PUBLIC LAW PROJECT ANNUAL CONFERENCE 2013

REVIEW OF THE YEAR

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Introduction

There are by now so many JR cases, which cover such a broad range of topics that a talk such as this is necessarily nothing more than a personal choice, and cannot hope to be comprehensive. What is set out below is merely a few cases from 2013 which may be of general interest. There will be many others which are relevant to your particular cases and practices.

Jurisdiction- Human Rights Act

Susan Smith and others (FC) v The Ministry of Defence [2013] UKSC 41

1. The claims arose out of the deaths of service men who had lost their lives whilst serving in the British Army in Iraq. The Supreme Court considered whether soldiers in the British Army were within the jurisdiction of the United Kingdom when serving both on and off base in Iraq for the purposes of Article 1 of the ECHR. That issue fell to be determined in the context of deciding whether the United Kingdom could be responsible for the deaths, which it was argued were caused by the negligent actions of British troops and/or equipment failures.

2. The Court conducted a detailed examination of the authorities on jurisdiction including *Soering v United Kingdom* (1989) 11 EHRR 439, *R (Al-Skeini) v Secretary of State for Defence* [2007] UKHL 26 and *R (Smith) v Oxfordshire Assistant Deputy Coroner (Equality and Human Rights Commission intervening)* [2010] UKSC 29 ("Catherine Smith"). In *Catherine Smith*, the Supreme Court had concluded that the ECHR did not protect members of the British armed forces operating outside a UK military base other than in exceptional circumstances, as Article 1 was essentially territorial in nature.

3. Lord Hope noted that the question of whether the servicemen were, at the time of their deaths, within the jurisdiction of the United Kingdom did not receive a direct answer from the Grand Chamber in its *Al Skeini* judgment. However, three elements could be extracted from the Grand Chamber's *Al-Skeini* judgment pointing to the conclusion that the view in *Catherine Smith* could no longer be maintained:

    a. The first was to be found in it formulation of the general principle of jurisdiction with respect to state agent authority and control. In exceptional circumstances, the state could be held to be exercising its jurisdiction extra-territorially.

    b. The second was to be found in the way that this formulation resolved the inconsistency between *Issa v Turkey (31821/96)* (2005) 41 E.H.R.R. 27 and *Bankovic v Belgium (Admissibility)* (52207/99) 11 B.H.R.C. 435 on the question whether the test to be applied in these exceptional cases could be

satisfied by looking only at authority and control or was still essentially territorial. The matter was resolved in favour of *Issa's* indication that the question was one of authority and control.

c. The third was to be found in the way that the Grand Chamber had departed from the indication in *Bankovic* that the package of rights in the Convention could not be divided and tailored to the particular circumstances of the extra-territorial act in question. To the extent that a state's extra-territorial jurisdiction over local inhabitants existed because of the authority and control that was exercised over them, this was because of the authority and control that the state had over its own armed forces. It followed that an occupying state could not have any jurisdiction over local inhabitants without already having jurisdiction over its own armed forces in the sense of Article 1 of the Convention.

4. The decision in *Catherine Smith* could thus be departed from as it was inconsistent with the guidance that the Grand Chamber had given in its *Al-Skeini* judgment.

5. Accordingly, the UK's Article 1 jurisdiction extended to securing the protection of Article 2 to members of the armed forces serving outside its territory. The extent to which the application of the substantive obligation under Article 2 could be held impossible or inappropriate would vary according to context.

6. By a majority, the Supreme Court declined to strike out the claims as non-justiciable under Article 2 or on the basis of combat immunity.

Jurisdiction – EU Charter of Fundamental rights

R (Sandiford) v The Secretary of State for Foreign and Commonwealth Affairs [2013] EWCA Civ 581

7. This case concerned the Secretary of State's decision to adhere to his policy of refusing to provide funding for legal fees and expenses to UK nationals who face the death penalty abroad.

