant with limited capability for work has already passed a medical test which finds it is "*not reasonable to require him to work*".[19] Further, for anyone on ESA working fewer than 16 hours at minimum wage the cut does not increase work incentives at all, because their income is already discounted under the permitted work rule.[20] The cut will not only affect those in the WRAG, but also claimants in the support group, who will continue to get the support component but no longer receive the WRAC.

45. A perhaps unintended consequence of the change is that it will place an ESA claimant in a worse position to a JSA claimant when it comes to being sanctioned. Currently an ESA claimant who is sanctioned (for example for non-participation in the Work Programme) will lose all of the main component but will still be able to rely on the WRAC, in recognition of the fact that ESA claimants are by definition vulnerable. Now, sanctioned ESA claimants will receive nothing and (unlike JSA) sanctions are open ended.

46. As in *Mathieson*, a key issue will be the extent to which claimants can show that they have additional disability-related needs above those of JSA claimants which will not be met because of the withdrawal of £29.05 per week. Whether the Government has complied with the public sector equality duty will also be relevant. [21]

Public Sector Equality Duty

34. The equality assessment in relation to the impact on the disabled is so far limited to the following statement:

> *"The majority of those affected are in families where someone describes themselves as disabled, (under the Equalities Act 2010 definition). This is because those who report themselves as having a disability are more likely to qualify for those benefits which are affected by the policy change. Disability status on the survey is self-reported and so does not necessarily compare directly to benefit eligibility but is the best evidence available in the context to assess the impact on disabled people."*

47. It is highly questionable whether this is sufficient to meet the obligation under s149 Equality Act 2010. There is no recognition of the similarities between the limited capability for work test and the test for disability under the Equality Act 2010 which mean that the vast majority of those found not fit to work will be by definition disabled. There is no attempt to consider the severe

[19] S8 Welfare Reform Act 2007.
[20] Schedule 7, paragraph 5 ESA Regs
[21] *R(MA) v Secretary of State for Work and Pensions* [2014] EWCA Civ 13 at [98] and [99].

effects the policy will have on the ability of disabled people to meet their basic needs or on how they will cope with the move into work. There is no attempt to consider less harsh or blunt policies or ones that might mitigate its effects. As the McCombe LJ noted in *Bracking*:

> "*In the absence of evidence of a "structured attempt to focus upon the details of equality issues" (per my Lord, Elias LJ in Hurley & Moore) a decision maker is likely to be in difficulties if his or her subsequent decision is challenged*."

Conclusion

48. As a minimum, the Government will need to conduct a full impact assessment of the effect of the cut on disabled people who have limited capability for work and consider other less severe alternatives.

Full conditionality for carers of pre-school children

49. Clause 15 will subject responsible carers of three and four year olds who are claiming universal credit to full work-related conditionality. A responsible carer is someone who is either a lone parent or a member of a couple who has been designated by the couple jointly as responsible for a child (i.e. a "stay-at-home" parent).[22]

50. The Bill will amend ss 20 and 21 of the Welfare Reform Act 2012 so that:

    a. Responsible carers whose children are **aged under one** will continue to be **exempt** from all work-related requirements;

    b. Responsible carers whose children are **aged 1** (rather than the current ages 1 and 2) will be subject only to a **work-focused interview requirement**. This is a requirement to attend regular work-focused interviews at the job centre with a view that to making it more likely for the claimant to attend work or better paid work.

    c. Responsible carers whose children are **aged 2** (rather than the current ages 3 and 4) will be subject only to a **work preparation requirement**. This is a requirement to take particular specified actions for the purpose of making it more likely that the claimant will obtain paid work or better-paid work, such as attending skills assessment or participating in training.

    d. All responsible carers whose children are **aged over 2** (rather than the current age of 5 or over) will be subject to **all work-related requirements**. This includes requirements

[22] S19(6) Welfare Reform Act 2012.

to be actively available for and seeking full time work, to conduct at least 35 hours of work search per week and to attend unpaid work placements through programmes such as the Work Programme.

Article 14

51. The measure is likely to disproportionately affect women because:

    a. Responsible carers are overwhelmingly women. 92% of lone parents are women.[23] 84% of partners who stay at home to care for children are women.[24]

    b. A women who is a responsible carer of a child under five may be required to choose between caring for her young children and searching for a job, attending an unpaid work placement or taking up work that conflicts with her childcare responsibilities.

    c. Women are therefore disproportionately more likely to be sanctioned as a result of the measure. While they can appeal against the sanction, this is of scant comfort for the intervening period of destitution.[25]

52. Age 5 is important because it is the age children can first attend primary school. Currently, responsible carers with children aged between 5 and 13 can restrict their hours of job search and availability for work during school hours.[26] Responsible carers whose children are aged 3 and 4 will obviously be unable to benefit from this protection. So whether adequate childcare will be made available and whether the regulations will be amended so that responsible carers can restrict their hours of job search around affordable and available childcare will be crucial.

53. The Government has promised that up to 30 hours free childcare will be made available to "working" parents from September 2017, but the hours will not cover school holidays and will not be available to parents who are not working (but who will be required to spend 35 hours searching for work). There may also be problems with implementation, as currently half of local authorities say they cannot meet the Government's current childcare commitments.

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[23] SG and Others at [2].

[24] http://www.bbc.co.uk/news/magazine-27626510

[25] *R(Reilly and Wilson) v SSWP* [2013] UKSC 68, per Lords Neuberger and Toulson at [64]: "*The ability to appeal against a notice or a withholding of benefits (to a First-tier Tribunal of the Social Entitlement Chamber under section 12(2) of the Social Security Act 1998) is a form of protection. However, it is necessarily retrospective and, in practice, it may be small comfort to a person who is faced with an immediate termination of benefit.*"

[26] Regulation 88(2)(b) Universal Credit Regulations 2013.

Justification

54. The Government does not expect to save any money from the change, so technically this is not a budget cut. According to the Impact Assessment, the costs of providing childcare to 3 and 4 year olds and work-focused interviews to responsible carers (average: £40m) will outweigh the savings from responsible carers moving off benefit altogether (average £25m). Work incentives mean that responsible carers who avoid conditionality by moving into work will still be entitled to roughly the same amount of benefit.

55. The Government's justification is entirely focused on the proposed economic and social benefits:

> "*The main policy driver for these changes is to ensure full employment and as such the measures are within the margin of appreciation of the state in the sphere of economic and social policy. Increased numbers of the population in work is good for the economy and for those who become employed… The evidence shows that children in working households have better outcomes in academic attainment, training and future employment. Work provides a route out of poverty for families and improves children's wellbeing and life chances as fewer will grow up in workless households*."[27]

56. Requiring responsible carers to enter full-time work at an early stage and sanctioning them for failing to do so would be likely to impact on the child's right to an adequate standard of living under Article 27 of the UNCRC. Further, Article 18 provides that "*parents… have the primary responsibility for the upbringing and development of the child*" and that the state must "*render appropriate assistance to parents and legal guardians in the performance of child-rearing responsibilities*" and ensure that children of working families can benefit from child-care facilities.

57. The Government's view is that the measure will promote the best interests of pre-school age children by encouraging both parents into work. The evidence behind this could be criticised: none of it appears to relate to children under five or looks at the impact on children of having one rather than both parents in work. The Government claims these are social issues within the margin of appreciation. As Lord Wilson pointed out in *Mathieson*:

> "*the very concept of a "margin of appreciation" is inapt to describe the measure of respect which, albeit of differing width, will always be due from the UK judiciary to the UK legislature*" [25].

[27] Human Rights Memorandum, paragraph 65.

58. The UN Committee on the Rights of the Child has stressed the importance of supporting parents during early childhood:

> "*Early childhood is the period of most extensive (and intensive) parental responsibilities related to all aspects of children's well-being covered by the Convention: their survival, health, physical safety and emotional security, standards of living and care, opportunities for play and learning, and freedom of expression. Accordingly, realizing children's rights is in large measure dependent on the well-being and resources available to those with responsibility for their care*."[28]

59. If the Government is found to be in breach of the UNCRC, applying the decision of the majority in *SG* (and absent any onward appeal to Strasbourg), this would not be taken into account in considering justification of discrimination on grounds of sex.[29]

Conclusion

60. A lot will depend on whether the childcare offer for children aged 2 and 3 is adequate and accessible to responsible carers claiming universal credit and whether the regulations allow claimants to adjust their work search and work availability requirements accordingly. So far there have been few details on this.

[28] UN Committee on the Rights of the Child, General Comment No. 7 (2005) at [20] http://www2.ohchr.org/english/bodies/crc/docs/AdvanceVersions/GeneralComment7Rev1.pdf

[29] Per Lord Reed at [18], Lord Carnath [129]-[131] and Lord Hughes [146].

Article 14 discrimination in state benefit cases: trends and forecasts

PLP 5 October 2015

Jamie Burton (Doughty Street), Sarah Clarke (PLP) and Michael Spencer (CPAG)

'The duty of States parties to protect the vulnerable members of their societies assumes greater rather than less importance in times of severe resource constraints.'[1]

UN Committee on Economic, Social and Cultural Rights, General Comment No 3

Introduction

1. There are no enforceable economic, social or cultural rights in the UK. Although the UK has ratified ICESCR it has not been incorporated into domestic law and the ECHR is of course primarily concerned with civil and political rights.

2. Therefore it is generally uncontroversial that there are no rights to state benefits or social security in the UK. The attempts that have been made to infer such rights under ECHR have largely failed.

3. Nonetheless, there have still been a large number of challenges brought to various aspects of the benefits system. Mostly these have been on grounds derived from the common law, EU law, the public sector equality duty or Article 14 ECHR discrimination. As is clear from the summer 2015 budget and the Welfare Reform and Work Bill 2015/16, the program of reform to the UK social security system is likely to remain a political reality for some time to come and doubtless the legal challenges will also continue.

4. In the event that the HRA is repealed or substantially modified the common law standards of ultra vires and the principle of legality are likely to develop apace but as their application tends to be very case specific they are not discussed further here. EU law is also outside the scope of this short paper but is another area where major changes can be anticipated in the coming years, particularly in relation to benefits for EEA nationals. On the other hand the law regarding the public sector equality duty, contained in s.149 Equality Act 2010, seems to have

[1] *General Comment No 3*

become fairly settled, at least in terms of the relevant principles.[2] It is also probably fair to say that in the field of state benefits at least the relevant public authorities now routinely carry out equality impact assessments, although, somewhat controversially, not in relation to the cumulative impact of contemporaneous changes to the system.

5. It is perhaps in the area of Article 14 ECHR discrimination where judicial disharmony is most sharply edged. Below is a short account of where the law may soon be travelling in that context.

6. Article 14 ECHR states:

"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".

7. In *Clift v United Kingdom* the Grand Chamber applied Art 14 and stated that (at para [60]):[3]

"It should be recalled in this regards that the general purpose of Article 14 is to ensure that where a State provides for rights falling within the ambit of the Convention which go beyond the minimum guarantees set out therein, those supplementary rights are applied fairly and consistently to all those within its jurisdiction unless a difference of treatment is objectively justified".

8. It is well established that Article 14 does not require a substantive breach of one of the other Articles. However:

- The facts must be within the ambit of one of the other Articles.
- The discrimination alleged must be on the ground of a status recognised by the Article.
- If discrimination is shown then the burden shifts to the Defendant to show that the rule is justified as pursuing a legitimate aim and that it is proportionate.

[2] See R(Bracking) v. SSWP [2013] EWHC 897
[3] No. 7205/07

Ambit of one of the Articles

9. It is generally accepted that most state benefit challenges engage Article 1 Protocol 1, the right to peaceful enjoyment of one's possessions. Note however that Lord Reed considers this less settled than most, commenting in *SG* [2015] UKSC 16 (the benefits cap case) that at least in relation to the decision to cap a benefit the applicability of A1P1 is not straightforward. It may be that the Secretary of State does not concede this point quite so readily next time, should there be one.

10. There may also be arguments available that the alleged discrimination falls within other Articles, most notable Article 8 or in relation to the 2 child rule for example, Article 9 ECHR (religious freedom). In light of the decision in *SG* there may now be some utility in alleging discrimination within the scope of Article 8 as it may permit the Court to have regard to the UN Convention on the Rights of the Child (CRC) when analysing whether the measure is justified.

Categories of discrimination

11. There are three categories of discrimination under Article 14:

1. Direct discrimination
2. Indirect discrimination[4]
3. *Thlimmenos* discrimination[5] - i.e failing to treat differently persons whose situations are significantly different

12. Collectively these fall under a single principle: as Elias LJ at said *in AM (Somalia)*:

"[l]ike cases should be treated alike, and different cases treated differently. This is perhaps the most fundamental principle of justice."[6]

[4] E.g *DH v Czech Republic* (2008) 47 EHRR 3)
[5] *Thlimmenos v Greece (2001) 31 EHRR 15*
[6] AM (Somalia) [2009] EWCA Civ 634 at [34]

13. However, for the purposes of state benefit cases it may not matter how the alleged discrimination is characterised as the approach to justification is likely to the same, at least in the vast majority of cases (see Dyson in *R(MA) v Secretary of State for Work and Pensions* [2014] EWCA Civ 13 at 46).

'Status' under Article 14

14. The courts have taken a fairly broad approach to the meaning of "other status".

15. In *(AL) Serbia*, Lady Hale commented that "[i]n general, the list [in Article 14] concentrates on personal characteristics which the complainant did not choose and either cannot or should not be expected to change".[7] Lord Neuberger broadened this to include a person's status as homeless person.[8] Other examples include a person who has chosen a particular country to live in[9] and a former employee of the KGB.[10]

16. Lord Wilson recently observed that it "is clear that, if the alleged discrimination falls within the scope of a Convention right, the ECtHR is reluctant to conclude that nevertheless the applicant has no relevant status, with the result that the inquiry into discrimination cannot proceed."[11]

17. In that case he confirmed that Cameron Mathieson's status under Article 14 was "that of a severely disabled child who was in need of lengthy in-patient hospital treatment and that, in comparison with a severely disabled child who was not in need of lengthy in-patient hospital treatment, application to Cameron of the 84-day rule discriminated against him contrary to article 14."[12]

Justification

18. The Supreme Court has spent quite a lot of time in the last couple of years discussing the law regarding proportionality. The definitive statements as to what is required of the domestic

[7] *AL (Serbia) v Secretary of State for the Home Department* [2008] UKHL 42, [2008] 1 WLR 1434
[8] *R (RJM) v Secretary of State for Work and Pensions* [2008] UKHL 63, [2009] AC 311
[9] *R (Carson) v Secretary of State for Work and Pensions* [2005] UKHL 37, [2006] 1 AC 173
[10] *Sidabras and Dziautas v Lithuania* (2004) 42 EHRR 104).
[11] *Mathieson v. So DWP* [2015] UKSC 47 at [22]
[12] Ibid at [19]

courts when considering proportionality are set out in *Bank Mellat v. HM Treasury* (*No 2*) [2013] UKSC 38. Lord Reed set it out as follows [at 74]:

"it is necessary to determine (1) whether the objective of the measure is sufficiently important to justify the limitation of a protected right, (2) whether the measure is rationally connected to the objective, (3) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective, and (4) whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter ....In essence, the question at step four is whether the impact of the rights infringement is disproportionate to the likely benefit of the impugned measure."

19. However, in A1P1 matters which concern social policy specific standards have been developed.

20. In *Stec v United Kingdom* (2006) 43 EHRR 47 the Strasbourg Court said in the (oft quoted) paragraphs:

"51. A difference of treatment is, however, discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised. The Contracting State enjoys a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment."

52. The scope of this margin will vary according to the circumstances, the subject-matter and the background. As a general rule, very weighty reasons would have to be put forward before the Court could regard a difference in treatment based exclusively on the ground of sex as compatible with the Convention. On the other hand, a wide margin is usually allowed to the State under the Convention when it comes to general measures of economic or social strategy. Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is in

the public interest on social or economic grounds, and the Court will generally respect the legislature's policy choice unless it is "manifestly without reasonable foundation".'

21. This has been taken to mean that the "manifestly without reasonable foundation" test applies to all social security cases irrespective of the ground upon which the alleged discrimination is said to be based:

"It seems clear from Stec, however, that the normally strict test for justification of sex discrimination in the enjoyment of the Convention rights gives way to the 'manifestly without reasonable foundation' test in the context of state benefits."[13]

22. The same test was applied by Lord Neuberger (with whom Lord Hope, Lord Walker and Lord Rodger agreed) in *RJM*[14], which concerned the denial of income support disability premium to rough sleepers. Lord Neuberger said at paragraph 54:

"policy concerned with social welfare payments must inevitably be something of a blunt instrument, and social policy is an area where a wide measure of appreciation is accorded by the ECtHR to the state (see para 52 of the judgment in Stec 43 EHRR 1017). As Lord Bingham said about a rather different statute, "[a] general rule means that a line must be drawn, and it is for Parliament to decide where", and this "inevitably means that hard cases will arise falling on the wrong side of it, but that should not be held to invalidate the rule if, judged in the round, it is beneficial" - *R (Animal Defenders International) v Secretary of State for Culture, Media and Sport [2008] 2 WLR 781* , para 33.

23. Lord Neuberger went on to say that it was not possible to characterise the views taken by the executive as 'unreasonable', and concluded [57]:

'The fact that there are grounds for criticising, or disagreeing with, these views does not mean that they must be rejected. Equally, the fact that the line may have been drawn imperfectly does not mean that the policy cannot be justified. Of course, there will come a point where the justification for a policy is so weak, or the line has been drawn in such an

[13] Baroness Hale in *Humphreys v Revenue and Customs Commissioners* [2012] UKSC 18 at [19]
[14] *R (RJM) v Secretary of State for Work and Pensions* [2008] UKHL 63, [2009] 1 AC 311

arbitrary position, that, even with the broad margin of appreciation accorded to the state, the court will conclude that the policy is unjustifiable.'