8. The appellant, a UK national, was a vulnerable person suffering from physical and mental health problems. On 19 May 2012, she was apprehended at the airport in Bali, Indonesia by customs officials who found 10 packets of cocaine in her luggage. On 20 December 2012, the Indonesian prosecutor requested a sentence of 15 years' imprisonment. On 22 January 2013, the judges of the District Court of Denpasar sentenced her to death by firing squad. She appealed against conviction and sentence to the High Court of Denaspar.

9. The appellant issued judicial review proceedings seeking a mandatory order requiring the Secretary of State for Foreign and Commonwealth Affairs to provide and fund an adequate lawyer to represent her in her appeal against conviction and sentence. The Secretary of State's failure to do so was unlawful on the following grounds:

a. It breached her rights guaranteed by (i) the European Convention on Human Rights and (ii) the Charter of Fundamental Rights of the European Union.

b. It was an unjustified departure from the Government policy, as set out in *HMG Strategy for Abolition of the Death Penalty* ("the Strategy").

c. It was an unlawful fettering of discretion by adopting the blanket policy as set out in the Strategy.

10. Under the first ground the Claimant argued that notwithstanding her circumstances of being imprisoned in Indonesia, she fell within the "jurisdiction" of the United Kingdom, relying on the decision of the Grand Chamber of the European Court of Human Rights in *Al-Skeini and Others v United Kingdom* (2011) 53 EHRR 18.

11. Gloster J and Nicola Davies J rejected this argument. It was clear from [134]-[137] of *Al Skeini* that the Court was identifying the principles that would establish the exercise of "jurisdiction" by a Contracting State by the acts of its diplomatic and consular agents, by reference to the test as to whether those agents were exerting "authority and control over others" outside the territory. Mere acts or omissions of a Contracting State, which affected the property or persons in a foreign jurisdiction were not sufficient to engage the Contracting State's responsibility.

12. In the instant case, from the moment the appellant was arrested she was and remained in control of the Indonesian state and relevant criminal authorities. The mere fact that the consular officials provided her with advice and support, and that the FCO engaged in diplomatic representations, could not be regarded as any kind of assertion of authority or control by agents of the United Kingdom so as to engage its responsibilities under the Convention.

13. Neither did the Court accept that the appellant had established any breach by the defendant of her rights under the EU Charter of Fundamental Rights. The Claimant argued that (1) EU law can apply extra-territorially; (2) the Claimant was an EU citizen and thus fell within the personal scope of EU law (*ratione personae*); (3) the offences with which the claimant has been charged were the subject of Framework Decision 2004/757/JHA which had extra territorial effect and thus the claimant's situation fell within the material scope of EU law; (4) the Defendant was implementing (or derogating from) EU law in not seeking the claimant's extradition and therefore the Charter required the FCO to fund a lawyer for the Claimant. The Court concluded that although the appellant fell within the personal scope of EU law (*ratione personae*), her situation did not fall within the material scope of EU law (*ratione materiae*).

14. Following the judgment of the Divisional Court, the High Court of Denpasar dismissed the Claimant's appeal against conviction and sentence. She sought to appeal further to the Supreme Court of Indonesia but needed to raise £8000 for her legal representation. She appealed to the Court of Appeal.

15. The Court of Appeal rejected all three of the appellant's grounds as they were put in the appeal:

a. First, that the appellant's situation fell within the material scope of EU law and the Secretary of State was in breach of the duty to protect the appellant's rights under the Charter of Fundamental Rights of the European Union ("the Charter").

b. Second, that the appellant was within the jurisdiction of the UK for the purpose of Article 1 of the European Convention on Human Rights and the Secretary of State was in breach of Article 6 of the Convention.

c. Third, that the policy of the Secretary of State never to fund legal representation in death penalty cases regardless of the circumstances was irrational and therefore unlawful as a matter of domestic law.

16. In respect of her first ground of appeal it was submitted on behalf of the Claimant that the High Court erred in law in conflating two distinct questions, namely (i) whether the appellant's situation fell within the material scope of EU law for the purposes of article 51(1) of the Charter and (ii) if so, whether, in the circumstances of the case, the acts or omissions of the Member State were compatible with the provisions of the Charter.

17. The Court accepted the Claimant's argument in this regard but for reasons that differed from those of the Divisional Court, concluded that there was no decision implementing EU law that was material to the present case. The Court did not consider that, by having a policy not to pay for legal representation of UK nationals who are facing the death penalty abroad, the Secretary of State was implementing the Framework Decision. Such a policy was not therefore in breach of EU law.

18. The Court rejected the Claimant's argument that she was within the "jurisdiction" of the UK because of the engagement by, and activities of, the FCO and its consular officers in Indonesia in connection with her case. The necessary degree of authority and control could not be established.

19. The Court of Appeal also rejected the Claimant's argument that the policy contained in the Strategy was irrational. The practical problems identified with the policy were not sufficient to show that it was irrational. Further, it was based on reasoning which was coherent and neither arbitrary nor perverse.

Jurisdiction – habeas corpus

Secretary of State for Foreign and Commonwealth Affairs and Another v Rahmatullah [2012] UKSC 48

20. Mr Rahmatullah, a Pakistani national, had been captured by UK forces in a US controlled area of Iraq in February 2004. He was transferred to US forces in accordance with the terms of a Memorandum of Understanding of 2003 that was to be implemented in accordance with the Geneva Conventions, including the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, as well as customary international law. By June 2004, Mr Rahmatullah had been transferred by the US forces to Bagram Air Base in Afghanistan.

21. Mr Rahmatullah applied for a writ of habeas corpus on the grounds that his detention was unlawful, and that the UK had sufficient control over him to justify his release in accordance with the MoU.

22. The Divisional Court refused his application, but the Court of Appeal allowed his appeal on the basis that it was arguable that the UK enjoyed a sufficient degree of control over him. The Court required that the UK seek his return, or demonstrate why he could not be returned.

23. The Secretaries of State thus requested that the US return Mr Rahmatullah. The US refused the UK's request for his release on the basis that a request for his repatriation had already been made by the government of Pakistan. The Court of Appeal was satisfied with this response.

24. The Secretaries of State appealed against the Court of Appeal's decision to issue a writ of habeas corpus. Mr Rahmatullah cross-appealed the decision that the response by the US was sufficient to demonstrate that the UK could not secure his release.

25. The Supreme Court unanimously dismissed the appeal and by a majority of 5-2 also dismissed the cross-appeal.

26. The critical issue was whether the respondent to an application for habeas corpus had a sufficient measure of control over the applicant's detention. The Court of Appeal's decision did not amount to an "instruction" to the UK Government to demand Mr Rahmatullah's return. Its judgment reflected the court's conclusion that there were sufficient grounds for believing that the UK had the means of obtaining control over his custody. The essential underpinning of the Court's conclusion was that there was sufficient reason to believe that the Government could obtain control of Mr Rahmatullah.

27. Neither did the effect of the Court of Appeal's decision involve an attempt to "dictate to the executive government steps that it should take in the course of executing Government foreign policy". Rather, it required the Government to test whether it had the control that it appeared to have over the custody of Mr Rahmatullah and to demonstrate in the return it made to the writ that, if it were the case, it did not have sufficient control. In the present case there was ample reason to believe that the UK government's request that Mr Rahmutallah be returned to UK authorities would be granted.

28. In respect of the cross-appeal the Court concluded (Lord Carnwath and Lady Hale dissenting) that the Court of Appeal was entitled to hold that a sufficient return to the writ was made by the Secretaries of State, based on the letter of response of the US authorities to the formal letter of request, in which the British authorities had sought the release of Mr Rahmatullah.