24. Notably, in *MA* the Master of the Rolls, Lord Dyson, observed that Lord Neuberger's comments in *RJM* "came quite close" to saying that all that the Secretary of State has to show is that his policy is not irrational."[15]

25. That said, it should be remembered that "the fact that the test is less stringent than the "weighty reasons" normally applied ... does not mean that the justifications put forward for the rule should escape careful scrutiny. On analysis, it may indeed lack a reasonable basis",[16] or be based on a "fallacy" which "defied everyday experience."[17]

The beginning of the end for the 'manifestly without reasonable foundation' test

26. From the passages cited above it can be seen that thee distinct but related issues account for the test and its application in state benefit cases:

    1. The wide margin of appreciation that Strasbourg affords the UK and other states in relation to its social security provisions;

    2. The intrinsic value of having general rules or "bright lines";

    3. The respect the courts are required to display towards the democratic legitimacy and institutional competence of the legislature.

27. It is arguable that the force behind each of these as explanations or justifications for the rule is waning, at least in respect of the first two.

Margin of appreciation

[15] Ibid at [80]
[16] Baroness Hale in Humphreys paragraph 22
[17] Lord Hoffman in *G (A Child) (Adoption*) [2008] UKHL 38 at [18].

28. First, as noted by Lord Wilson in *Mathieson* at [25], "the very concept of a "margin of appreciation" is inapt to describe the measure of respect which, albeit of differing width, will always be due from the UK judiciary to the UK legislature."

29. Related to this, it now seems fairly clear that the 'manifestly without reasonable foundation' test the test is only applicable to the first stage of the four stages of the proportionality exercise, namely the broader policy choice of "whether the objective of the measure is sufficiently important to justify the limitation of a protected right", and the all important final stage ,will be determined by "asking simply whether, weighing all relevant factors, the measure adopted achieves a fair or proportionate balance between the public interest being promoted and the other interests involved", the test which is otherwise of general application in Convention jurisprudence (see Lord Mance in *Recovery of Medical Costs for Asbestos Diseases (Wales) Bill,* Re Supreme Court, 09 February 2015 at [44-52]).[18]

30. Although "that does not mean that significant weight may not or should not be given to the particular legislative choice even at the fourth stage", it is potentially of profound importance as the high threshold test will not apply to the precursor questions, namely:

(2) whether the measure is rationally connected to the objective;

(3) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective; and

(4) whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter.

31. In particular, and in light of recent decisions, it seems the Court may be more receptive to evidence that the measure in question is unlikely to contribute to the achievement of the objective, at least to the extent with which the Secretary of State maintains it will.

[18] Notably, these points were not argued in SG but Baroness Hale nonetheless observed that the 'manifestly without reasonable foundation' test was considered to be of more limited application that had been conceded by the parties in that case (at [209 & 210]).

32. In cases which concern measures that are in large part justified by the anticipated financial savings this loosening of the test may result in the court paying closer attention to the externalities which result from their implementation – for example see Baroness Hale when evaluating the savings made by the benefit cap (*SG* at [194]). Plainly this will be a feature of any future challenge to the new cap.

33. The restriction in the application of the test may also affect how the courts approach the consideration of alternative sources of support or assistance the availability of which is said to contribute towards the justification of the cut, reduction or cap in question.

34. In *Morris* it was decided that a discriminatory measure is no less discriminatory simply because there are other means by which the adverse treatment might be ameliorated: "[a]n incompatibility remains an incompatibility whatever other forms of recourse are or become available".[19]

35. However, in *MA* the Court of Appeal were persuaded that the fact that Discretionary Housing Payments were ostensibly available for some of those affected by the removal of the subsidy meant the removal was justified. Notably, the opposite conclusion was reached in *Burnip*.

36. In *Mathieson* the availability of NHS services in lieu of parental services was considered by all the Supreme Court judges to be "irrelevant". Indeed the issue, which was at the heart of the Secretary of State's case on justification, was dealt with in a single line [47 & 55].

Deference

37. Lord Neuberger said this in *Rotherham MBC v. SoS BIS* [2015] UKSC 6:

"61 The courts have no more constitutionally important duty than to hold the executive to account by ensuring that it makes decisions and takes actions in accordance with the law. And that duty applies to decisions as to allocation of resources just as it applies to any other decision. However, whether in the context of a domestic judicial review, the Human Rights Act 1998 , or EU law, the duty has to be exercised bearing in mind that the executive is the primary decision-maker, and that it normally has the information, the contextual

[19] *Morris v. Westminster CC* [2006] HLR 8 at 30-32

appreciation, the expertise and the experience which the court lacks. The weight to be given to such factors will inevitably depend on all the circumstances.

62 The importance of according proper respect to the primary decision-making function of the executive is particularly significant in relation to a high level financial decision such as that under consideration in the present case. That is because it is a decision which the executive is much better equipped to assess than the judiciary, as (i) it involves an allocation of money, a vital and relatively scarce resource, (ii) it could engage a number of different and competing political, economic and social factors, and (iii) it could result in a large number of possible outcomes, none of which would be safe from some telling criticisms or complaints.

65 Nonetheless, a court should be very slow about interfering with a high level decision as to how to distribute a large sum of money between regions of the UK. But the degree of restraint which a court should show must depend on the purpose of the allocation, the legal framework pursuant to which the resources are allocated, and the grounds put forward to justify the allocation. The line between judicial over-activism and judicial timidity is sometimes a little hard to tread with confidence, but it is worth remembering that, while judicial bravery and independence are essential, the rule of law is not served by judges failing to accord appropriate respect to the primary policy-making and decision-making powers of the executive.

93 That consideration is relevant to these appeals, since the question of proportionality involves controversial issues of social and economic policy, with major implications for public expenditure. The determination of those issues is pre-eminently the function of democratically elected institutions. It is therefore necessary for the court to give due weight to the considered assessment made by those institutions. Unless manifestly without reasonable foundation, their assessment should be respected."

38. In *SG* Lord Reed stressed that Parliament had explicitly considered and approved of the cap by affirmative resolution and cited Lord Sumption in *Bank Mellat* at 44 that the court's "constitutional function call for considerable caution" before holding unlawful something which is within the "ambit of Parliament's review." Lord Reed then cited the words of Lord Bingham in *R (Countryside Alliance) v Attorney General [2007] UKHL 52; [2008] AC 719* , para 45:

"The democratic process is liable to be subverted if, on a question of moral and political judgment, opponents of the Act achieve through the courts what they could not achieve in Parliament."

39. On the other hand Baroness Hale's view in *SG* was that they were not concerned with moral or political judgements but legal ones [160]:

"Therefore, even in the area of welfare benefits, where the court would normally defer to the considered decision of the legislature, if that decision results in unjustified discrimination, then it is the duty of the courts to say so. In many cases, the result will be to leave it to the legislature to decide how the matter is to be put right."

40. Having considered the evidence Baroness Hale's conclusions on justification disclosed no obvious judicial deference to the views of Parliament but the considerable analytical skills of a judge [229]:

"Viewed in the light of the primary consideration of the best interests of the children affected, therefore, the indirect discrimination against women inherent in the way in which the benefit cap has been implemented cannot be seen as a proportionate means of achieving a legitimate aim. Families in work are already better off than those on benefits and so the cap is not necessary in order to achieve fairness between them; saving money cannot be achieved by unjustified discrimination; but the major aim, of incentivising work and changing the benefits culture, has little force in the context of lone parents, whatever the age of their children. Depriving them of the basic means of subsistence cannot be a proportionate means of achieving it."

41. It is of course in the essence of discrimination law to resist the excesses of a majoritarian system, no matter how much consideration it has given to the measure in question. Indeed, as observed by Lord Hope in *G (A Child),* the more controversial a measure proves to be in the legislative process the greater the risk that it might be discriminatory and it "is for the courts to see that does not happen."[20]

[20] *G (A Child) (Adoption)* [2008] UKHL at 48

42. There might also be limits however to the extent that *every* decision made in connection with a particular policy measure must be approached with the degree of caution espoused by Lord Neuberger in *Rotherham*. For example in *MA* it was argued that whilst the court should be relatively deferential in respect of the "general policy" choice that tenants in social housing should not have more space than they need, the detailed decisions taken in the implementation of that choice should be subjected to the ordinary "fair balance" proportionality test. It is well within the competence and constitutional role of the court to test and examine the finer detail of legislative scheme in a way that parliamentarians may not be so readily able to do. The argument was unsuccessful in the Court of Appeal but it remains to be seen what the Supreme Court make of it when *MA* is heard in spring 2016.

43. In any event it seems the courts are becoming more willing to hear evidence and make findings about the facts in cases that concern policy decisions and state benefits. In *SG* the Supreme Court requested certain statistical evidence to be provided to it and in the final analysis the facts about the numbers of capped single parents of children under 5 who were able to secure employment in order to escape the cap was of some significance in the judicial deliberations [56-8], [74].

44. *Mathieson* is another good example. In addition to the evidence regarding Cameron Mathieson's circumstances, the Supreme Court was also influenced markedly by evidence in the form of a survey conducted by a charity which was said to be "spearheading a campaign" against the measure [31]. The results of the survey suggested that disabled children in hospitals continued to need considerable care from their families and concluded that the justification for stopping their Disability Living Allowance after 84 days was unproven [47]. The contrast with the decision of the Court of Appeal, which considered the same evidence, is stark ([see paragraph 34 at [2014] EWCA Civ 286]).

Bright line rules

45. Another tension in the case of *Mathieson* is reflected in the relief granted. The Court declined to grant any relief beyond that which was required to meet the violation of Cameron Mathieson's rights. Although it was recognised that "the court's decision will no doubt enable many other disabled children to establish an equal entitlement", it was accepted that it will not always follow that every termination of support after 84 days would breach the

child's rights and therefore the Secretary of State ought to be afforded an opportunity to take steps other than the abrogation of the rule in order to avoid violating the rights of other disabled children [49].

46. This conclusion was not dissimilar to a result that Laws LJ had said in the Court of Appeal would "abolish the brightline rule in favour of ad hominem approach".[21]

47. Obviously there are likely to be significant limits to how far this approach will be allowed to develop in light of the costs and uncertainty involved but it might allow for the worst of the "hard cases" referred to by Lord Bingham in *Animal Defenders* to escape the consequences of being on the wrong side of the line. Notably, whilst agreeing with Lord Wilson's conclusions, Lord Mance, with whom Lord Clarke and Lord Reed agreed, felt it necessary to distance himself somewhat from Lord Wilson's approach that bright lines were only lawful "within reason" [at 51].

48. Of particular note in this respect, the Supreme Court is now likely to be hearing several cases in which different Claimants will maintain that they represent a "precise class of person"[22] that ought to have been exempted from the bedroom tax, including women in sanctuary regimes and grandparent carers of disabled children.[23] This may require the Court to consider the merits of a number of different classes being exempted as regards a more general rule which is ameliorated by the availability of DHPs.

Relevance of unincorporated treaties

49. In *JS* it was not in dispute that:

"the Convention rights protected in our domestic law by the Human Rights Act can also be interpreted in the light of international treaties, such as the UNCRC , that are applicable in the particular sphere."[24]

[21] Ibid at [38].
[22] as per Laws LJ at 53 in Divisional Court
[23] *R(A) v.SSDWP and R(SR) v. SSDWP* granted permission to appeal to the CA [2015] EWCA Civ 772 on an expedited basis so that they may be heard by SC at the same time as MA (insofar as necessary).
[24] Lord Reed at [83]

50. By way of example Maurice Kay said in *Burnip* that:

"If the correct legal analysis of the meaning of art.14 discrimination in the circumstances of these appeals had been elusive or uncertain (and I have held that it is not), I would have resorted to the CRDP and it would have resolved the uncertainty in favour of the appellants. It seems to me that it has the potential to illuminate our approach to both discrimination and justification."[25]

51. It is also fairly clear that the CRC, for example, will be relevant in the "illumination" of children's rights and questions about interference with their parents' right to respect for their family life.[26] In particular Article 3 of the Convention has been relied on in a number of different cases. Article 3 states:

"In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

52. It is clear that the requirement to treat the best interests of the child as a primary consideration is more than traditional public law obligation to have regard to a material consideration. Instead it required a more structured decision making process as set out in *FZ (Congo) v SSHD* [2013] 1 W.L.R. 3690 at 10:

(1) The best interests of a child are an integral part of the proportionality assessment under article 8 ECHR ;

(2) In making that assessment, the best interests of a child must be a primary consideration, although not always the only primary consideration; and the child's best interests do not of themselves have the status of the paramount consideration;

(3) Although the best interests of a child can be outweighed by the cumulative effect of other considerations, no other consideration can be treated as inherently more significant;

(4) While different judges might approach the question of the best interests of a child in different ways, it is important to ask oneself the right questions in an orderly manner in order

[25] *Burnip v Birmingham City Counci*l [2012] EWCA Civ 629; [2013] PTSR 117 at [22]
[26] Lord Reed at [86]. Lord Hughes at

to avoid the risk that the best interests of a child might be undervalued when other important considerations were in play;

(5) It is important to have a clear idea of a child's circumstances and of what is in a child's best interests before one asks oneself whether those interests are outweighed by the force of other considerations;

(6) To that end there is no substitute for a careful examination of all relevant factors when the interests of a child are involved in an article 8 assessment; and

(7) A child must not be blamed for matters for which he or she is not responsible, such as the conduct of a parent.

53. Important aspects of this obligation remain unresolved, including:

(i) whether it is legitimate to treat as a primary consideration the best interests of children generally or only the ones directly affected by the measure in question.[27]

(ii) the extent to which the Court will consider authoritative the General Comments of the Treaty Monitoring Bodies like the UN Committee on the CRC.[28]

54. In JS it was argued that the CRC was relevant to the consideration of justification under Article 14 and under Article 8. That aspect of the claim was lost on the facts before the Court of Appeal – there "was ample evidence that the Secretary of State did have regard to the interests of children as a primary consideration".[29]

55. In the Supreme Court that finding was reversed. Lords Kerr, Canworth and Baroness Hale all agreed that Article 3(1) of the CRC had not been complied with as the best interests of the children had not been treated as a primary consideration.

56. In the *SC* the Secretary of State argued that international treaties are only relevant to the content of the substantive right and are irrelevant to the question of Article 14 discrimination and/or the question of proportionality.

[27] See Lord Hughes at [153] c/f Baroness Hale at [226]

[28] Lord Carnwath considered them to be "authoritative guidance" in SG [at 106].

[29] [2014] EWCA Civ 156 at [74]

57. On both those points the Secretary of State lost. The argument therefore focussed on whether Article 3 of the CRC in particular was relevant to the question whether the benefit cap unlawfully discriminated against women in the their enjoyment of their A1P1 property rights.

58. Baroness Hale and Lord Kerr both found the CRC was directly relevant in that the best interests of the Appellants' children was obviously relevant to the question whether the benefit cap as it applied to sole parents was justified. As stated by Baroness Hale [at 218]:

> "Whatever the width of the margin of appreciation in relation to the subject matter of a measure, the Strasbourg court would look with particular care at the justification put forward for any measure which places the United Kingdom in breach of its international obligations under another human rights treaty to which we are party."

59. The majority concluded that it did not. Lord Reed said at 89:

> "In cases where the cap results in a reduction in the resources available to parents to provide for children in their care, the impact of that reduction upon a child living with a single father is the same as the impact on a child living with a single mother in similar circumstances, or for that matter a child living with both parents. The fact that children are statistically more likely to be living with a single mother than with a single father is unrelated to the question whether the children's rights under article 3(1) of the UNCRC have been violated. There is no factual or legal relationship between the fact that the cap affects more women than men, on the one hand, and the (assumed) failure of the legislation to give primacy to the best interests of children, on the other."
>
> The conclusion that the cap is incompatible with the UNCRC rights of the children affected therefore tells one nothing about whether the fact that it affects more women than men is unjustifiable under article 14 of the ECHR read with A1P1.
>
> The contrary view focuses on the question whether the impact of the legislation on children can be justified under article 3(1) of the UNCRC, rather than on the question whether the differential impact of the legislation on men and women can be justified

under article 14 read with A1P1, and having concluded that the legislation violates article 3(1) of the UNCRC, mistakenly infers that the difference in the impact on men and women cannot therefore be justified.

60. Lord Hughes, who agreed with Lord Reed, put it more starkly, and stated that that "interests of the children would be exactly the same in [the child of a male lone parent's] case, but he would have no article 14 claim to discrimination." [147]

61. Lord Canwarth also agreed with Lord Reed but "with considerable reluctance"

62. There are a number of problems with the majority's decision:

a. Lord Hughes statement that the "interests of the children would be exactly the same in [the child of a male lone parent's] case, but he would have no article 14 claim to discrimination" [147] may not be correct. If the Secretary of State were to remove the measure insofar as it applied to women then male single parents (and therefore their children, at least in the manner referred to by Lord Hughes) would have a straightforward claim for Article 14 discrimination. This is akin to the type of situation identified by Elias LJ in *AM (Somalia)* [2009] EWCA Civ 634 at [43}:

"Furthermore, in some cases, once the rule is found to operate in an indirectly discriminatory way, it may be impossible lawfully to apply the rule at all. To continue with the example of a requirement of full time work, if the rule is found disproportionately to impact on women without justification, then it is unlawful to apply it to women. However, it is difficult to see how it can thereafter be applied to that small minority of men with childcare responsibilities who are also prejudiced by the rule, since following the dis-application of the rule to women, they will now be able to claim direct discrimination on grounds of sex in circumstances where it has already been held that the rule was not justified. In such circumstances, the apparently neutral rule applying to all should not be applied at all."

b. The manner in which the majority characterised the decision was arguably the wrong way around. The majority saw no reason why the discrimination against their mother could be relevant to their children's best interest whereas Baroness Hale and Lord Kerr were surely

right to focus on the relevance of the children's best interest to the justification for the imposition of the benefit cap on single mothers. As Baroness Hale said [at 224]:

"What has to be considered is whether the measure itself, which in this case I take to be the benefit cap as it applies to lone parents, can be justified independently of its discriminatory effects. In considering whether that measure can be justified, I have no doubt at all that it is right, and indeed necessary, to ask whether proper account was taken of the best interests of the children affected by it.

c. In this regard the decision of Lord Carnwath is seemingly incomplete. Having accepted that "in considering the nature of the admittedly discriminatory effect of the scheme on lone parents, and its alleged justification, the effects on their children must also be taken into account" and that their best interests had not as a question of fact been treated as a primary consideration", he did not go on to give an opinion as to whether the cap was justified, seemingly on the basis that the CRC, and any violation of it, could play no part in the court's analysis. But absent the existence of the CRC the application of the normal ECHR principles would nonetheless have required a determination as to whether the cap was justified as it applied to sole parents, having regard to the effects on their children. One is left wondering whether Lord Carnwath's view in this regard might have made a difference to the result.

d. It is perhaps the case that the real difference between Lord Reed and Hughes on the one hand and Lords Carnwath and Kerr[30] on the other, may have been that the former saw it as inevitable that if applicable the best interest of the child test would effectively replace the "manifestly without reasonable foundation" test and this would be too profound an intrusion on the legislature's capacity to govern (see Lord Reed at [79] and Lord Hughes at 147). However, this is surely an unwarranted interpretation of the requirements of Article 3 which are plainly of a process and not substantive quality.

e. Finally, there is potentially another problem with the analysis of the majority. It is clear that Lords Reed, Hughes and Carnwath could not see a means by which the interest of the their children could be relevant to the whether or not an interference with their property is justified (Lord Reed at 89, Lord Carnwath [131], Lord Hughes, [146]) but Lord Hughes

[30] Lord Carnwath at [120] and Lord Kerr at [268]

appeared to concede that the CRC would have been relevant had the Claimants' Article 8 rights to respect for family life been engaged by the measure in question [146].