Deportation and Article 6

Omar Othman Aka Abu Qatada v Secretary of State for the Home Department [2013] EWCA Civ 277

29. For a number of years, the Secretary of State for the Home Department had been seeking to deport Mr Othman from the United Kingdom to Jordan under section 5(1) of the Immigration Act 1971, as a person whose deportation is deemed to be conducive to the public good. He had already been tried and convicted in his absence in Jordan for terrorism offences and if returned to Jordan would face a retrial. The issue in the proceedings was the proper assessment of the risk that the evidence against him at the retrial would include statements that had been obtained by torture and, if so, what effect this had on the lawfulness of his deportation.

30. On 18 February 2009, the House of Lords dismissed Mr Othman's challenges to the Secretary of State's earlier decision to give notice of deportation. On the same day, the Secretary of State signed and served a deportation order under section 5(1) of the 1971 Act.

31. On 17 January 2012, the ECHR handed down its judgment on his application challenging the lawfulness of his proposed deportation. The Court held that his deportation would violate Article 6 of the European Convention on Human Rights on account of "the real risk of the admission at the applicant's retrial of evidence obtained by torture of third persons".

32. Following discussions between the British and Jordanian governments, on 17 April 2012, the Secretary of State notified Mr Othman of her intention to deport him and on 18 May she refused to revoke the deportation order that she had earlier made on 18 February 2009. Mr Othman appealed the refusal to revoke the deportation order to the Special Immigration Appeals Commission. His appeal was allowed.

33. The first ground of appeal was that SIAC erred in finding that that there would be a real risk of a flagrant denial of justice on transfer to Jordan unless it could be established that, under Jordanian law, the prosecutor would bear "the burden of proving to a high standard" that the impugned statements would not be admitted in evidence at the retrial.

34. The second ground was that SIAC failed to consider whether there was a real risk of a flagrant denial in the round.

35. Both grounds of appeal were dismissed by the Court of Appeal, which was satisfied that SIAC had not committed any legal errors. The Court noted that criticisms of a specialist tribunal that had directed itself properly as to the general legal test to apply were particularly difficult to sustain.

36. Abu Qatada left the UK on 7 July 2013 after the UK and Jordanian Governments reached an agreement that evidence obtained by torture would not be used against him at his trial in Jordan.

Kapri (AP) v The Lord Advocate representing the Government of the Republic of Albania (Scotland) [2013] UKSC 48

37. In this case, the Supreme Court allowed an appeal against an extradition order issued by the Lord Advocate on the basis of allegations that the judicial system in Albania was systemically corrupt. The Court considered whether it would be compatible with the appellant's Convention rights within the meaning of the Human Rights Act 1998 for the appellant, an Albanian national, to be extradited to Albania.

38. It was alleged that the appellant was responsible for the murder of another Albanian national in the United Kingdom in April 2001. On the day after the incident the appellant left London and travelled to Glasgow, where he assumed a false Macedonian identity.

39. The Metropolitan Police were unable to locate the appellant. In December 2001 the Crown Prosecution Service delivered all materials about the case that were in their possession to the prosecuting authority in Albania and invited the Albanian authorities to prosecute the appellant. This the Albanian authorities decided to do.

40. The trial in Albania took place in the apellant's absence and he was convicted and sentenced to 22 years imprisonment. The whereabouts of the appellant were unknown and so no further steps were taken to make the decision effective.

41. In 2010 the UK police became aware that the appellant was living in Glasgow and notified the Albanian authorities. On 22 June 2010 the Albanian Ministry of Justice made a formal request for the appellant's extradition to Albania. On 29 July 2010 the Scottish Ministers issued a certificate under sections 70 and 141 of the Extradition Act 2003 that the request for the appellant's extradition to Albania was valid.

42. The appellant lodged a devolution minute alleging that he could not receive a fair trial in Albania because of systematic corruption in the judicial system. He relied upon a Foreign and Commonwealth Office Annual Report on Human Rights and other international reports. The Lord Advocate argued that there was nothing in the reports which addressed the issue of whether corruption would lead to a flagrant denial of justice in the appellant's case.