The Court of Appeal found that Article 8 was engaged and this finding was not appealed. Furthermore, it was agreed that the Appellants' case under Article 14 was put on both Article 8 as A1P1. However, only Lord Reed expressly considered (and rejected) whether the benefit cap did indeed engage Article 8 [79] whilst Lord Carnwath stated somewhat ambiguously that the Appellants' argument that they were discriminated under Article 14 in connection with Article 8 didn't add anything of substance to the claim based on A1P1.

The result is that the compatibility or otherwise of the benefit cap with Article 14 taken with Article 8, with explicit reference to the best interests of the children, remains somewhat unclear. This is likely to be in issue in the event that the proposed reduction in the cap is challenged.

63. Interesting in *Mathieson* Lord Wilson limited his conclusion on the CRC issue to the observation that the Article 14 breach "would harmonise with [although not be based on] a conclusion" that Conrad Mathieson's best interests had not been treated as a primary consideration.

64. In any event and in the meantime we are left with the situation described by Carnwath at [130]

"In each of these cases, it can plausibly be argued that the court was using the international materials to fill out, or reinforce, the content of a Convention article dealing with the same subject matter. They can be justified broadly as exercises in interpretation of "terms and notions" in the Convention, consistently with the *Demir* principle."

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Future proofing: running human rights arguments under the common law.

- Adam Straw -

1. There have been lots of exciting things going on in the courts recently regarding the constitution and fundamental rights. Michael Fordham QC has delivered an overview of these changes in his earlier talk. This seminar aims to fill in the detail. It outlines the recent changes and argues that there is as yet no certainty that a repeal of the HRA will make no difference. It gives suggestions for what may be done now to try to enhance the protection of fundamental rights by the common law and to safeguard your cases from the potential repeal of the Human Rights Act.

Resurgence of common law protection of rights

2. There have been several recent Supreme Court decisions that have suggested that there is little difference between the protection that the common law affords to fundamental rights, and that afforded by the Convention or EU law. For example, in *Kennedy v. Information Commissioner* [2015] AC 455 Lord Mance observed that Convention rights "may be expected, at least generally even if not always, to reflect and to find their homologue in the common or domestic statute law." §46[1].

3. Similarly, in *R (Rotherham MBC) v. Secretary of State for Business, Innovation and Skills* [2015] UKSC 6, §55 it was observed that "the grounds of (i) breach of the EU principles of equality or proportionality and/or (ii) breach of domestic

[1] See also *Pham v. Secretary of State for the Home Department* [2015] 1 WLR 1591, §98; *R v Secretary of State for the Home Department, ex parte Brind* [1991] 1 AC 696, 717 (HL); see also Roger Masterman and Seshauna Wheatle, 'A Common Law Resurgence in Rights Protection?' [2015] EHRLR 57; Richard Clayton, 'The Empire Strikes Back' [2015] PL 3; Dinah Rose, What's the Point of the Human Rights Act? (Politeia 2015); Lady Hale 'UK Constitutionalism on the March?' (Constitutional and Administrative Law Bar Association Conference, 12 July 2014, www.supremecourt.uk/docs/speech--- 140712.pdf;
Lord Neuberger, '"Judge not, that ye be not judged": Judging judicial decision--- making' (F A Mann Lecture, 29 January 2015) www.supremecourt.uk/docs/speech--- 150129.pdf.

public law principles… march together very closely, and it is hard to envisage circumstances in which only one of them was satisfied…".

4. The most significant recent changes involve the standard of review by the Administrative Court or by equivalent tribunals, such as the Information Commissioner or SIAC. There appears to be no reasons why these should not also apply in other contexts, such as in civil claim for damages.

The standard of review

5. A key case is *Kennedy.* This involved a challenge to the Charity Commission's refusal to disclose to a journalist information relevant to a statutory inquiry it had carried out into an appeal founded by George Galloway MP.

6. The majority of the Supreme Court endorsed a flexible approach to the principles of judicial review, and observed that the courts no longer simply apply *Wednesbury* unreasonableness. The intensity of review and weight to be given to the view of the decision maker depend on the context, in particular on whether a common law right or constitutional principle is involved. The more substantial the interference with human rights, the more the court will require by way of justification.

7. Lord Mance did not think there was any significant difference between the nature or outcome of the court's scrutiny of the decision, whether that was under domestic law (having regard to the importance of accountability in the Charities Act and common law) or under article 10 ECHR (the right to freedom of expression). It was for the defendant to show some persuasive counterveilling consideration. The court should ascertain whether the relevant interests had been properly balanced.

8. Lord Mance, with whom the majority essentially agreed, decided that proportionality was a ground of judicial review:

> "The advantage of the terminology of proportionality is that it introduces an element of structure into the exercise, by directing attention to factors such as suitability or appropriateness, necessity and the balance or imbalance of

> benefits and disadvantages. There seems no reason why such factors should not be relevant in judicial review even outside the scope of Convention and EU law." §54.

9. These aspects of *Kennedy* have been approved in several more recent authorities, such as *Pham v. Secretary of State for the Home Department* [2015] 1 WLR 1591*; R (Rotherham MBC) v. Secretary of State for Business, Innovation and Skills* [2015] UKSC 6, §55; and *Rainbow Insurance Company Limited v. The Financial Services Commission and others (Mauritius)* [2015] UKPC 15, §39.

10. *Pham* is another important case. The claimant challenged a decision by the Home Secretary to deprive him of British citizenship, on the ground that he was alleged to have received terrorist training. Lord Mance decided that, because the removal of citizenship was "a radical step… the tool of proportionality is one which would… be both available and valuable for the purposes of such a review…": §98. It was unlikely that there would be any difference between domestic, and EU or ECHR proportionality review.

11. Similarly, Lord Sumption observed that the range of rational decisions available to the decision maker depends on the context. In some cases there will only be one lawful decision available (§107). The common law can assess the appropriateness of the balance drawn by the Home Secretary between the right to citizenship and the interests of national security.

12. Next, in *R (Bourgass) v. Secretary of State for Justice* [2015] 3 WLR 457 the Supreme Court decided that procedural fairness meant a prisoner should normally have a reasonable opportunity to make representations before being segregated. The Supreme Court observed:

> "the test of unreasonableness has to be applied with sensitivity to the context, including the nature of any interests engaged and the gravity of any adverse effects on those interests: see, for example, *Pham* ... The potential consequences of prolonged segregation are so serious that a court will require a cogent justification before it is satisfied that the decision to authorise its continuation is reasonable." §129.

13. This line of authority was applied in *Zaw Lin v Commissioner of Police of the Metropolis* [2015] EWHC 2484 (QB). The Claimants were Burmese nationals on trial in Thailand for the murder there of two Britons. They confessed to the murder but later retracted the confessions, saying they had been obtained by torture. The Claimants face the death penalty.

14. The Metropolitan police conducted an independent inquiry, but it was agreed with the Thai authorities that the investigation was not for the purpose of the criminal trial, and the report of it was merely to be disclosed to the families of the victims. The Claimants applied under the Data Protection Act 1998 for disclosure of the report. The High Court noted that in determining the application, because the case involved common law right to life and to a fair trial, there would be "intensive scrutiny of *all* relevant interests arising and which injects a proportionality exercise into the weighing process" §49. It was agreed that it was most unlikely that there would be any real difference to the outcome as between the common law and Convention. In considering the proportionality exercise, the burden was on the police to demonstrate significant and weighty grounds for intruding on the Claimants' prima facie right under the Data Protection Act to the report.

15. The court decided the police were not required to disclose the report. But that was on the basis of the court's view of the particular facts of the case, including that the report would not assist the Claimants and that disclosure would undermine the ability of the police to engage with foreign authorities in future.

Summary

16. Those four authorities may be summarized as follows. The test a court will apply in deciding whether a decision was lawful depends on the context. Two important factors are where the decision interferes with fundamental rights, and the gravity of any adverse effects of the decision. If so:

    1. The intensity of review and of scrutiny of the decision is greater.
    2. It will be for the Defendant to show any interference is justified.
    3. Proportionality is available. This may mean that the interference should be necessary to achieve a legitimate aim.

4. The more serious the adverse impact, the more the court will require by way of justification.
5. The court should decide whether the relevant interests have been properly balanced.
6. The weight given to the view of the decision maker is less.
7. While the question is whether the decision was reasonable, that does not involve asking whether it was *Wednesbury* irrational.

What are the common law rights?

17. Common law fundamental rights are similar to those in the Convention. They include the right to:

17.1. Life: *R. v. Home Secretary, Ex p. Bugdaycay* [1987] AC 514, at 531G

17.2. Freedom from degrading and inhuman treatment/cruel and unusual punishment: Article 10 of the Bill of Rights 1688, *Matthew v State of Trinidad and Tobago* [2005] 1 AC 433, §12.

17.3. Open justice, and open administration: *Kennedy*, §47.

17.4. Freedom of expression: *R v. Secretary of State for the Home Department, ex p Brind* [1991] 1 AC 696.

17.5. Citizenship: *Pham* §60.

17.6. A fair trial: *Bernard v. State of Trinidad and Tobago* [2007] UKPC 34; [2007] 2 Cr. App. R. 22 at §§ 22, 24, 30

17.7. Access to the courts, to legal advice and representation: *R v. Shayler* [2003] 1 AC 247, §73.

17.8. Equality of arms: *Attorney-General's Reference (No. 82A of 2000)* [2002] EWCA Crim 215; [2002] 2 Cr.App.R. 24 per Lord Woolf at §14.

17.9. Legal professional privilege: *R (Daly) v. Secretary of State for the Home Department* [2001] 2 AC 532.

17.10. Respect for human dignity: *R (Osborn) v. Parole Board* [2014] AC 1115, §68

17.11. Freedom of expression: *R v. Secretary of State for the Home Department, ex p Simms* [2000] 2 AC 115.

17.12. Equal treatment: *AXA General Insurance Ltd & Ors v. HM Advocate & Ors* [2012] 1 AC 868, §97.

Rationale for the changes

18. There are a number of reasons that were given for these developments, or might be relied on to try to continue with this trajectory.

19. That the common law is dynamic and can develop markedly is well recognized. An example in the context of fairness is Lord Bingham in *R v. H* [2004] 2 AC 134 at §11 and 15.

20. One basis for arguing that the common law should reflect fundamental rights is the principle of legality. A public body may not act beyond its statutory authority, and there is a presumption that a statute does not authorize a breach of fundamental rights unless it is explicit (*R v Lord Chancellor, ex parte Witham* [1998] QB 575, at 581; and *R v Secretary of State ex p Simms* [2000] 2 AC 115 at 131E).

21. There are various ways by which international law may influence the common law. For example, "there is a strong presumption in favour of interpreting English law (whether common law or statute) in a way which does not place the United Kingdom in breach of an international obligation": *R v. Lyons* [2003] 1 AC 976, at §27. In addition, customary international law is observed and enforced as part of the common law unless in conflict with an Act of Parliament: *Trendtex Trading Corporation v. Central Bank of Nigeria* [1977] QB 529, at 557; and *R v*

Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (No 1) [2000] 1 AC 61, 89-90). 'CIL' consists of those legal obligations about which there is a clear consensus among relevant states.

22. Thus, in *R (Osborn) v. Parole Board* [2014] AC 1115 the Supreme Court observed that the:

> "ordinary approach to the relationship between domestic law and the Convention was described as being that the courts endeavour to apply and if need be develop the common law, and interpret and apply statutory provisions, so as to arrive at a result which is in compliance with the UK's international obligations", at §62.

23. Similarly, the common law should be "interpreted and developed in accordance with the [HRA] when appropriate", §57.

24. Although at times it is suggested that international law can only be relied on if it is not in conflict with domestic law, the recognition that the domestic law may be 'developed' indicates that there is more flexibility.

25. The Supreme Court appeared to invite the argument that statute should be re-interpreted to ensure it is consistent with international law, if possible, in *Nzolameso v Westminster City Council (Secretary of State for Communities and Local Government and another intervening)* [2015] UKSC 22; [2015] P.T.S.R. 549, at §29:

> "We have not heard argument on the interesting question of whether, even where no Convention right is involved, section 11 [of the Children Act 2004, which requires certain public authorities to safeguard child welfare] should nevertheless be construed consistently with the international obligations of the United Kingdom under article 3 of the UNCRC. That must be a question for another day."

26. The focus on statutory interpretation is important. A powerful aspect of the HRA is section 3 – the need to read and give effect to legislation in a way which is compatible with Convention rights so far as it is possible to do so. It is unclear how much the same approach is reflected in the common law.

Damages claims

27. Sections 7 and 8 HRA give a victim of a breach of the Convention a right to claim a declaration and, if necessary to afford just satisfaction, damages. If the HRA is repealed, will that cause of action still be available under the common law? For example, will claimants be able to sue the police for negligent failure to protect life or prohibit inhuman treatment if that Act goes, on the same basis as they could obtain damages if they took their case to the European Court of Human Rights?

28. The answer is as yet unclear. In some areas, the Convention has led to rights to damages being created under the common law where they did not previously exist. An example is the new tort of misuse of private information (e.g. disclosing or selling website metadata without permission). This reflects the HRA right to damages for breach of the right to privacy under article 8: *Vidal-Hall v. Google Inc.* [2015] 3 WLR 409.

29. In *Montgomery v. Lanarkshire Health Board* [2015] UKSC 11 the Supreme Court altered an aspect of medical negligence, so that a doctor is now under a duty to take reasonable care to ensure that the patient is aware of any material risks involved in any recommended treatment. The reasons for doing so included social changes, and also that: "Under the stimulus of the Human Rights Act 1998, the courts have become increasingly conscious of the extent to which the common law reflects fundamental values." §80. Strasbourg authorities, and even the Oviedo Convention on Human Rights and Biomedicine, were relied on to support the alteration to the common law.

30. There was debate in *Michael v Chief Constable of South Wales* [2015] UKSC 2; [2015] 2 WLR 343 about whether the tort of negligence should reflect the duties that articles 2 and 3 place on the police to protect those at risk. The decision in that case was that it was not necessary for negligence to do so, but that was in part because those rights could be vindicated by a claim under the HRA. The question of whether a different result would arise if the HRA was repealed was not answered.

31. Similarly, in *Zenati v. Commissioner of Police of the Metropolis* [2015] 2 WLR 1563 the Court of Appeal decided that delay by the police in investigating the circumstances of a man who was in custody breached article 5.1(c) ECHR, entitling him to damages. However, that was not reflected in any right to damages for false imprisonment.

32. But again, one of the reasons for the decision that false imprisonment did not reflect the Convention was that the Claimant was entitled to damages under the HRA. That justification would be absent if the HRA was repealed.

33. There were supplementary reasons in *Zenati* and *Michael* for the doubts expressed as to the ability of the common law to reflect damages claims that are available under the Convention. One reason was that there was no clear basis in the common law for the particular cause of action sought, and that the common law may only be developed slowly and incrementally. But as has been seen above, the common law has developed quickly and markedly. Alternatively, that reasoning indicates it is important, where possible, to include in your pleadings a common law claim that is identical to that under the Convention.

34. A further reason was that HRA damages claims are different to domestic claims. For example, a breach of the Convention does not lead to damages as of right. But in some contexts, such as a violation of articles 2 or 3, damages are ordinarily awarded.

35. These are not compelling arguments against any future developments, but whether they can be overcome can only be fully tested if the HRA goes.

Practical tips

36. There are several reasons why it is advisable to start your human rights claim (judicial review of civil claim), wherever possible, with a common law ground, but to also include Convention and/or EU grounds.

37. The first is that the Supreme Court has repeatedly said, in recent cases, that the 'starting point' for any human rights argument should be the common law, not the Convention (*Kennedy* at §46; *A v BBC* [2014] UKSC 25 at §57; and *Pham* §110.)

38. The second reason is that the common law is often said to develop incrementally. That suggests it would be more difficult to wait until the HRA is repealed, before arguing that big changes should be made to domestic law.

39. The third reason is that the courts are more likely to change the common law, if they are persuaded that is necessary to reflect what is in EU and Convention law. *Pham* is a good example of this working in practice. But if the HRA goes, the impetus of Convention law will be much weaker.

40. Finally, if the HRA is repealed with retrospective effect before your claim is determined, amending your claim to add a common law ground may be problematic.

41. Another practical tip is to look long and hard for some credible authority for what you say the common law now is. One difficulty in trying to elicit changes is that the courts try to pretend that the common law has always been the same, and so try to find some authority on which to base their current decision.

42. If you can find a helpful authority, whether from domestic law, international law, or otherwise, use it. This may come from an unlikely source, as in *Montgomery v. Lanarkshire Health Board* [2015] UKSC 11. That decision also shows that highlighting social and professional changes can help. Similarly, one reason why the Supreme Court felt able to adopt proportionality review was that academic analysis demonstrated this was in fact implicit in a substantial body of domestic law for more than half a century. Another reason was that the courts have demonstrated their ability to apply this approach under EU and Convention law: *Pham* §108-9.

43. A further option is to rely on broad explicit or implicit common law rights, and then apply those by means of proportionality review. An example is to rely on the

principle of open justice when arguing you need disclosure of a police report about a client on death row abroad. It may be easier to argue that the broad common law rights are long established, than to find an authority about the specific factual scenario of your case. For example, it has been said that they were an important basis for the Convention[2]. As has been seen above, there are several reasons which provide the foundation for the changes that have been made to proportionality review in this context.

Example

44. The following example may help illustrate some of the changes set out above. Your client's daughter was killed by a third party, when the police were aware of a real and immediate risk that her life was at threat, but failed to take steps that might have prevented the killing. At the inquest into her death, public funding for legal representation is available because the article 2 procedural duty is engaged and funding is necessary to enable the family to participate effectively. Further, a coroner must enable the jury to leave a judgmental conclusion about the important factual issues, because that is what the procedural duty within article 2 requires. If it was an ordinary domestic inquest, usually no judgmental conclusions would be left. Finally, sections 7 and 8 HRA mean your client can claim just satisfaction from the police.

45. If the HRA were to be repealed, it is unclear whether any of those benefits for your client would be available. One reason it is unclear is that the Convention has been embedded in many legislative provisions other than the HRA (e.g. s.10 Legal Aid, Sentencing and Punishment of Offenders Act 2012, regarding legal aid, and s.5(2) Coroners and Justice Act 2009, regarding the scope of the inquest).

46. Assuming s.10 LASPO is also repealed, leaving the Director with a discretion whether to grant funding, it is arguable that a family ought to be given legal aid in the same circumstances as now. The reasons include that the funding decision impacts on a common law fundamental right, the right to life, which is also recognized in international law, for example under the Convention. Any decision

[2] *Kennedy* at §46 and 133; See also Lady Hale, "UK Constitutionalism on the March?" (July 12, 2014).

to refuse funding should be subject to proportionality review, and (as the courts have frequently stated) it is unlikely that there is any difference between the outcome under the HRA and that under the common law.

47. The principle of legality could also be used. Assuming s.5(2) and s.10 CJA 2009 were to be repealed, it might still be argued that a coroner should leave a judgmental conclusion in a case where the article 2 procedural duty is triggered. The reasons may include that there is an international law duty, for example under article 2 of the Convention, to identify what went wrong. There is a presumption that section 10 CJA 2009 (which requires there to be a determination of how the deceased came by his or her death) is interpreted and applied consistently with that international law duty.

48. To claim damages, you would need to address the reasoning in *Michael* and *Van Colle.* But it is at least arguable that if the HRA 1998 were to be repealed, it would be necessary for the common law of negligence to be adapted to reflect the right to just satisfaction that an applicant would have in Strasbourg.

PUBLIC LAW DISCRIMINATION CLAIMS: DEVELOPMENTS IN 2015

Heather Williams QC

This paper surveys the significant decisions and developments in discrimination cases this year that are likely to be of most relevance for public law claims[1].

Direct discrimination

Comparability and justification under ECHR and EU law:

In two recent appellate cases Justices of the Supreme Court have stressed that "sameness" and justification are not rigidly discrete issues.

In ***Webster v Attorney General of Trinidad and Tobago*** [2015] UKPC 10; [2015] ICR 1048; 9 March 2015, when summarising the European Court of Human Rights' ('ECtHR') approach under Article 14, Baroness Hale stressed that: "It is almost always possible to find *some* difference between people who have been treated differently…..discrimination entails an *unjustified* difference in treatment (paragraph 18)[2]. Citing from Lord Nicholls' speech in *R (Carson) v Secretary of State for Work and Pensions* [2006] AC 173, Baroness Hale made the point that the issues of "sameness" and justification can merge into one another. Whilst there may be occasions where there is an obvious *relevant* difference between the claimant and those who he seeks to compare himself with such that their situations cannot be regarded as analogous; where the position is not so clear, the Court's scrutiny may be best directed to considering whether the difference has a legitimate aim and whether the means chosen to achieve that aim are appropriate and not disproportionate (paragraph 19).

[1] For ease of reference there is an appendix setting out the main discrimination provisions that are referred to in this paper.

[2] This observation was made in the context of a claim brought under section 14 of the Constitution of Trinidad and Tobago for alleged infringement of the right to equality of treatment by reservist police officers complaining that they were not provided with the benefits conferred upon regular officers, such as free medical treatment and housing allowances. The judge below and the Court of Appeal of Trinidad and Tobago had dismissed the claim on the basis that the regular officers were not valid comparators for the reservists. Although finding there was no sufficient reason to depart from the findings of fact made

Baroness Hale also noted that the position was much the same under EU law, where the Court of Justice has made clear that it is not required for situations to be identical, merely that they be comparable; and if broad comparability is established, the second question is whether the reason for the difference in treatment is sufficient to justify it: see for example *Maruko v Versorgungsanstalt der deutschen Bühnene* (Case C-267/06) [2008] All ER (EC) 977 (paragraph 20).

In ***R (JS) v Secretary of State for Work and Pensions***[3] [2015] UKSC 16; [2015] 1 WLR 1449; 18 March 2018, the same point was made by Lord Reed (see paragraphs 8 – 9). A violation of article 14 would arise where there was: (1) a difference in treatment, (2) of persons in *relevantly similar* positions[4], (3) if it does not pursue a legitimate aim, or (4) if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised. However, he observed that in practice the ECtHR usually elided the comparability of the situation, focusing on the question of whether the different treatment was justified; "This reflects the fact that an assessment of whether situations are 'relevantly' similar is generally linked to the aims of the measure in question: see for example, *Ramussen v Denmark* (1984) 7 EHRR 371".

Comparability under the Equality Act 2010

The challenge in ***R (Coll) v Secretary of State for Justice*** [2015] EWCA Civ 328; [2015] 1 WLR 3781; 31 March 2015 concerned the relative lack of approved premises ('APs') for female prisoners to live in when they were released on licence from prison. APs are single sex institutions with a relative strict regime and extensive security measures, where offenders stay for about 80 days between prison and return to the community. Generally placements in APs are as close to the individual's home as

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below and thus dismissing the appeal, the Privy Council preferred to analyse the position by way of considering whether the differential in treatment was justified.

[3] Also known as *R (SG) v Secretary of State for Work and Pensions*. This case is considered in detail below in relation to indirect discrimination.

[4] Emphasis added.

possible, but this is more difficult to achieve for female offenders as there are 94 APs for men in England and Wales, but only 6 for women[5].

Cranston J. had rejected the claim that these arrangements directly discriminated against female prisoners on their release to APs, on the basis that the position of male and female APs was not comparable because of the lower risk requirements and various other respects in which female and male prisoners are treated differently, so that their situations were not comparable as required by section 23 Equality Act 2010 ('EQA 2010')[6].

The Court of Appeal dismissed the appeal in respect of the direct discrimination claim on different grounds. Elias LJ, giving the leading judgment, said that although he saw some force in that submission, he was ultimately persuaded that the differences that had been identified were not *material* for the purposes of the particular alleged discrimination. For example the different risk categories did not bear on the question of whether male and female prisoners should, where possible, be accommodated close to home. Thus the differences were not material and would not explain the difference in treatment (paragraphs 43 – 44).

The direct discrimination claim failed instead because the Court of Appeal considered that the policy under challenged did not itself differentiate between men and women, the same rule was applied to both, but its respective effect depended upon the configuration of available APs at the time. In so far as the complaint was about discrimination that might arise in a particular set of circumstances, it was not a complaint about the scheme as a whole and judicial review was not the appropriate remedy (paragraphs 39 – 41)[7].

[5] The case is also considered in relation to indirect discrimination below at page xxx.
[6] Set out on the appendix to this paper.
[7] The Court went on to conclude that had direct discrimination been established, the defence of justification in paragraph 26(1)(3) of Schedule 3, EQA 2010 would have been available to justify the separate accommodation of the sexes and the allocation of approved premises (paragraphs 48 – 49).

As regards undertaking a comparative exercise, Elias LJ also stressed (as highlighted by the appellate courts in various employment discrimination cases from Lord Nicholls speech in *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337 onwards), that in direct discrimination cases it is usually unhelpful to try and identify the hypothetical comparator in the abstract, since the material characteristics of the comparator cannot be identified without determining *why* the claimant was treated as she was, so that the two questions are inextricably interlinked (paragraphs 23 – 24).

Indirect discrimination

The connection between the claimant, the protected characteristic and the group disadvantage

This topic has arisen recently in two different contexts, firstly in relation to whether a claimant must identify and share the *reason* for the group disadvantage relied upon under the statutory definition of indirect discrimination contained in section 19 EQA 2010 (see the appendix); and secondly as to whether a shared protected characteristic between the group and the claimant is required under EU law.

Shared reason for the group disadvantage

The section 19 EQA 2010 question arose in the context of an employment case, but the same definition of indirect discrimination applies in respect of the other areas of conduct covered by the legislation, including the exercise of public functions and the provision of services, so the point is of wider application.

In ***Home Office (UK Border Agency) v Essop*** [2015] EWCA Civ 609; [2015] IRLR 724; 22 June 2015 the Court of Appeal considered whether a claimant had to show that the disadvantage suffered by him (under section 19(2)(1)(c)) and by the group with the same protected characteristic (section 19(2)(1)(b)) was a shared one, connected to that characteristic. In the EAT Langstaff J had held that it was unnecessary in an indirect discrimination case for the claimant to show *why* the provision, criterion or practice ('PCP') had disadvantaged the group and the individual claimant. The Court of Appeal

disagreed with that approach. Sir Colin Rimer, who gave the leading judgment, considered that it was conceptually impossible to prove a group disadvantage for the purposes of section 19(2)(b) without also showing *why* the claimed disadvantage was said to arise: "group disadvantage cannot be proved in the abstract. Its proof necessarily requires a demonstration of why the comparative exercise inherent in the section 19(2)(b) inquiry results in the claimed disadvantage" (paragraph 59).

Mr Essop was the lead claimant of a group of Home Office employees, who alleged that the operation of the internal Core Skills Assessment ('CSA') test was indirectly discriminatory in terms of race and/or age. All Home Office staff had to pass the generic CSA in order to be eligible for promotion; if they passed this test they were then able to sit and pass a Specific Skills Assessment test relating to a particular post. The claimants had all failed the CSA and thus were ineligible for promotion. They relied on the protected characteristics of BME and/or age (the latter in respect of claimants who were over 35). Agreed statistical evidence showed that proportionately BME and older candidates had a significantly lower CSA pass rate that white and younger candidates[8]. A preliminary hearing in the Employment Tribunal rejected the proposition that this statistical disparity of itself established prima facie indirect discrimination arising from the admitted PCP (the requirement to pass the CSA), deciding that it was necessary for the nature of the particular disadvantage shared by the group in question and by the claimants to be identified (paragraph 22). The Court of Appeal agreed that it was necessary to show the nature of the group disadvantage and that each claimant suffered the same disadvantage: see paragraphs 60 – 61.

<u>The impact of the reverse burden of proof provision</u>

However, the Court of Appeal did reject the Home Office's submission that proof of the particular disadvantage within section 19(1)(c) had to be shown by the claimant *before* the reverse burden of proof provisions in section 136[9] could apply (paragraph 66). The

[8] The BME selection rate was 40.3% of the white selection rate and there was a 0.1% chance that this could happen by chance. For older candidates the rate was 37.4% with again a 0.1% risk that this could happen by chance.

[9] Included in the appendix to this paper.

Court held that it was in principle open to the claimants to rely on the statistical evidence in support of the proposition that each of them was disadvantaged by the PCP in the same way as the group as a whole, so as to meet the requirements of section 19(1)(c) and, relying on section 136, to submit that *in the absence of any other explanation* the ET could decide that, subject to justification, the claim was made out (paragraphs 64 – 65).

Lack of shared protected characteristic

After the Court of Appeal's decision in ***Essop***, the Grand Chamber of the Court of Justice of the EU gave judgment in ***CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia*** EU:C: 2015: 480; [2015] IRLR 746; 27 July 2015, a case which considered whether an alleged victim of indirect discrimination need share the protected characteristic of the group in question.

The indirect race discrimination claim arose in the context of the provision of electricity services to consumers. Article 2.1(b) of Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, provides that indirect discrimination occurs "*where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic original at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary*". Article 3.1(h) of Council Directive 2000/43 covers discrimination in relation to access to and supply of goods and services to the public. Reliance was also placed on Article 21 of the Charter of Fundamental Rights of the European Union.

The question for the Court arose from a domestic Bulgarian claim brought by Ms Nikolova who ran a grocer's shop in Dupnitsa, a district inhabited mainly by persons of Roma origin. The CHEZ RB had installed the electricity meters for all consumers in that district on the concrete pylons forming part of the overhead electricity supply network at a height of between 6 – 7 metres. In other local districts CHEZ RB had placed meters

at a much lower height of about 1.70 metres and usually in the consumer's property. In consequence of its placement, it was very difficult for Ms Nikolova to read her meter, which she wanted to check regularly. She was not herself a Roma. It was accepted evidence that CHEZ RB placed metres in the inaccessible way complained of only in 'Roma districts' and apparent to the Court that this was because it considered it was above all people of Roma origins who would otherwise make unlawful connections to the supply (paragraph 31).

The Court ruled that the concept of indirect discrimination in Directive 2000/43 and in the Charter must be interpreted to include the instant situation, even though Ms Nikolova did not share the protected characteristic (Roma), which was the factor which had led to the collective measure in question, she had suffered the same particular disadvantage resulting from the measure (namely placement of metres at an inaccessible height in her district): see paragraphs 50 & 59 – 60.

Implications

As worded, section 19 EQA 2010 would preclude an indirect discrimination claim in this kind of situation as section 19(1) and (2)(b) requires that the PCP is discriminatory in relation to a protected characteristic of 'B's' (the claimant) and that he "shares the characteristic" with the group who is put at a disadvantage. There may be arguments for the future, underscored by the *CHEZ RB* case that this definition is too restrictive to be compatible with EU law. (It may also be significant that on the particular facts it was clearly apparent that the alleged victim of the discrimination and the group with the protected characteristic suffered the same disadvantage – being unable to reach their electricity meters).

Establishing group disadvantage

To what extent it is still necessary to conduct the kind of detailed statistical analysis that was commonplace under the legacy discrimination statutes, to show prima facie indirect discrimination within section 19(1) EQA 2010?

In ***R (Diocese of Menevia) v City and County of Swansea Council*** [2015] EWHC 1436 (Admin) Wyn Williams J observed that whilst in *Homer v Chief Constable of West Yorkshire Police* [2012] 3 All ER 1287 Baroness Hale had made it clear that one of the objects of the wording chosen for section 19 in the EQA 2010 was to remove the need for statistical comparisons in cases involving alleged indirect discrimination, he did not read this as removing the need for such an analysis where all the necessary statistical information existed upon which such analysis could be undertaken (paragraphs 43-44 & 74).

It may be significant that both parties in that case sought to rely on the available statistics as helpful to their position, albeit the claimant initially presented the case without reference to the detailed statistical analysis[10] that was subsequently advanced to rebut the defendant's contentions. In the judgment there is much debate about the correct pool and correct statistical interpretation. However, having examined the competing contentions in detail, the Court found that the requisite group disadvantage was shown.

The claim concerned a changed policy in respect of the provision of free transport for pupils attending one of the six faith schools in the local education authority's area, restricting its provision to circumstances where no suitable alternative school was located within a specified distance of the pupil's home. The provision of free transport to schools in the area where teaching was undertaken in Welsh remained unchanged. The claim was brought on the basis that the changed policy was indirect race discrimination, (Schedule 3, Part 2 paragraph 11(e) of the EQA 2010 precluding a claim on the ground of religion or belief).

[10] Relying on the fact that under the previous policy 1642 white British children and 270 BME children received free transport, whereas under the amended policy the figures would be 1211 and 33 respectively, so that a very significant number of white British children would still qualify, but nearly all BME children currently provided with free transport would be excluded (paragraph 73).

The Court upheld the claimant's submission that the pool should be confined to those pupils who would qualify for the free school transport but for the amended policy[11].

In terms of the particular disadvantage (loss of free school transport), the Court held that within the pool it had identified, the percentage of white British children who were disadvantaged by the amended policy was 29.17%, whereas the percentage of BME children disadvantaged was 86.23%, so that the statutory test was plainly met (paragraph 71)[12].

Failing to confer an advantage as opposed to putting at a disadvantage

The indirect discrimination challenge pursuant to section 19 EQA 2010 in ***R (Coll) v Secretary of State for Justice*** (see pages 2 - 3 above for the underlying facts and the analysis of the direct discrimination claim) was rejected by the Court of Appeal on the basis that the real complaint was not about disparate impact arising from the application of the current policy of requiring residence in an AP if a condition to do so was attached to the prisoner's release licence, but about the failure to adopt a further and distinct policy of *positive discrimination* to deal with the particular problem faced by women prisoners alone resulting from the small number of APs available to them and thus the potentially long distances from their homes (paragraphs 54 – 59).

Elias LJ (with whom the other members of the Court of the Appeal agreed) considered that section 19 EQA 2010 did not bite on such a complaint (paragraph 60). He went on to observe that in so far as there could be any positive discrimination argument, it would have to be advanced under the ECHR along the lines that the Article 8 rights of the female prisoners were engaged and there was discrimination contrary to Article 14 in that they were in a different position, but subject to the same policy. As is now well

[11] Applying Baroness Hale's approach in *Homer*, that a pool for comparison would not include people who had no interest in the advantage or disadvantage identified as a consequence of the provision under scrutiny. Accordingly the pool was confined to the children who had a genuine interest in the amended policy: see paragraphs 36 & 68 – 70.