43. The Court held that the scope the appeal depended upon whether the issue was a compatibility issue under the Criminal Procedure (Scotland) Act 1995 s.34 or a devolution issue under the Scotland Act 2012 s.36(4). Extradition proceedings were not "criminal proceedings" for the purpose of s.288AA(4) of the 1995 Act. The roles given to the Scottish Ministers and the Lord Advocate under the Extradition Act 2003 in relation to extradition proceedings in Scotland were separate from those that they were required to perform under the 1995 Act. It followed from the nature of the statutory provisions, under which the Lord Advocate performed his functions in extradition cases, that the issue which gave rise to the instant appeal was a devolution issue.

44. The Court considered the threshold test as set out in ***Mamatkulov and Askarov v Turkey*** (2005) 41 EHRR 494 and ***Othman v United Kingdom*** (2012) 55 EHRR 1 of whether the appellant would suffer a "flagrant denial of justice" if he were to be extradited. This was a stringent test of unfairness requiring a flagrant breach of the relevant right, such as will completely deny or nullify the right in the destination country.

45. None of the cases in which the test has been described was concerned with the way it was to be applied where the complaint is of systemic judicial corruption. It was not so obvious that the only way it could be met, as it was in those cases, was by pointing to particular facts or circumstances affecting the case of the particular individual. It was impossible to say that an individual who was returned to such a system would receive the most fundamental of all the rights provided for by Article 6 of the Convention, which is the right to a fair trial.

46. The case was thus returned to the Appeal Court so that it could be provided with up to date information to reach a properly informed decision as to whether or not the threshold test was satisfied. Allegations of corruption had to be taken seriously and warranted closer examination of the evidence before a final decision was made concerning extradition.

Grant of Refugee status

Al-Sirri (FC) v Secretary of State for the Home Department; DD (Afghanistan) v Secretary of State for the Home Department [2012] UKSC 54

47. The appeals were concerned with article 1F(c) of the Geneva Convention on the Status of Refugees which excludes from refugee status and protection "any person with respect to whom there are serious reasons for considering that … he has been guilty of acts contrary to the purposes and principles of the United Nations."

48. In Al-Sirri, the appellant was refused asylum due to his contributing to a book, the author of whom was a member of an organisation proscribed under the Terrorism Act 2000, his possession of an unpublished Arabic manuscript, his transfer of money to and from foreign countries allegedly in sums greater than his known income could explain and his alleged involvement in a murder in Afghanistan.

49. In the case of DD, the appellant's asylum claim was refused on the basis that his account was not credible, and even if it were, his claim that he had fought against the International Security Assistance Force in Afghanistan (an armed force but not an United Nations force) meant that he was excluded from the definition of refugee by reason of article 1F(c) of the Refugee Convention.

50. The Home Secretary accepted that the appellants could not be returned to their home countries because they faced a real risk of torture or inhuman or degrading treatment or punishment there. It was the grant of refugee status, rather than the right to stay in the United Kingdom that was at issue in the proceedings.

51. The Court set out that article 1F(c) should be interpreted restrictively and applied with caution. There should be a high threshold "defined in terms of the gravity of the act in question, the manner in which the act is organised, its international impact and long-term objectives, and the implications for international peace and security". The Court concluded that the phrase "acts contrary to the purposes and principles of the United Nations" must have an autonomous meaning. Member States were not free to adopt their own definitions.

52. The appropriately cautious and restrictive approach was to adopt para 17 of the UNHCR Guidelines:

> "Article 1F(c) is only triggered in extreme circumstances by activity which attacks the very basis of the international community's coexistence. Such activity must have an international dimension. Crimes capable of affecting international peace, security and peaceful relations between states, as well as serious and sustained violations of human rights would fall under this category."