[12] The Defendant failed to establish justification, in that it had not shown that the amended policy was a proportionate means of achieving a legitimate aim, given there had been a failure to appraise the alternatives: paragraphs 77 – 80.

established, Article 14 requires that significantly different cases be treated differently: (*Thlimmenos v Greece* (2000) 31 EHRR 411). However, the contention had not been pursued in the instant claim and Elias LJ observed that even if it was advanced, the test of proportionality in such a case would be very broad, conferring a wide margin of appreciation to the State[13] and he had no doubt that it would be satisfied in this instance (paragraph 60). He also indicated that he would expect the approach of the courts in such circumstances to broadly reflect the Strasbourg caselaw, which would allow greater weight to be given to economic pressures and the needs of other public objectives, than is the position in relation to justification under section 19(2)(c) EQA 2010[14].

Consistent with a theme discussed above in relation to direct discrimination (see pages 1 – 3), Elias LJ indicated that he not adopt the reasoning of Cranston J below, who had rejected the indirect discrimination claim on the basis that the circumstances of the male and female prisoners were different (paragraph 61).

Justification

Cranston J had found that the Secretary of State was in breach of the public sector equality duty ('PSED') under section 149 EQA 2010 in that he had failed to address possible impacts by assessing that there was a disadvantage to women, how significant it was and what steps might be taken to mitigate it. There was no appeal against this conclusion. Nonetheless, Cranston J had also held that if there was prima facie indirect discrimination, it was a proportionate means of achieving a legitimate aim. Side-stepping addressing the justification question in any detail (perhaps because of the potential problem presented by the PSED finding), Elias LJ said that he considered the justification finding to be sustainable, but the exercise was artificial, because the complaint was essentially about positive discrimination (paragraph 64).

[13] He referred in this context to Sales J's judgment in what he described as a factually analogous case, *R (S) v Secretary of State for Justice* [2013] 1 WLR 3079.

[14] In relation to justification under section 19 EQA 2010 it is established that it cannot be based on costs saving alone: *Woodcock v Cumbria Primary Care Trust* [2012] ICR 1126 (albeit in *Ministry of Justice* v *O'Brien* [2013] I WLR 522 Baroness Hale left open the question of whether this was a correct analysis).

When considering the justification arguments in this case, Elias LJ indicated (at paragraph 62) that the Secretary of State accepted the claimant's submission that the test of proportionality under the ECHR, including in respect of Article 14, is not as rigourous as the justification defence under the EQA 2010: see ***Aster Communities Ltd v Akerman-Livingstone*** [2015] 2 WLR 721 (discussed in the next section of this paper).

Justification

Justification under the EQA 2010 and ECHR proportionality

In ***Aster Communities Ltd (formerly Flourish Homes Ltd) v Akerman-Livingstone*** [2015] UKSC 15; [2015] 2 WLR 721; 11 March 2015 the Supreme Court highlighted the distinctions between a defendant establishing justification in relation to discrimination arising from disability under section 15 EQA 2010[15] and establishing a lawful justification for an infringement of Article 8 ECHR rights in relation to the recovery of possession of residential accommodation.

The context

The issue arose in the context of the Court identifying the circumstances in which an order for possession could be granted summarily when the occupier contended that the bringing of possession proceedings constituted discrimination against him by reason of his disability pursuant to section 15(1) EQA 2010 (read with section 35 of the Act which covers discrimination against occupier by those managing premises). The Supreme Court had previously held that if an Article 8 defence was raised, the court had to determine whether it would be proportionate to make a possession order, but that in virtually every social housing case in which there were no domestic law rights of occupation, there would be a strong basis for saying that the possession order would be a proportionate means of achieving the twin aims of vindicating the local authority's property rights and enabling it to comply with its statutory duties in respect of the

[15] In relation to which the justification test is the same as in respect of indirect discrimination: see sections 15(1)(b) and 19(2)(c) in the appendix provided.

allocation of housing stock, so as to enable summary determination of the issue: *Manchester City Council v Pinnock* [2011] 2 AC 104.

The Supreme Court's decision

However, the Supreme Court held that the substantive right to equal treatment protected under the EQA 2010 was different from and stronger than the substantive right protected by Article 8 ECHR. Once the possibility of discrimination was made out, the burden of proof was on the landlord to show either that there was no unfavourable treatment because of something arising in consequence of the tenant's disability contrary to section 15(1)(a) or that the order for possession was a proportionate means of achieving a legitimate aim under section 15(1)(b). It could not be taken for granted that the aim of vindicating the landlord's property rights would invariably prevail over the tenant's right to have due allowances made for the consequences of his disability. Accordingly, dealing with the claim summarily would not normally be appropriate if the claim was genuinely disputed on grounds which appeared to be substantial[16].

The Justices' reasoning

Baroness Hale acknowledged that the concept of proportionality in section 15(1)(b) EQA 2010 was drawn from EU and ECHR case law and as explained by Lord Reed in *Bank Mellat v HM Treasury (No. 2)* [2014] AC 700 it required consideration of the following four overlapping questions: (i) is the objective sufficiently important to justify limiting a fundamental right; (ii) is the measure rationally connected to that objective; (iii) are the means chosen no more than is necessary to accomplish the objective or could a less intrusive measure have been used; and (iv) whether having regard to these matters and to the severity of the consequences, a fair balance has been struck between the right of the individual and the interests of the community[17] (paragraph28).

[16] The Court went on to hold that although the judge in the County Court had misdirected himself in his approach to the claim in deciding to grant an order for possession summarily, on the particular facts the tenant's eviction would be a proportionate means of achieving a legitimate aim so the case would not be remitted for a full hearing.

[17] A number of recent judgments still refer to the previous threefold formulation first identified in domestic case law in *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69.

Despite the similar test and the fact that the legitimate aims relied upon would be in the same in a section 35 EQA 2010 discrimination claim as in an Article 8 ECHR case, it did not follow, she said, that vindicating a landlord's rights would trump the occupier's equality rights. In particular, direct discrimination under the EQA 2010 could not be justified; section 15 EQA 2010 obliged a landlord to be *more* considerate towards a disabled tenant than all his tenants with their Article 8 rights; and the justification test required a balance to be struck between the landlord's aims and the seriousness of the impact on the tenant (paragraphs 30 – 32). Furthermore, the structured approach to proportionality identified in *Mellat* was not to be applied in the *Pinnock* type of situation (paragraph 29). A further difference between Article 8 and the EQA 2010 situation was the shifting burden of proof applicable in the latter instance (paragraphs 33 – 34).

Lord Neuberger arrived at the same conclusion as Baroness Hale for similar reasons[18]. He stressed that the protection afforded by section 15 read with section 35 EQA 2010 provided a particular degree of protection to a limited class of occupiers, considered by Parliament to be deserving of special protection (paragraph 55). Furthermore, in contrast with an Article 8 case, the proportionality exercise involved focusing on a very specific issue, namely the justification for the discrimination (paragraphs 55 - 56).

Wider applicability?

Given the identical wording of the justification defence, the Supreme Court's analysis of section 15(1)(b) should be equally applicable to a justification defence raised in respect of indirect discrimination under section 19 EQA 2010.

Less clear, is whether the distinctions drawn by the Court between an evaluation of a justification defence under the EQA 2010 and a consideration of proportionality under Article 8 ECHR in the context of a possession claim, applies more widely to indicate a difference of principle in the approach to justification in a discrimination claim brought

[18] Lords Wilson, Clarke and Hughes agreed with the principles stated by both Baroness Hale and Lord Neuberger,

under Article 14 as opposed to under the domestic statute. As indicated earlier in this paper, brief observations in *R (Coll) v Secretary of State for Justice* seem to support this proposition (see page 11 above). However, as this summary of the Supreme Court's reasoning shows, much of it was specific to the particular possession-related Article 8 context.

Justification: relevance of non-compliance with international convention obligations:

The relevance of actual / assumed non-compliance with obligations arising under the United Nations Convention on the Rights of the Child ('UNCRC'), an unincorporated international treaty to which the UK was a signatory, was considered by the Supreme Court in ***R (JS) v Secretary of State for Work and Pensions*** [2015] UKSC 16; [2015] 1 WLR 1449; 18 March 2015[19], in determining whether the disparate adverse impact of the benefit cap upon women had been justified by the Minister under Article 14 ECHR.

As is explained in more detail below, a minority of the Supreme Court (Baroness Hale and Lord Kerr) held that non-compliance with Article 3.1 of the UNCRC was relevant, indeed crucial, to the assessment of whether justification had been established. However, a majority of the Court (Lords Reed, Carnwarth and Hughes JJSC) dismissed the appeal on the narrow ground that the particular international treaty obligations relied on here were only relevant at best to questions concerning the ECHR rights of children and not to a claim of discrimination between men and women. Nonetheless in his general analysis of the significance of a breach of an international convention obligation and the conclusion that Article 3.1 UNCRC was not adhered to in this instance, Lord Carnwarth agreed with Baroness Hale and Lord Kerr.

<u>The claim and the issues before the Court</u>

The Benefit Cap (Housing Benefit) Regulations 2012 which imposed a cap on the amount of welfare benefits received by non-working households, equivalent to the net median earnings of working households were challenged as contrary to Article 14

ECHR read with Article 1 of the First Protocol to the Convention ('A1P1'). The claimants were from lone parent families whose welfare benefits were substantially reduced as a result of the cap. They argued that child-related benefits should have been excluded from the benefits covered by the legislation or that exceptions should have been made for lone parents with several children at home. It was accepted that the Regulations resulted in a disparate impact on women as compared to men, because most non-working households receiving the highest level of benefits were lone parent households and in turn most lone parents were women. It was also accepted that the benefits could amount to "possessions" for the purposes of A1P1. The claim thus turned on whether the differential impact was justified, the Secretary of State arguing that it was on the grounds of economic and social policy.

The correct justification test

In *Humphreys v Revenue and Customs Comrs* [2012] 1 WLR 1545 the Supreme Court had accepted that the normally strict test for justification of sex discrimination in the enjoyment of Convention rights gave way to the "*manifestly without reasonable foundation*" test in the context of welfare benefits, applying the ECtHR's decision in *Stec v United Kingdom* (2006) 43 EHRR 1017.

The Article 3.1 UNCRC submission

In relation to proportionality, the claimants relied upon Article 3.1 of the UN Convention on the Rights of the Child (1989) which provides: "*In all actions concerning children…the best interests of the child shall be a primary consideration*". Although an unincorporated treaty in terms of domestic law, the claimants contended that in enacting the Regulations the Minister had failed to have regard to the best interests of children affected and that the failure to comply with the Article 3.1 obligation was decisive in their favour in terms of the proportionality argument[20].

[19] The case is also known as *R (SG) v Secretary for Work and Pensions*.
[20] For a discussion of the content of the Article 3.1 UNCRC obligation, see Lord Carnwarth at paragraphs 105-108.

Situations where the relevance of an unincorporated international treaty is accepted

In considering the submission, the Justices reviewed the circumstances in which it was already accepted that an unincorporated international treaty such as the UNCRC had an impact. It could be taken into account as an aid to interpretation of a domestic statute in cases of ambiguity, on the basis that this country meant to honour its international obligations (paragraphs 115 & 137). Equally it could guide the development of the common law (paragraph 137). Furthermore, it could be taken into account by the ECtHR in the interpretation of the ECHR in accordance with Article 31 of the Vienna Convention on the Law of Treaties (paragraphs 83, 116 & 137); and it followed that ECHR rights protected in domestic law under the HRA could be interpreted in light of such treaties (paragraphs 83 – 84).

Failure to comply with Article 3.1 UNCRC in this instance

A majority of the Justices (Carnwarth, Hale and Kerr JJSC) agreed that the Secretary of State had failed to show how the Regulations were compatible with the obligation to treat the best interests of the child as a primary consideration: paragraphs 122-128 (Lord Carnwarth); paragraphs 225 - 227 (Baroness Hale) and paragraph 257 & 269 (Lord Kerr). The crucial question was thus how this finding affected the justification issue.

Significance of non-compliance

Baroness Hale considered that international obligations under the UNCRC had the potential to illuminate the court's approach to justification and that the ECtHR would look with particular care at justification put forward for any measure which placed the UK in breach of its international obligations under a human rights treaty to which it was a party (paragraphs 217 – 218). Further, that in considering whether the discriminatory effects of the benefit cap in terms of lone parents could be justified, she had no doubt that it was right to take account of the best interests of the children affected by it (paragraphs 223 - 224).

Lord Kerr was prepared to go even further, finding that Article 3.1 UNCRC was directly enforceable in UK domestic law (paragraph 257). However, in the alternative, he was in agreement with Baroness Hale's approach (paragraphs 233). Article 3.1 UNCRC was directly relevant to justification in terms of whether a primacy of importance was given to the interests of the children in formulating the Regulations (paragraphs 259 – 262). Further, the discriminatory impact on women was by reason of their position as lone parents, so that justification of that impact must directly address the impact it would have upon their children; the lone mother's interests when it came to receiving State benefits was indissociable from those of her children (paragraphs 263 – 268).

For these reasons, both Baroness Hale and Lord Kerr considered that justification for the admitted discriminatory effect had not been shown.

However, a majority of the Justices (Reed, Hughes & Carnwarth JJSC) held that even if the benefit cap regulations were not compatible with Article 3.1 UNCRC[21], such a failure did not have any bearing on whether the legislation unjustifiably discriminated between *men and women* in their enjoyment of their A1P1 property rights, as the rights of the adults were not inseparable from the best interests of the children and there was no factual or legal relationship between the fact the cap affected more women than men and the failure of the legislation to give primary to the best interests of the child: Lord Reed at paragraphs 86 – 90; Lord Carnwarth at paragraphs 129 & 131; and Lord Hughes at paragraphs 142 – 147. Accordingly, applying the manifestly without reasonable foundation test (which the Article 3.1 UNCRC submission was seen as an attempt to circumvent), the Secretary of State had established an objective and reasonable justification based on the legitimate aims of fiscal savings, incentivising work and imposing a reasonable limit on the amount of benefits a household could receive.

Lord Carnwarth's analysis appeared to accept the proposition that where there was a direct link between the international treaty relied upon and the particular discrimination

[21] A proposition wwhich Lord Carnwarth found established and Lords Reed and Hughes assumed for the purposes of the argument without so finding.

alleged, non-compliance with the treaty obligations *could impact on the proportionality assessment*, on the basis that, broadly speaking, this was an exercise in interpreting the terms and notions of the ECHR, an approach, in turn, which had been accepted by the ECtHR: see paragraphs 113 – 119 & 130. Lord Hughes also seemed to allow for this possibility (paragraphs 142 – 144). Accordingly, it can be said with some confidence that there was majority support from the Supreme Court for the proposition that non-compliance with an international treaty could inform the assessment of whether justification had been shown in respect of a difference in treatment arising under Article 14 ECHR.

An additional observation on the *Stec* test

Baroness Hale raised the idea that for the purposes of the application of the *Stec* "*manifestly without foundation test*", a distinction might be drawn between the aims of the interference and the proportionality of the means employed, with this test only relating to the former: paragraph 210. However, this was not a point argued in the current case or addressed in detail.

The extent to which non-compliance with Article 3.1 UNCRC and (in this case) Article 7.2 of the United Nations Convention on the Rights of Persons with Disabilities affected justification under Article 14 ECHR was also raised by the claimant's appeal to the Supreme Court in the subsequent case of ***Mathieson v Secretary of State for Work and Pensions*** [2015] UKSC 47; [2015] 1 WLR 3250; 8 July 2015, a case in which the Secretary of State failed to make out a justification defence even on the "*manifestly without reasonable foundation test".*

The claim and the issues before the Court

The claimant was diagnosed with a number of severe medical conditions after he was born in June 2007. He lived at home and his complex bodily needs were met by his parents who received disability living allowance ('DLA'). In 2010 he was admitted to hospital where he remained for 13 months. During this time one or other of his parents was at the hospital at all times and they remained his primary care-givers. Extra

expenses were caused to the parents as a result of their son's hospitalisation. The Secretary of State suspended the claimant's DLA in accordance with regulations 8, 10, 12A & 12B of the Social Security (Disability Living Allowance) Regulations 1991 on the ground that he had been an in-patient in an NHS hospital for more than 84 days.

The claimant, by his father, challenged this on the basis that it breached his right not to be discriminated against under Article 14 ECHR, read with the right to peaceful enjoyment of his possessions in A1P1. Following the claimant's death, his father continued with the claim.

The claim was unsuccessful before the First-tier Tribunal, the Upper Tribunal and the Court of Appeal, but succeed unanimously in the Supreme Court.

It was accepted that the provision of DLA fell within the scope of A1P1, but the defendant argued that the claimant did not have a status falling within the grounds of discrimination protected by Article 14 and, alternatively, that the difference in treatment was justified.

<u>"Other status" under Article 14 ECHR</u>

The Court needed little persuading that the claimant had a status protected by Article 14, whether it was analysed as that of a severely disabled child in need of lengthy in-patient treatment (Baroness Hale, Lord Clare, Lord Wilson and Lord Reed) or as a child hospitalised free of charge in an NHS hospital (Lord Mance, Lord Clare and Lord Reed). Lord Wilson reviewed the Strasbourg authorities on what amounted to an "other status" within Article 14, observing that where the alleged discrimination fell within the scope of a Convention right, the ECtHR was reluctant to conclude that the applicant had no relevant status, with the result that the inquiry into the discrimination could not proceed (paragraph 22).

A lack of justification and the Court's decision on the appeal

As there was a difference of treatment between children in this position (on the one hand) and disabled children who did not require such hospital admission and thus remained entitled to DLA without the application of an 84 day cut-off period (on the other), the question was whether there was objective and reasonable justification.

As the challenge concerned the provision of a welfare benefit, the "*manifestly without reasonable foundation*" test applied (see page 15 above). The Court also followed earlier authority in observing that a bright-line rule would not be invalidated simply because hard cases fell on the wrong side of it, provided the rule was beneficial overall: Lord Wilson (paragraph 27) and emphasising this point more strongly, Lord Mance, with whom Lords Clarke and Reed agreed (paragraph 51).

Nonetheless, the evidence before the Court (which the Secretary of State had not countered), showed that the personal and financial demands made on the substantial majority of parents who helped to care for their disabled children who were long-term hospital in-patients was *no less* than when they cared for them at home, so that the Secretary of State had failed to establish any reasonable foundation for the suspension of DLA after 84 days of a child being in hospital and thus for the difference in treatment.

Accordingly, the Secretary of State's decision to suspend payment of DLA to the claimant violated his rights under Article 14 ECHR read with A1P1 and he was entitled to declaratory relief to that effect. However, it did not follow from this that the suspension of payment pursuant to the 84 day rule would always entail a violation; decisions founded on human rights were essentially individual and the Secretary of State should be given the opportunity to consider whether there were adjustments he could make other than abrogation of the cut-off provision to avoid violating Article 14 rights in other cases (paragraphs 48 – 49).

Significance of the breaches of international Conventions

Lord Wilson reviewed the content of Article 3.1 UNCRC and Article 7.2 UNRPD, indicating that on the evidence before the court, the Secretary of State had never conducted an evaluation of the possible impact of the decision to bring in the 84 day cut-off rule on the children concerned, so that in turn, he was in breach of both the substantive duty to have the best interests of the child as a primary consideration and the procedural duty to evaluate the possible impact arising under Article 3.1 UNCRC[22]. Lord Wilson thus turned to consider how that conclusion would affect the Article 14 justification argument.

He noted that in *R (JS) v Secretary of State for Work and Pensions*, the Secretary of State's submission that an international convention had no role to play in any inquiry under Article 14 into the justification for any difference in treatment in the enjoyment of the substantive rights had been rejected by a majority of the Supreme Court (see pages 16 - 18 above). However, he went no further than observing that his conclusion already reached without reference to the international conventions that the Secretary of State had failed to establish justification, would "*harmonise"* with a conclusion that his different treatment of them violated their rights under the two Conventions relied upon by the claimant (paragraphs 43 – 44).

Thus in this indirect way the Court took into account the breaches of the international conventions as supporting / reinforcing the conclusion already reached without reference to them that justification had not been established. As the Secretary of State was unable to show justification even on a conventional application of the *Stec* case, the Court did not have to decide what difference the breach of the international conventions might have made had this not been the case.

[22] Like Lord Carnwarth in *R (JS) v Secretary of State for Work and Pensions*, Lord Wilson proceeded on the basis that Article 3.1 UNCRC imposed three-fold obligations: a substantive right, an interpretative principle and a procedural duty, as identified by the UN Committee on the Rights of the Child in its General Comment No 14 (2013): (paragraph 39).

Justification in circumstances involving the application of bright line rules

A third Supreme Court appeal this year also raised fundamental issues over the correct approach to justification under Article 14 ECHR, in this instance in relation to the provision of student loans in ***R (Tigere) v Secretary of State for Business, Innovation and Skills*** [2015] UKSC 57; [2015] 1 WLR 3820; 29 July 2015. The majority in a sharply divided Supreme Court held that the "*manifestly without reasonable foundation*" approach did not apply in relation to measure relating to the provision of funding for education and that justification was not established as even if *a* bright-line rule would have been justified in the circumstances, limiting eligibility for student loans, the rule chosen had to be rationally connected to its aim and proportionate in its achievement, which was not the case here.

<u>The claim and the issues before the Court</u>

The claimant had come to the UK in 2001 with her parents from Zambia. She and her mother were granted discretionary leave to remain as overstayers after her father returned to Zambia in 2003. After successfully completing her school studies in the UK, she obtained a place at a university in England, but was refused the student loan she needed to enable her to study because she could not meet the criteria contained in regulation 4(2) and paragraph 2, Schedule 1 of the Education (Student Support) Regulations 2011. Specifically, she could not show that she had been lawfully ordinarily resident in the UK for 3 years before the first day of the academic course or that she had been "settled" in the UK on the day, as she would not be eligible under immigration legislation to attain indefinite leave to remain in the UK until 2018.

The claimant argued that she had been unlawfully discriminated against under Article 14 ECHR in respect of her rights under Article 2 of the First Protocol ('A2P1'). The Court accepted that there was a difference of treatment by reference to her immigration status, which was an "other status" for the purposes of Article 14 and that the provisions relied upon required that state support for tertiary education be funded on a non-discriminatory basis. Thus the crux of the argument was whether the difference in treatment was justified.

The Supreme Court agreed that the three years ordinary residence rule was justified and thus compatible with the claimant's ECHR rights. However, the Court was divided 3 – 2 over whether the settlement rule was justified.

The approach of the majority to the justification issue

For the majority, Baroness Hale held that education, unlike other social welfare benefits, was given special protection by A2P1 and that nowhere in the Strasbourg discrimination cases concerning education was the "manifestly without reasonable foundation" phrase used, accordingly the usual, established four-fold justification test identified in *Bank Mellat v HM Treasury (No 2)*[23] applied: see paragraph 32.

Baroness Hale (with whom Lord Kerr agreed) went on to hold that even if *a* bright-line rule is justified in a particular context, *the particular* bright line rule chosen had itself to be rationally connected to the legitimate aim identified and a proportionate way of achieving it (paragraph 37). Further, it was one thing to have an inclusionary bright line rule defining those who definitively should be included and another thing to have an *exclusionary* bright line which, as here, allowed for no discretion to consider unusual cases falling on the wrong side of the line (paragraph 37). In this instance a bright line rule could have been chosen which more closely fitted the aims of the measure (paragraph 38). Furthermore, a fair balance had not been struck between the interests of the community in maintaining the bright line rule and the very severe effects on persons in the claimant's position (paragraph 39). For these reasons the application of the settlement rule to the applicant could not be justified and was incompatible with her Convention rights (paragraph 42) and the claimant was entitled to a declaration to that effect (paragraph 49). However, the Court declined to quash the settlement criterion in its entirety, as there would be cases where it was not incompatible with the individual's Convention rights (paragraph 49).

[23] See page 12 above.

Although agreeing with Baroness Hale's conclusion (paragraphs 50 & 68), Lord Hughes emphasised that a simple bright line rule, even if it gave rise to hard cases that fell on the wrong side of it, generally had great merit (paragraphs 59 – 60). However, in this instance he accepted that there would be no difficulty in formulating a rule as clear and simple to operate as the current one, but which recognised the position of students in the claimant's position, who's long residence in the UK was such that she was in ordinary parlance settled here and was in reality a "home grown" student (paragraphs 64 & 67).

The approach of the dissenting minority to the justification issue

Lords Sumption & Reed, dissenting, considered that the current Regulations represented a lawful policy choice for the Secretary of State. Whilst other criteria could have been chosen, within the broad lines that had not been exceeded in this case, these were matters for his political judgment (paragraphs 69, 95 & 100).

The minority considered that there was no basis for not applying the *Stec* "manifestly without reasonable foundation" approach to justification, as there was no principled reason why State benefits in the domain of education should be subject to any different test from other equally important State benefits (paragraphs 76 – 77). However, they did acknowledge that the more fundamental the right which is affected by the discrimination in the provision of financial support, the readier a court may be to find that the reasons for the discrimination are manifestly without reasonable foundation.

As regards the bright line settlement rule, the minority considered that as it was legitimate to discriminate between those who do and those who do not have a sufficient connection with the UK for the purpose of the provision of student loans, it was not only justifiable but necessary to make the distinction by reference to a rule of general application in the interests of legal certainty and consistency (paragraphs 88 – 93). Further, once it was accepted that a line had to be drawn at some point on a continuous spectrum, proportionality could not be tested by reference to outlying cases (paragraph 98).

Public Sector Equality Duty

The public sector equality duty imposed by section 149 EQA 2010 (see appendix) has now been considered by the Supreme Court for the first time in ***Hotak v Southwark London Borough Council*** [2015] UKSC 30; [2015] 2 WLR 1341; 13 May 2015.

The identification of what the PSED requires in a series of earlier Court of Appeal decisions, in particular in the judgment of Wilson LJ at paragraphs 28 & 32 in *Pieretti v Enfield London Borough Council* [2011] PTSR 565; McCombe LJ at paragraph 26 in *Bracking v Secretary of State for Work and Pensions* [2014] Eq LR 60; and Elias LJ at paragraphs 77 – 78 & 89 in *R (Hurley) v Secretary of State for Business, Innovation and Skills* [2012] HRLR 374, was not challenged in this appeal. Nonetheless, it is noteworthy that Lord Neuberger, giving the judgment on behalf of the majority, not only cited from these judgments, but appeared to endorse them, noting that they had "rightly" not been challenged in the instant appeals (see paragraph 72). Accordingly, this part of Lord Neuberger's judgment, particularly when cited in tandem with McCombe LJ's judgment in *Bracking* provides a helpful round-up of the applicable principles from the case law.

Beyond this, Lord Neuberger did make the point that it was difficult to be more prescriptive as to what "*due*" regard required; the weight and extent of the duty was highly fact-sensitive and dependent on individual judgement (paragraph 74).

In the cases before the Court, the PSED was raised in the context of whether the reviewing officer had complied with the equality duty in deciding that the applicant, who had mental and physical health problems, and his wife were "vulnerable" under section 189(1) of the Housing Act 1996.

Lord Neuberger said that at each stage of the decision making exercise in relation to an application with an actual or possible disability, the decisions must be made with the

equality duty well in mind and "must be exercised in substance, with rigour and with an open mind", rather than it simply becoming a formulaic or high-minded mantra (paragraph 78). He also acknowledged that there would be cases where a review which was otherwise lawful, will be unlawful because it does not comply with the equality duty (paragraph 79).

Examples of other interesting discrimination cases determined in 2015

Other successful, interesting public law discrimination cases this year have included:

> ***R (Moore) v Secretary of State for Communities and Local Government*** [2015] EWHC 44 (Admin); [2015] JPL 762; 21 January 2015, where Gilbart J found that the defendant's practice of recovering planning appeals for himself where they related to proposals for pitches occupied by one or more caravans on Green Belt land, constituted indirect discrimination under section 19 EQA 2010 and entailed a breach of the PSED; and
>
> ***R (Hardy) v Sandwell Metropolitan Borough Council*** [2015] EWHC 890 (Admin); 30 March 2015 where Phillips J held that the Defendant's practice of taking into account the care component of disability living allowance when assessing the amount of a discretionary house payment constituted indirect discrimination under Article 14 ECHR and a breach of the PSED.

Other unsuccessful, interesting public law discrimination cases this year have included:

> ***R (JK) v The Registrar General for England and Wales*** [2015] EWHC 990 (Admin); [2015] HRLR 10; 20 April 2015 where Hickinbottom J held that the requirement a transgender woman be recorded as the 'father' on the birth certificates of her two biological children was a lawful and proportionate interference with her Article 8 and her Article 14 ECHR rights; and

R (A) v Secretary of State for Work and Pensions [2015] EWHC 159 (Admin); 29 January 2015 in which it was held that in failing to provide an exception for victims of domestic violence living in accommodation adapted under the provisions of a Sanctuary Scheme in the 'bedroom tax' provisions contained in the Housing Benefit (Amendment) Regulations 2012, the Secretary of State had not discriminated unlawfully under Article 14. In finding that the discriminatory effect on women was justified and there was no breach of the PSED, the Court relied heavily on the Court of Appeal's decision in the earlier bedroom tax case, *R (MA) v Secretary of State for Work and Pensions* [2014] EWCA Civ 13, due to be heard by the Supreme Court next year. Permission to appeal in this case has been granted by the Court of Appeal and the appeal will be heard along with the claimant's appeal in *R (Rutherford) v Secretary of State for Work and Pensions* [2014] EWHC 1631 (Admin) .

Heather Williams QC
Doughty Street Chambers

30 September 2015

Appendix: Discrimination Provisions[24]

Article 14: European Convention on Human Rights

"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."

Equality Act 2010

Direct discrimination: section 13:

"(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."

Discrimination arising from disability: section 15:

"(1) A person (A) discriminates against a disabled person (B) if –

(a) A treats B unfavourably because of something arising in consequence of B's disability; and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Subsection (1) does not apply if A shows that A did not know and could not reasonably have been expected to know that B had the disability."

Indirect discrimination: section 19:

"(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purposes of subsection (1) a provision criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if –

[24] This appendix sets out the text of the discrimination provisions most frequently referred to in the cases discussed above, for ease of reference. It should not be treated as a comprehensive round-up of such provisions.

(a) A applies or would apply it to persons with whom B does not share the characteristic,
(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
(c) it puts, or would put B at that disadvantage and, (d) A cannot show it to be a proportionate means of achieving a legitimate aim.

(3) The relevant protected characteristics are -
age;
disability;
gender reassignment;
marriage and civil partnership;
race;
religion or belief;
sex;
sexual orientation."

Discrimination arising from disability: section 15:

"(1) A person (A) discriminates against a disabled person (B) if – (a) A treats B unfavourably because of something arising in consequence of B's disability and (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Subsection (1) does not apply if A shows that A did not know and could not reasonably be expected to know that B had the disability."

Comparison by reference to circumstances: section 23:

"(1) On a comparison of cases for the purposes of section 13, 14 or 19 there must be mo material difference between the circumstances relating to each case."

Discrimination in provision of services and exercise of public functions:

Section 29:

"(1) A person ("a service-provider") concerned with the provision of a service to the public or a section of the public (for payment or not) must not discriminate against a person requiring the service by not providing the person with that service.

(2) A service provider (A) must not, in providing the service, discrimination against a person (B) –

(a) as to the terms on which A provides a service to B;
(b) by terminating the provision of the service to B;
(c) by subjecting B to any other detriment

(6) A person must not, in the exercise of a public function that is not the provision of a service to the public or a section of the public, do anything that constitutes discrimination, harassment or victimisation".

Section 31:

"(3) A reference to the provision of a service includes a reference to the provision of a service in the exercise of a public function"

Burden of proof: section 136:

"(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

Public sector equality duty: section 149:

"(1) A public authority must, in the exercise of its functions, have due regard to the need to –

(a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;

(b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;

(c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

(2) A person who is not a public authority but who exercises public functions must, in the exercise of those functions, have due regard to the mattes mentioned in subsection (1).

(3) Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to –

(a) remove or minimise disadvantage suffered by persons who share a relevant protected characteristic that are connected to that characteristic;

(b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;

(c) encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.

(4) The steps involved in meeting the needs of disabled persons that are different from the needs of persons who are not disabled include, in particular, steps to take account of disabled persons' disabilities.

(5) Having due regard to the need to foster good relations between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to –

(a) tackle prejudice; and

(b) promote understanding."

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Talk to the Public Law Project on 5 October 2015

How Public Law has not been able to provide the Chagossians with a remedy

Introduction

1. It is 50 years ago next month since the Chagos islands were detached from Mauritius and the population deported to make way for an airbase. Many lawyers since that date have tried to construct a remedy, and this task has fallen to me for the past 18 years in company with Clifford Chance, with whom I am now a consultant and for 10 years before that as a partner with Sheridans. Over such a long period, with successes and failures along the way, this litigation has become a cat and mouse struggle between a government and its citizens in which the courts have played an important part. As a legal campaigner, I should point that out whilst I believe all the facts and comments in this talk are accurate I cannot pretend that all of what follows is agreed, and may not represent the views of the government, of some of the judiciary or indeed of my firm.

2. I therefore now describe some elements of this political and legal struggle. I will tease out some public law principles as pointers on the way to what I hope will be a successful outcome, but which is, as yet, beyond our grasp. I will interpose a few sub-headings as we go.

Background

3. At the height of the Cold War, in 1964-5 the Russians were believed to be seeking a warm water port in the Indian Ocean. Britain signed an exchange of Notes with the USA giving the entire archipelago of 65 islands to the USA to construct a naval and military base on one of those islands, and to "resettle" the population. The Archipelago was detached from the Colony of Mauritius, in breach of specific UN resolutions, and BIOT was created on 8.11.65.

4. The population of some 1,870 souls was removed from its homeland and dumped in Mauritius and Seychelles, some 1,000 miles distant, without homes or jobs thus condemning them to a life of poverty.

5. The New Colony had to be reported to the United Nations Decolonisation Committee . The UK informed the Committee that there were only contract labourers on the islands. It concealed the existence of a permanent population which had in fact been, settled for five generations, and was thus entitled to the “Sacred trust” of Art 73.

6. Thus the only body that might have saved the Islanders was misled. Mauritius and Seycheelles were paid £3m and the cost of an airport respectively. FCO’s lawyers advised that since Britain had not ratified the fourth protocol to the ECHR, there was no legal right of return and accordingly the FCO could "*make up the rules as we go along*". An Order in Council was passed in 1971 making it a criminal offence for anyone other than those connected with the US military base to be on the islands. Government agents who had continued to run the Plantations after their land had been

compulsorily purchased, were instructed to kill nearly 1,000 pet dogs, but save the horses and deport the natives into Exile.

7. This unique set of legal and political circumstances is the first and only occasion when an entire population of British subjects was removed from the whole of its British homeland as a deliberate act and policy of the UK government.

8. But over the period of 40 years that the Chagossian community has endured its exile, it has proven almost impossible to construct a legal remedy, in such an intensely political case.

9. But why has this been so difficult? After all, it was 800 years ago, this year, that Magna Carta condemned the practice of exiling British subjects from the realm:-

"Chapter 29: No free man shall be exiled but by lawful judgment of his peers or by the law of the land".

But this broad statement of principle, relied upon by the Chagos islanders in both public law and private law actions against the FCO has been held to provide no remedy at all. Such gains as there have been have been met by officials determined to keep the Islanders from their homeland, and tactics adopted which lack integrity.

First Attempts at a Remedy – the Vencatassen case

10. The first action was brought in 1975 by one deported islander Michel Vencatassen – it was a strange pleading in tort based on intimidation, deprivation of liberty, assault by a British Naval Officer and conspiracy to prevent return. With half hearted support from the Legal Aid Authorities, it defeated an attempt by FCO to block discovery of documents by claiming PII. But the action went no further. The FCO however wished to settle and made an offer of £1.25. My predecessor Bernard Sheridan was required by FCO to involve all the islanders in a settlement. This he did with some alacrity, but before he could complete his mission the terms of settlement – which included renunciation of all rights arising from the deportation, were excoriated and the deal fell flat.