53. In the case of DD, the Court rejected the argument that the appellant was capable of being guilty if he fought against UNAMA (the United Nations Assistance Mission in Afghanistan) but not if he was found to be guilty of fighting against ISAF. Although there were clear differences between ISAF and UNAMA, their aims and objectives were congruent. The differences were not material to the issue of whether the appellant is excluded from refugee status by article 1F(c).

54. The Court also considered the standard of proof required in article 1F(c) for there to be "serious reasons for considering that" the individual asylum seeker had committed the crimes referred to in article 1F(a) or (b) or "been guilty of" the acts referred to in article 1F(c). It concluded that:

    a. "Serious reasons" was stronger than "reasonable grounds".

    b. The evidence from which those reasons are derived must be "clear and credible" or "strong".

    c. "Considering" was stronger than "suspecting" and "believing". It required the considered judgment of the decision-maker.

    d. The decision-maker need not be satisfied beyond reasonable doubt or to the standard required in criminal law.

    e. It was unnecessary to import domestic standards of proof into the question. However, if the decision-maker was satisfied that it was more likely than not that the applicant has *not* committed the crimes in question or had *not* been guilty of acts contrary to the purposes and principles of the United Nations, it was difficult to see how there could be serious reasons for considering that he had done so. In that context, there were unlikely to be sufficiently serious reasons for considering the applicant to be guilty unless the decision-maker could be satisfied on the balance of probabilities that he was. But the task of the decision- maker is to apply the words of the Convention (and the Directive) in the particular case.

Scope of Article 2 investigative duty

R (Ali Zaki Mousa and others) v Secretary of State for Defence [2013] EWHC 1412 (Admin)

55. The claimants were Iraqi citizens who claimed that they were ill-treated by the British armed forces in Iraq or were relatives of those killed by the British armed forces. They brought judicial review proceedings in February 2010 claiming that the investigation established by the Defendant Secretary of State for Defence was neither independent nor in adequate compliance with the investigative duties under Articles 2 and 3 of the Human Rights Convention. In those proceedings they succeeded in establishing that the investigation was not sufficiently independent. The Secretary of State reconstituted the investigation, setting up the Iraq Historic Allegations Team to investigate the allegations of ill-treatment.

56. In the second set of proceedings, the Claimants contended that the investigation conducted by IHAT was still not independent and they sought a more far reaching inquiry.

57. The Court held that IHAT was independent and could objectively be seen as independent. However, IHAT's investigation had not fulfilled the United Kingdom's obligations under Article 2 of the ECHR.

58. All cases involving civilian deaths should be subject to a public "inquisitorial process" utilising the model of coroners' inquests. Suitably adapted, a form of inquisitorial inquiry used by coroners would have many advantages over an overarching public inquiry.

59. The investigative duty of the State under Article 2 ECHR in the case of deaths in custody was only discharged by a full, fair and fearless investigation accessible to the victim's families and to the public into each death, which looked into and considered the immediate and surrounding circumstances in which each of the deaths occurred. These circumstances would ordinarily include the instructions, training and supervision given to soldiers involved in the interrogation of those who died in custody in the aftermath of the invasion. It should also identify the culpable and discreditable conduct of those involved, including their acts, omissions as well as identifying the steps needed for the rectification of dangerous practices and procedures.

60. In the two death cases in which there had already been decisions not to prosecute any UK personnel, there was no impediment to starting the public inquisitorial process immediately. In all other death cases an order should be made that the Secretary of State should state either through an official or the Head of IHAT within six weeks (1) what further progress has been made in investigating the deaths of each of those who fell into that category and (2) when a decision would be made as to whether a prosecution would be brought in respect of each of those cases.

61. In all torture and inhuman and degrading treatment cases, once it was determined that there were cases in which there will be no prosecution, the procedure for Article 3 cases should be reviewed by the Secretary of State in the light of the experience in the Article 2 cases. It may well be possible to conduct the inquisitorial enquiry into these cases by taking a sample of the more serious cases. The Court would maintain a supervisory role going forward in all cases: if a procedure could not be agreed, the Court wold consider these issues further in the provisions made in the formal order of the Court.