11. After Bernard returned from Mauritius in 1979, Legal Aid was not extended so the action went to sleep. Other islanders agitated for settlement, and in 1982, just as the Falklands War was about to begin, a renewed offer of settlement was made by the UK directly to the Mauritian government. A bilateral Conference took place in Mauritius, with some Chagossians looking on. Bindmans and QC were requested to attend on behalf of the Chagossians.

Settlement terms are mis-described.

12. The UK representative opened the meeting (which was conducted throughout in English, a language not understood by Chagossians) by saying there was now £3 million on the table and that the UK would no longer insist on individual renunciations, thus stating for the first time that the islanders could expect to return to the islands. Negotiations proceeded over an extended period. The offer was raised to £4 million and the Mauritian government agreed to provide £1 million worth of land for building of flats.

Chagossians are misinformed.

13. A mass meeting was held at which Chagossians were informed by a Mauritian minister that the amount of compensation was final but that they would retain their right to return to the islands. Bindmans and leading counsel returned home. A draft bilateral agreement which had been circulating suddenly acquired a new clause. Article 4 required

"the government of Mauritius is to use its best endeavours to procure from each member of the Ilois community in Mauritius a signed renunciation of the claims referred to in Article 2 of this agreement and shall hold such renunciations of claims at the disposal of the government of the United Kingdom".

Despite their introductory promise, the FCO simply could not prevent themselves from slamming the door on Chagossians and rubbing in the insult to the Mauritian government.

14. It may sound an idle quibble to point out that the article did not specify which government was to be exonerated by these yet-to-be-drafted forms of renunciation. (Both Mauritius or the United Kingdom were held responsible by the Chagossians, particularly Mauritius)

15. One might have thought that given the UK delegation statement that individual renunciations would no longer be required by the UK government, this ambiguity might have been resolved in favour of the Chagossians. In fact it was worse than that because the FCO actually informed us, in a later affidavit by their Director of the Americas, Peter Westmacott, that:-

"It was intended that waivers should be obtained from individual Ilois, which were to reflect at an individual level the settlement reached at community and government level. In fact waivers were only obtained in respect of the claims against the Mauritius government and not the UK government."

16. And so both the judicial review of 2000 and the group litigation of 2003 were prepared on the basis that the Chagossians had not renounced any rights against the UK government, a fact supported by the press report stating that they retained their rights to return to Diego Garcia. You can imagine my shock, therefore, when at the opening of trial of the group litigation in October 2002, I was confronted with a pile of 1,344 renunciation forms, thumb-printed by every compensated Chagossian, albeit without any form of explanation or translation. Did I complain to leading counsel, who had agreed to their admission without demur? I will leave that answer to your imagination.

17. So the settlement had taken place in 1982, with the Chagossians ignorant of the oppressive conditions imposed. Each islander received an average of £2,795, sufficient for some to acquire housing and for others merely to pay off the debts incurred during a decade of absolute poverty. The Vencatassen action was stayed on the basis of a Tomlin Order, all disclosed documents were returned to Treasury Solicitor. These concealed settlement terms have cast a long shadow over subsequent attempts to achieve a just solution.

The Judicial Review in Bancoult (1) and its evolution

18. When I came to review what was left of Chagossians' rights in 1997 the position was extremely unclear. On reviewing the Vencatassen file there were no government documents there, merely some pleadings, a Sunday Times report from 1975 and a few miscellaneous documents and records. The Chagossians were adamant that they had not given up any rights in the 1982 settlement, that they had not been asked to do so and if asked would have stoutly refused. They retained their social position at the very bottom of a stratified society as a poverty-stricken group in Mauritius and Seychelles. By demonstrating against the British authorities and petitioning the USA, they had hoped to raise the profile of their case.

Procedural reform

19. Protests proved ineffective, but two things came to their aid. First, following the Law Commission report in 1976 (the year after the Vencatassen case was launched) the remedy of judicial review had been instituted and for the first time permitted, at least in theory, a claim for damages in public law. Judicial review had developed much procedure and case-law over the intervening decade.

Do Your Homework first.

20. Second, the passage of 30 years meant that records covering the establishment of BIOT in 1965 and the agreement with the USA in 1966 should now be available in public records. Searches were made and revealed a stream of correspondence between Whitehall and the UK representative at the United Nations, instructing him to mislead the Decolonisation Committee about the permanence of the population which it was proposed to remove. With this limited insight into the decision-making process, a judicial review was launched in 1998 challenging Clause 4 of the BIOT Immigration Ordinance 1971 which prevented the return of the population and gave cover for its unlawful removal. In granting leave to move for judicial review, Scott Baker J. observed that "*Someone is trying to pretend that the population does not exist*". Jurisdictional objections were dismissed and leave granted. It led directly to the production of internal documents which fully explained the whole sorry saga.

How did the High Court declare the Exile Unlawful?

21. I will highlight a couple of aspects of the judgment. It was held that Magna Carta did apply to the colonies but its effect was surprisingly limited. What chapter 29 provided was that if such freedoms as exile were to be cut down, all that was necessary was for the law of the land to make provision for it, i.e. Magna Carta only guaranteed a procedure not a right. The Immigration Ordinance 1971 providing for the banishment of the population was nonetheless the law of the land. The question was whether it was a valid law and in order to answer that question the Court had to look elsewhere.

22. Second, the court addressed the *ultra vires* argument that the colonial power of governance was limited to the welfare of the inhabitants and did not permit its exile. The court recognised that there was a long line of cases such as *Reil, Sekgome* and *Winfat* saying that a colonial legislature was sovereign in its territory and was not an agent of the Crown. Nonetheless the phrase POGG must mean something since it was

not an infinite power which the Commissioner had to exercise. Although POGG was a large tapestry, the tapestry nonetheless had borders. In this case POGG required that subjects were to be governed and not removed and the clause in the BIOT Order providing for the exile was therefore ultra vires. A narrow interpretation was justified by the unusual factors of an unrepresentative legislature and a breach of fundamental rights, despite previous authority.

23. On the day of judgment Robin Cook accepted it and announced the new urgency in the feasibility Study which he had set up to investigate the implications of return. In court we struggled to create some sort of remedy out of the court's decision. We asked for the case to be held over to enable the court in effect to supervise what the Foreign Secretary immediately promised namely a restoration of the right to return and an acceleration of the feasibility study. The court was having none of it, complimented the Foreign Office on its candour in volunteering the historical record, and left it entirely to government as to how a remedy should be fashioned.

24. Although damages were a theoretical possibility in judicial review, we were not within shouting distance of making any such claim. It would need several more years of litigation of the heaviest sort and involved the most vigorous resistance from government. This resistance was ultimately successful and Chagossians again were denied a remedy.

25. I observe here that, the court did in fact decide that there was a breach of Magna Carta. Since the law of the land (the challenged Immigration Ordinance 1971) required by chapter 29 was invalid, then the exile must be a violation. Magna Carta was to become an important platform when it came to seeking compensation in the group litigation.

The Group Litigation

26. On 23 April 2002 the group litigation was issued. It had taken over a year to enrol 4,287 Chagossians and to identify a sufficient cause of action to enable proceedings to issue. Compensation proceedings necessarily had to be a private law claim and based on tort. You will readily appreciate that the law of tort has more to do with snails in bottles than it has with exiled populations. Considerable ingenuity was required, just as it had been in pleading the Vencatassen case. But we had one advantage. In public law the removals had been declared unlawful and in effect a breach of Magna Carta established. So the headline claim was for "*the tort of exile*". In fact the claim was broadly based comprising six causes of action. In addition to the tort of exile, there was misfeasance in public office, negligence, deceit, property rights arising under the law of Mauritius, and breach of human rights (not arising under the Human Rights Act, but from the Mauritius Constitution 1964 which contained a Human Rights chapter). The FCO relied on two defences, the finality of the 1982 settlement, and, of course, limitation of actions, denying any continuity in any of these torts.

27. The trial judge dismissed all six causes of action as unarguable and upheld both of the FCO defences. The Court of Appeal was asked to rule. It concentrated on the three principal torts of exile, misfeasance and deceit.

28. The Court of Appeal's judgment shows in the starkest possible way that no-one gets damages against the State unless they can prove individual officials personally

responsible for an identified civil wrong. Not only can the State do no wrong in civil law, it simply has no liability. Sedley LJ acknowledged, without apology, the lack of a remedy in such a case, contrasting English public law with the civil law system in France where the judicial review judgment in November 2000 would in France have entitled Mr Bancoult and his compatriots to claim damages directly against the UK.

Misfeasance, what misfeasance?

29. But even the secondary proposition that the vicarious responsibility for individual torts which was provided by section 2 of the Crown Proceedings Act 1947, was not enough. It was necessary For each individual official or minister to be identified and particulars served of his state of knowledge. As the trial judge had observed, no doubt with some satisfaction, most of the main players here had long since passed away. In any event there was no kind of corporate responsibility which would enable the underlying illegal plan to rest upon the combined knowledge of the FCO and its ministers. Misfeasance has clearly been interpreted to apply mainly to police officers and corrupt officials and is totally inadequate to deal with an unlawful policy decided at the highest level. We were not allowed to amalgamate the knowledge of different officials and ministers who together conspired to cheat the Chagossians of their homeland.

30. We had relied upon the House of Lords decision in *Three Rivers v Bank of England* where Lord Hutton had said

"It is clear from the authorities that a plaintiff can allege misfeasance in public office against a body such as a local authority or a government ministry" (citing *Dunlop v Woolahra* and *Burgoin v Ministry of Agriculture*).

31. But Sedley LJ disagreed: He said

"What Dunlop set out self-evidently concerned a local corporation. The claim against the nominated department of State in Burgoin depended on proof that the "minister's motive was to further the interest of English turkey producers by keeping out the produce of French turkey producers" – an act which must necessarily injure them". .....

"In other words, if the necessary knowledge and motive could be brought home to the minister, the Crown, in the nominal form of the MAFF would be vicariously liable. It is in that sense that Lord Hutton was speaking of departmental liability for misfeasance in public office."

32. Well that is very strange. That is exactly what the Chagossians case was – namely that officials and ministers right up to the Prime Minister intended to remove the Chagos islanders, and to dump them 1,000 miles away without provision for homes or jobs. Normally a person is taken to intend the normal and probable consequences of his actions. But not, it seems, when ministers and officials of the Crown are involved. Sedley LJ continued:

"Faced with this inescapable difficulty (Counsel) submits that he's able to implicate officers of State in the tort so as to make the Crown vicariously liable ... (refers to the evidence) *... What he cannot point to however, is evidence that they or any of their subordinates (who constitutionally are their alter ego) knew that it was illegal. Such case law as there was ...*

confirmed that the power to make Ordinances for governments of dependencies went extremely wide. It was not until the divisional court decided in Bancoult 1 that a line was drawn."

33. So there we have it. Ministers and officials can do anything they like, closing their eyes to the obvious inhumanity involved, not bothering with Common Law, International Law or indeed Magna Carta, and claim that they did not know it was illegal. This was a judicial assumption, untested by evidence, that none of the participants were aware that to exile the Chagossians was unlawful. It was not good enough that they all knew that it was an outrageous breach of the practice of nations, a breach of the common law right of abode, a direct breach of a raft of international law from the Universal Declaration of Human Rights (1948) to the United Nations charter etc, etc. What was held to be decisive was the assumption that they did not know that they were acting unlawfully in English public law terms. They thought that they had the power to pass the Immigration Ordinance 1971, and it was held reasonable that they thought they could rely on the private ownership of land by the Crown (following compulsory acquisition).

34. Do we know any other area of the law where ignorance of it is a complete excuse? The simple fact is that they knew what they were doing was wrong (it involved lying to the United Nations and misrepresenting the case to the public), they certainly should have known about Magna Carta. The Common Law Right of Abode had been declared by the HL in *DPP v Bhagwan*, a case that started in 1970, before the unlawful Immigration Ordinance of BIOT was enacted. Even after the IO '71 was held unlawful in 2000, the High Court and CoA were prepared to exonerate an entire department plus its ministers upon an unproven assumption that they did not know it was illegal.

Magna Carta - The Fountain of all Liberty?

35. The great legal commentator Maitland described Magna Carta as a "*sacred text ... the nearest approach to an unappealable fundamental statute that England has ever had*". Moreover chapter 29 contains a negative injunction – "*thou shalt not exile*" – and there could not be a clearer breach than to remove an entire population from its entire homeland and dump it 1,000 miles away. Of course a breach of statutory duty requires further ingredients – the intention to benefit a particular class, and the absence of any other remedial provision. For reasons which I cannot explain, none of these issues was explored by the trial judge or the Court of Appeal, in a case which clearly required "anxious scrutiny". The Court of Appeal was willing to make all sorts of speculation on unpleaded matters (such as the speculation about a alternative cause of action based upon trespass to the person – for which evidence never existed), but to examine a breach of Magna Carta as a breach of statutory duty does not seem to have occurred to the judicial mind – despite finding that Magna Carta had been breached.

Deceit – does it matter?

36. Well there was one consolation prize, paradoxically in the case of the tort of deceit. Whereas the trial judge had held that deceit must be practised on the plaintiff and not on a third party, the Court of Appeal considered it arguable that deceit of a third party,

in the person of the United Nations, (the only body that could have rescued Chagossians at the time) was, at least arguably, a recognisable tort.

37. Of course it did not matter because all arguments deployed to overcome the statute of limitations – poverty, remoteness, lack of education and access to advice, the concealment practised by the UK etc. etc. – were all swept away in a rigid application of the six year time bar from the date of the 1982 settlement. And finally it was considered unarguable to seek a declaration of the right to return to all islands of the archipelago.

38. And so the Chagossians' quest for some form of remedy was finally disposed of. The European Court of Human Rights held the case inadmissible, largely on the basis that there was no jurisdiction to consider human rights in a territory to which the convention had not been extended.

You can't take that away from me, can you?

39. So Chagossians were denied compensation for their exile. But even then, one precious thing remained to the Chagos islanders – their inherent right of abode recognised in Bancoult (1) and given effect by Robin Cook's Immigration Ordinance which restored their right of return. But even that was to be snatched away from them in 2004.

40. In July 2002 the feasibility study which Robin Cook had promised to be the means of returning the population, managed to conclude that resettlement was not really feasible because, it was claimed, sea level rise would make life precarious for the population (but not for the military base), and the cost of sea defences would be prohibitive. This has now been shown to be scientific nonsense. But it took another two years, and a war in Iraq before the FCO bit the bullet and abolished the Chagossians' precious right of abode, in 2004. And it took us another decade to uncover the scientific distortions that had led consultants to the required conclusion to their work.

41. The risible conclusions of the feasibility study in 2002 had been gathering dust as the Iraq war gained in intensity. Then, stirred on by a public statement that the Chagossians intended to exercise their declared rights and actually return to the islands, the FCO sprang into action. Enacting an Order in Council without prior notice or consultation, Jack Straw passed a new constitution for BIOT, one which expressly excluded and indeed abolished the Chagossians' precious right of abode. This solemn farce was later admitted by Jack Straw to be one which exchanged legitimacy for speed. One wonders what kind of panic must have been caused by a Chagossian indicating that he would like to go home in exercise of his hard-won rights. Amongst the dark secrets that perhaps one day Sir John Chilcot will cast light upon, we may count the abolition of the Chagossians' right of abode as amongst the darkest.

Bancoult (2) 2004-2008

42. To defend their precious Right of Abode Chagossians were plunged into another four years of litigation, culminating in the House of Lords in 2008. During this epic battle seven judges ruled that the Ordinance was unlawful on a multiplicity of grounds – ultra vires, irrationality, abuse of process, legitimate expectation, all of which were held to have limited the Crown's prerogative to abrogate fundamental rights. The FCO's appeal to the House of Lords was expressly justified by the S/S on the basis that it was necessary to clarify whether the prerogative in the overseas territories was subject to these limitations. On that ground they lost, and the Crown's prerogative can now be judicially reviewed wherever it is deployed in the OT's. However on the ground of the rationality of its exercise, a narrow majority held that given the contents of the feasibility study (which had not been considered by any of the previous judges) it was not unreasonable to terminate the right of abode.

Were the Law Lords misled?

43. Which brings me on to the last and final attempt by Chagossians to penetrate the duplicity of their exile insofar as the FCO claimed that resettlement was not feasible.

44. This absurd conclusion (absurd because it did not apply to the US airbase on Diego Garcia) was solemnly set out in the 2002 study conducted by so-called independent consultants. As always with contested litigation you have to have the basic facts at your fingertips before you can contemplate a legal challenge. We therefore asked for the underlying papers relating to the feasibility study throughout the entire judicial review from 2004 to 2008. Not only were we refused but a claim was made that the papers no longer existed. But 4 years later, as our complaints got louder, suddenly in 2012 the file was found and the papers disclosed. Where were they found? In the archive of the Treasury Solicitor, the very person who had formally denied the existence of the file, on behalf of the FCO.

45. There followed not a word of explanation or apology, but the contents of the file were damning enough. The report published by FCO had concluded that increased storminess in the Indian Ocean would cause overtopping and flooding so as to require highly-expensive sea defences such that the UK taxpayer would be faced with a large and unending commitment. Sea level rise was also relied on as a factor affecting the islanders' resettlement. However when we looked at the draft report, and the way it had been conducted by the FCO and their single peer reviewer – coincidentally the scientist spearheading the campaign for the marine-protected area – it was possible to see the scientific flaws and the expectations of a negative outcome which FCO gave to the consultants at the outset. In short, a wholly fictitious hypothesis that there would be a shift in the cyclone belt leading to increased storminess was, after pressure from the peer reviewer, completely excised from the final report in favour of a certain scientific prediction. This was bad science at its worst. Moreover no measurements of sea level rise had been made at all and modelling only was conducted, based on measurements in the Pacific and ignoring the phenomenon known as the Indian Ocean dipole which has been measured to show negligible sea rise in that part of the Indian Ocean. Finally we instructed a real world-class expert on coral islands who filed a report to say that coral islands react to wave action by rebuilding themselves with the sediment displaced. They remain dynamic features and do not simply sink under the waves.