Disclosure of documents

Wikileaks and source of documents

R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs [2012] EWHC 2115 (Admin) and [2013] EWHC 1502 (Admin)

62. These cases concerned the longstanding campaign of the Chagos Islanders to return to the Chagos Islands after their removal by the British Government between 1965 and 1973 to allow the US government to build an airbase there. The Claimant was the chair of the Chagos Refugees Group.

63. In the first case, the Claimant sought an order permitting the cross examination of two of the witnesses of the Secretary of State in the judicial review proceedings challenging the Secretary of State's decision to create a Marine Protected Area around the Chagos Islands. The Claimant alleged that the decision had been made to prevent the return of the Chagos Islanders, which was an unlawful purpose. The creation of a Marine Protected Area rendered commercial fishing in the area unlawful, making it more difficult for the Islanders to sustain themselves if they were to succeed in returning to the Islands.

64. The allegation by the Claimant was made following the publication in two newspapers of what purported to be a confidential and sensitive document sent by the United States Embassy in London to the State Department in Washington. The document, purported to be a note of a 2009 meeting between British and US officials, and it was claimed that it showed that the real reason for the MPA was to prevent the Chagossians and their descendants from resettling the islands. The document was passed to one of the newspapers by Wikileaks.

65. The Court noted that for understandable reasons it was not the policy of the Secretary of State to admit or dispute that documents leaked by Wikileaks were or were not genuine. It also noted that the Wikileaks documents must have been obtained unlawfully and in all probability by the commission of a criminal offence or offences under US law. However, the document in question had been leaked and widely published, and no application had been made on public immunity or similar grounds.

66. The Claimant's application was granted. Although cross-examination was exceptional in judicial review proceedings, the Court should exercise its discretion to permit cross-examination where it was necessary for the claim to be determined

fairly and justly. The judicial review claim could not be fairly or justly determined without resolving the Claimant's allegation based on the documents. Given the conflicting evidence, oral evidence, including cross-examination of the witnesses in question, would be necessary.

67. The substantive hearing followed. The Claimant argued that the decision to establish a Marine Protection Area was flawed because (1) it had been made for an improper motive; (2) it was based on a flawed consultation process; (3) it placed the United Kingdom in breach of its obligations under TFEU art.198 not to jeopardise the objectives of association of the Chagos Islands with the European Union.

68. The Claimant's request that the Court rely on the cable documents as evidence was not permitted. Although admitting the materials would not constitute an offence under s. 6 of the Official Secrets Act 1989, they were inadmissible as a result of Articles 24 and 27(2) of the Vienna Convention on Diplomatic Relations 1961. It was a settled principle of public international and municipal law that the inviolability of diplomatic communications required that the courts of states that were parties to the Convention should, in the absence of consent by the sending state, exclude illicitly obtained diplomatic documents. The Wikileaks document was thus inadmissible.

69. The Claimant's application was dismissed. The evidence provided no basis for suspecting that the Secretary of State's motivation in creating a Marine Protected Area was to prevent the Chagossians from resettling the Islands. The consultation process was neither unfair nor unlawful, and the information provided was sufficient for the purposes of a valid consultation.

70. Nor did the omission of any express reference to traditional Mauritian fishing rights affect the fairness of the consultation or the validity of the MPA decision. Although the European Commission had already rejected a complaint from the Chagos Islanders based on TFEU art.198, it was open to B to raise the EU law issue in the instant proceedings and the court was not bound by the Commission's reasoning or decision.

71. However, whilst the obligation in TEU art.4(3) to refrain from any measure which could jeopardise the attainment of the EU's objectives gave rise to directly effective rights on which individuals could rely, the Court had come to the same conclusion as had the Commission: the Secretary of State's decision was compatible with EU law. It did nothing to prevent any change in the government's "no resettlement" policy, it could be reversed or modified as necessary and it had no exclusionary or prohibitive effect.