46. So when all this was revealed by the disclosure which had been refused to us throughout the journey to the House of Lords, we have now referred the matter back to the Supreme Court seeking to set aside the House of Lords judgment on the ground of a breach of the duty of candour and on the basis of new evidence.

47. Whilst judgment is awaited, and since we have been criticising the feasibility study for so long, the coalition government decided to redo the whole process. Fully independent consultants, KPMG, have now filed a further report, in which all the bad science and preconceived conclusions have been eradicated, and no obstacle to resettlement identified. Instead the task is now to find out how many islanders want to return, and how much a resettlement programme will cost. It is quite possible that before the end of this year a formal decision to resettle the population will at last be made. So why was all this litigation necessary?

48. We hear quite a lot these days from government about a generational struggle against the forces of darkness that threaten our civilisation. Tell that to the Chagossians and they will know what you mean. Sadly, Public Policy and Judicial Policy have played their part in this injustice. As a result of holding that ignorance of illegality was an excuse for Misfeasance, and deciding there was no tortious remedy for a breach of Magna Carta, English Public Law has failed to provide justice to the Exiles from the Chagos Islands.

Richard Gifford

Clifford Chance LLP

30 September 2015.

14

WHY HENRY VIII CLAUSES SHOULD BE CONSIGNED TO THE DUSTBIN OF HISTORY

Richard Gordon QC

1. The Government sometimes adds a provision to a Bill which enables the Government to repeal or amend it after it has become an Act of Parliament. The provision enables the amendment of primary legislation using delegated (or secondary) legislation. Such provisions are known as 'Henry VIII clauses'. The House of Lords Select Committee on the Scrutiny of Delegated Powers in its first report of 1992-93 defined a Henry VIII clause as: a provision in a Bill which enables primary legislation to be amended or repealed by subordinate legislation, with or without further Parliamentary scrutiny. [HL 57 1992-93, para 10]. Even if there is 'scrutiny' it will be perfunctory: instead of weeks or even month of consideration by committee and in the various stages of the legislative process - Parliament gets, at most, the opportunity to vote for or against the measure - no amendment is possible.

2. To students of *'1066 and All That'* Henry VIII was a dangerous tyrant and *'a bad thing'*. In 1539 he persuaded a supine parliament to pass the Statute of Proclamations giving the king's decisions the same force as acts of the legislature; hence the name Henry VIII clause.

3. Although the 1539 Act was repealed immediately after the king's death in 1547 similar powers to bypass parliament have resurfaced in modern legislation (see, eg: the Banking (Special Provisions) Act 2008 allowing Treasury ministers to *'disapply any specified statutory provision or rule of law'*; the Constitutional Reform and Governance Act 2010 allowing ministers to amend or repeal any prior statute dealing with the civil service, treaties or MPs' expenses).

4. Henry VIII clauses are not new but they have grown exponentially in recent times. A short outline of the history of their use is illuminating. After the death of Henry VIII, such clauses fell into disuse and it was 1888 before they seem to have re-emerged in the United Kingdom.

5. A 1932 Report of the Donoughmore Committee found that between 1888 and 1929 only nine Acts of Parliament contained such clauses. It recognised that their occasional use might be justified but concluded that their *'use must be demonstrably essential'* and justified on each occasion by the Minister *'to the hilt'*".

6. Thereafter, there were none until the Second World War, but they then returned in growing numbers. Concerns were more frequently expressed in the 1970s and 1980s. Controversy reached a height during the passage of the Deregulation and Contracting Out Act 1994 which contained a number of such clauses. More recently, as many as several hundred such clauses have been passed in a single Parliamentary session.

7. Despite it being unsupported by hard evidence and, therefore, speculative it seems probable that the proliferation of Henry VIII clauses reflects the influence of civil servants, who have found it convenient to circumvent the need to obtain Parliamentary approval for subsequent amendments to the statutes concerned.

8. It would be wrong to deny a Henry VIII clause any value. Such a clause can, for example, be useful where the Act in question may conflict with a large number of local Acts that may not be easily identifiable in the beginning, to allow either the old or the new Acts to be amended as necessary. But there are two clear dangers that widespread use of such clauses pose.

9. First, they bypass the authority of Parliament (parliamentary sovereignty). Certain developments in the twentieth and twenty-first centuries, including the UK's membership of the EU and the enactment of the Human Rights Act 1998, have led some to suggest that the principle of parliamentary sovereignty has declined. Arguably, this is truer in practice than in theory, as a result of Parliament's power to repeal the relevant legislation. However, the principle of parliamentary sovereignty remains a cornerstone of the constitution and, for that reason, Henry VIII powers have attracted a great deal of criticism.

10. Much of this criticism arises from the fact that their effect is practically to limit parliamentary scrutiny in allowing substantial changes to legislation to be made via

the delegated procedure. Henry VIII clauses and the subsequent use of the secondary (delegated) legislation to change Acts of Parliament are a "*constitutional oddity*" (House of Lords Constitution Committee, Sixth Report on the Public Bodies Bill, dated 4 November 2010, counter-democratic, undermine parliamentary sovereignty and unduly fetter parliamentary scrutiny.

11. Secondly, in the case of prospective Henry VII clauses, there is no way of assessing at the time of enactment which future statutes the power will be used against. It has been suggested by Barber and Young (2003 PL 112 at 114) in the context of emergency powers legislation which may be used in relation to all primary legislation whether enacted before or after the Act conferring the power that such prospective Henry VIII clauses *'constitute a fetter on the power of future Parliaments creating the risk that as yet un-thought of statutes will be overturned through the use of delegated powers'* and that *'Parliament must put its trust entirely in the body to whom Parliament is delegated.'*

12. A notable recent example of the potentially enormous reach of Henry VIII clauses is afforded by the Legislative and Regulatory Reform Bill introduced in 2006 by the Blair Government. Clause 1 provided that a Minister could, by Order, make provision for *'reforming legislation.'* The measure was presented as simple streamlining of the Regulatory Reform Act 2001 by which the Government, to help industry, could reduce red tape. The Bill, which came to be known as the Abolition of Parliament Bill', produced uproar. Six Cambridge law professors writing to the Times (16th February 2006) said that, as drafted, the Government by delegated legislation could curtail or abolish jury trial, allow the Prime Minister to sack judges, rewrite the law on nationality and 'reform' Magna Carta. The Government accepted that the Bill went too far and it was considerably amended to build in various safeguards including the super-affirmative procedure which *'requires Ministers to take into account any representations, any resolution of either House, and any recommendations of a parliamentary committee in respect of a draft order (a draft order being laid for a period of 60 days).'*

13. The Public Bodies Act 2011 is another example of the worrying use of Henry VIII clauses. JUSTICE called the Bill *'one vast Henry VIII clause'.*

14. The House of Lords Constitution Committee's Report on the Bill as first introduced was outspokenly critical (see HL Constitution Committee 6th Report 2010-2011 *Public Bodies Bill* HL 51):

> ***'The point of principle***
>
> *6. The Government has not made out the case as to why the vast range and number of statutory bodies affected by this Bill should be abolished, merged or modified by force only of ministerial order, rather than by ordinary legislative amendment and debate in Parliament. As we have said, and as is axiomatic, the ordinary constitutional position in the United Kingdom is that primary legislation is amended or repealed only by Parliament. Further, it is a fundamental principle of the constitution that parliamentary scrutiny of legislation is allowed to be effective. While we acknowledge that exceptions are permitted - as in the case of fast-track legislation, for example - we have also sought to ensure that such exceptions are used only where the need for them is clearly set out and justified. As we have said, the use of Henry VIII powers, while accepted in certain, limited circumstances, remains a departure from constitutional principle.* ***Departures from constitutional principle should be contemplated only where a full and clear explanation and justification is provided.***
>
> *13. The Public Bodies Bill [HL] strikes at the very heart of our constitutional system, being a type of 'framework' or 'enabling' legislation that drains the lifeblood of legislative amendment and debate across a very broad range of public arrangements. In particular, it hits directly at the role of the House of Lords as a revising chamber.'*

15. In June 2012 the House of Lords Delegated Powers and Regulatory Committee in a special report identified eleven statutes in which there were a variety of heightened statutory scrutiny procedures because of Henry VIII powers. It urged that no new variations of such heightened scrutiny measures be introduced (see HL Delegated Powers and Regulatory Reform Committee *'Strengthened Statutory Procedures for the Scrutiny of Delegated Powers'* 3rd Report 2012-2013, HL 19).

16. In January 2014 the Constitution Unit at UCL published a set of proposed legislative standards for the scrutiny of Bills. Unsurprisingly, it contains a large number of suggested provisions for addressing the effect of Henry VIII clauses.

17. It is worth reproducing in full:

‘2) Delegated powers, delegated legislation and Henry VIII clauses

2.1 Defining the power

2.1.1 Delegations of legislative power should be framed as narrowly as possible.
2.1.2 The policy aims of a Ministerial power should be included in the bill itself.
2.1.3 The scope of a Henry VIII power should be limited to the minimum necessary to meet the pressing need for such an exceptional measure.
2.1.4 The use of Henry VIII powers should only be permitted if specific purposes are provided for in the Bill.
2.1.5 Ministerial powers should be defined objectively.
2.1.6 Ministerial powers to make secondary legislation should be restricted by effective legal boundaries.

2.2 Safeguards in delegation of legislative powers

2.2.1 Laws that contain delegated powers should strike a balance between the desire for effectiveness and the safeguards needed to ensure constitutional propriety.
2.2.2 If constitutional safeguards can be added to a delegated ministerial legislative power without undermining the policy goals of a Bill then they should be included.
2.2.3 Henry VIII powers should be accompanied by adequate procedural and legal safeguards.
2.2.4 Henry VIII powers that relate to a constitutionally sensitive subject-matter should use a super-affirmative parliamentary procedure.
2.2.5 Ministers should not be able to suspend legal powers by giving directions; instead orders, which are subject to parliamentary oversight, should be used.
2.2.6 Provision should be made for Parliament to be informed promptly of all ministerial exercises of legislative power.

2.3 Appropriate uses of delegated powers

2.3.1 Henry VIII clauses should be limited so that they cannot be used to alter constitutional arrangements.
2.3.2 Laws should not permit the sub-delegation of legislative powers.
2.3.3 Delegating order-making powers to Ministers to change the statute book should be avoided when there are other more constitutionally appropriate alternatives available.
2.3.4 Delegated legislation should not be used to create regulations that will have a major impact on the individual’s right to respect for private life.
2.3.5 Delegated legislation should not be used to create new criminal offences.
2.3.6 Bills should identify the provisions in other enactments that require amendment, rather than using Henry VIII powers to leave the power to make amendments to the subsequent discretion of the relevant department.
2.3.7 The most important aspects of a policy should be included on the face of a bill and not left to be decided through delegated legislation.

2.3.8 Rules that are central to a bill of constitutional significance should be to the greatest extent possible on the face of the bill, so allowing full legislative amendment and debate.
2.3.9 Rights of appeal should be defined in primary legislation and not in secondary legislation.
2.3.10 Delegations of legislative authority should fit within the overall scheme of the bill.

2.4 The parliamentary justification of delegated powers, delegated legislation and Henry VIII powers

2.4.1 Ministers should provide Parliament with their justifications for proposing the delegation of legislative powers.
2.4.2 Ministerial assurances as to the purpose of order-making powers are not a substitute for legal safeguards on the face of a Bill.
2.4.3 Widely-drawn delegations of legislative authority cannot be exclusively justified by the need for speed.
2.4.4 The justification for a Henry VIII clause should refer to the specific purpose that it is designed to serve.
2.4.5 Where an "incidental and consequential" Henry VIII power is likely to be used in relation to constitutional legislation, the Government should provide a clear and detailed account to Parliament of how and why it intends to exercise that power.'

18. None have yet been implemented.

19. The phrase *'consigned to the dustbin of history'* is not entirely mine'. In fact only one word is the product of originality on my part. At the Lord Mayor's Annual Dinner in July 2010 the former Lord Chief Justice Lord Judge devoted his entire Mansion House speech to Henry VIII clauses urging that they be *'confined to the dustbin of history'* (my underlining).

20. Joshua Rozenberg's account of the speech in the Guardian is (aside from amusement value) perhaps indicative of the fact that even the most distinguished lawyers can rant and rave about constitutional improprieties such as Henry VIII clauses but, in the end, it is unlikely to make a blind bit of difference:

> *'Of course, the government took the view that these powers were necessary. "Necessity is the plea for every infringement of human freedom," responded Judge, quoting William Pitt the Younger. "It is the argument of tyrants; it is the creed of slaves."*

Having twice implied that Clarke was a tyrant, the lord chief justice stressed that he was not accusing governments past or present of intending to subvert the constitution. "But what's to come is always unsure."

The proliferation of Henry VIII clauses would inevitably damage further the sovereignty of parliament, he feared, "increasing yet further the authority of the executive over the legislature".

Clarke took all this in good part: he has known Lord Judge since the days when they used to appear against each as barristers on the Midland circuit. "I take the lord chief justice's words as important to bear in mind," he said politely.

There were other signs of friendship: the lord chancellor said that he had not even been as bruised by judicial review as some of his colleagues. "Nevertheless," he continued, "I know I speak for all members of the government when I say to you – be gentle with us."

This was, perhaps, a rather curious thing to ask of the judges. It seems as unlikely that the courts will hold back from quashing ministerial decisions as it is that ministers will start repealing Henry VIII clauses – even though that could presumably be done without the need for legislation.'

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Judicial Review Trends & Forecasts

Conference Feedback Form
Monday 5 October 2015

The Public Law Project relies on collecting feedback from delegates to improve conferences and training. Please do fill this in as it will ultimately help us programme better events.

Session 1 Opening Address
Lord Justice Laws

What did you think of the speaker, with 1 being the worst score and 5 being the best score?

1 2 3 4 5

You can leave open feedback in the box below

Session 2 The top public law cases of the year
Naina Patel, Iain Steel and Joanna Ludlam
What did you think of the speakers, with 1 being the worst score and 5 being the best score?

1 2 3 4 5

What did you think of the printed materials, with 1 being the worst score and 5 being the best score?

1 2 3 4 5

You can leave open feedback in the box below

Session 3 Parliamentary vandalism and new human rights
Mike Fordham QC

What did you think of the speaker, with 1 being the worst score and 5 being the best score?

1 2 3 4 5

You can leave open feedback in the box below

Morning breakout Sessions

Please Underline or circle the session you attended

1: EU Law in domestic JR Deba Das, Marie Demetriou QC, Tom Snelling

2: Proportionality Tom de la Mare QC & John Halford

3: Victims, suspects and convicts
Simon Creighton, Philippa Kaufmann & Kate Stone

4: Challenging NHS decisions Tim Buley and David Lock QC

How would you rate the breakout session? 1= worst score, 5=best score

1 2 3 4 5

What was the quality of the course materials? 1= worst score, 5=best score

1 2 3 4 5

You can leave open feedback on the morning breakouts in the box below

Morning session 4: Information processing and disclosure by public authorities
Hugh Tomlinson QC

What did you think of the speaker, with 1 being the worst score and 5 being the best score?

1 2 3 4 5

What was the quality of the course materials? 1= worst score, 5=best score

1 2 3 4 5

You can leave open feedback in the box below

Afternoon plenary session 1: PUBLIC LAW PANEL: Surveillance and the law
Chair: Tim Otty QC,
Panel: David Anderson QC, Michael Drury CMG, Eric King & Alice Ross

What did you think of the panel, with 1 being the worst score and 5 being the best score?

1 2 3 4 5

You can leave open feedback in the box below

Afternoon breakout sessions

Please Underline or circle the workshop you attended

1: Public law and the regulators Andre Lidbetter and Jasveer Randhawa

2: International law in the domestic courts Richard Hermer QC and Ravi Mehta

3: Social security salami slicing Jamie Burton, Sarah Clarke & Mike Spencer

4: Future proofing & discrimination Adam Straw and Heather Williams QC

How would you rate the breakout session? 1= worst score, 5=best score

1 2 3 4 5

What was the quality of the course materials? 1= worst score, 5=best score

1 2 3 4 5

You can leave open feedback in the box below

Afternoon plenary session 2
The relationship between litigation and policy: The Chagossian Islanders
Richard Gifford

What did you think of the speakers, with 1 being the worst score and 5 being the best score?

1 2 3 4 5

What was the quality of the speaker materials? 1= worst score, 5=best score

1 2 3 4 5

You can leave open feedback in the box below

Afternoon plenary session 3
Why Henry VIII clauses should be consigned to the dustbin of history
Richard Gordon QC

What did you think of the speakers, with 1 being the worst score and 5 being the best score?

1 2 3 4 5

What was the quality of the course materials? 1= worst score, 5=best score

1 2 3 4 5

You can leave open feedback in the box below

Afternoon plenary session 4 closing address:
The Impact of terrorism policy on free speech
Prof Conor Gearty

How informative was the speaker? 1= worst score, 5=best score

1 2 3 4 5

You can leave open feedback in the box below

Course evaluation

	excellent	good	adequate	poor
How clear were the aims of the conference?	☐	☐	☐	☐

	excellent	good	adequate	poor
What was the quality of the venue	☐	☐	☐	☐

	yes	no
Was the room well ventilated and/or heat controlled?	☐	☐
Were refreshments satisfactory?	☐	☐
Was seating/room layout appropriate?	☐	☐

Please rate Public Law Project's administration services (for booking)

excellent ☐ good ☐ adequate ☐ poor ☐

	yes	**no**
Did you receive booking acknowledgement?	☐	☐
Were you given the SRA CPD reference?	☐	☐
Were you advised of the number of CPD hours the course attracted?	☐	☐

Where / how did you find out about the conference?

	excellent	good	adequate	poor
What was your overall feeling about the conference?	☐	☐	☐	☐

Having been, If we ran a very similar conference next year would you recommend it to anyone else? yes ☐ no ☐

Based upon your overall impression would you attend other courses provided by the same organisation? yes ☐ no ☐

General comments – please give your comments below:

If you have any additional comments that you would like to make to PLP regarding this course, please e-mail one of the following:
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THANKS FOR ATTENDING AND TAKING THE TIME TO DO THE FEEDBACK!