Disclosure

The Prince of Wales

R (Evans) v Her Majesty's Attorney General and the Information Commissioner [2013] EWHC 1960 (Admin)

72. This case concerned the preservation of non-disclosure of communications between the Prince of Wales and Government departments under the Freedom of Information Act 2000 and the "executive override" in s53 FOIA which enables Government Ministers or the Attorney General to exercise a statutory power of veto of disclosure

of information, even where a Tribunal or Court has concluded that the information is not exempt from disclosure under the FOIA.

73. The Claimant, a journalist, had sought disclosure of the communications. The government departments declined to make such disclosure and the Information Commissioner ruled that such withholding of the requested information was not in breach of the Freedom of Information Act 2000 or of the Environmental Information Regulations 2004 (which implemented Council Directive 2003/4/EC on public access to environmental information).

74. The Claimant appealed to the Tribunal which held that a particular category of correspondence (styled "advocacy correspondence") could not lawfully be withheld.

75. Following the decision of the Tribunal, the Attorney General issued a certificate under s. 53 of the FOIA stating that he had on reasonable grounds formed the opinion that there was no failure to comply with the relevant provisions of FOIA or of the 2004 Regulations. The Attorney General stated that there were strong public interest arguments against disclosure centred upon The Prince of Wales' preparation for kingship and the importance of not undermining his future role as sovereign.

76. The Claimant issued judicial review proceedings seeking the quashing of the certificate. The Court considered three principle issues: (1) the true meaning of s.53(2) of FOIA (2) the effect of the application of s.53(2) , on its true meaning, to the certificate given in the circumstances of the present case; (3)In so far as the request for advocacy correspondence extended to environmental information under the 2004 Regulations whether such a certificate under s.53(2) could be validly issued with regard to such environmental information at all.

77. Considering first s. 53 of the FOIA, the Court concluded that as a power to "executive override" it was a "remarkable provision", providing an executive override or veto of what (in the case of tribunal and court conclusions) will have been a judicial decision.

78. The Court concluded that s53 was not objectionable as conferring a power on the executive which, if exercised, could defeat the objective of the statute. Part of the very scheme of FOIA was to construct a series of available exemptions – whether absolute or qualified – to modify the general requirement of disclosure. It could not be said that the exercise of the power conferred by s53 of itself would infringe the *Padfield* principle.

79. Nor could the provision oust the jurisdiction of the courts: Parliament had imposed a requirement of "reasonable grounds" in respect of any certificate issued pursuant to s53.

80. In the instant case, the Court concluded that reasonable grounds did exist to justify the exercise of the executive override. The Statement of Reasons of the Attorney General was proper and rational. It was inherent in the whole operation of s.53 that the accountable person would have formed his own opinion which departed from the previous decision. Therefore, disagreement with the prior decision was precisely what s.53 contemplated, without any explicit or implicit requirement for the existence of fresh evidence or irrationality in the original decision.

81. Finally the Court considered whether a different approach and conclusion was called for with regard to communications passing between the Prince of Wales and ministers comprising environmental information. It rejected an argument that the power under s 53 FOIA was incompatible with Council Directive 2003/4/EC or with Article 47 of the EU Charter of Fundamental Rights. It concluded that Article 6(2) of the Directive imposed an additional requirement on Member States following a review procedure consistent with art.6(1), but how that requirement was met was left to national law. A review of the act or omission of the public authority was capable of being satisfied in a case under s.53 by the courts having the power to review the reasonableness of the grounds given by the accountable person in issuing the certificate. A review of the original decision to withhold the information would inevitably be an integral part of such a review. To conclude otherwise would be to put form over substance. Judicial review was a procedure consistent with the Aarhus Convention 1998 art.9(4). It was flexible, enabling an appropriate intensity of review where such intensity was called for.

82. Accordingly, s.53, as applied to environmental information, was not incompatible with the Directive or the Convention.

R (David Miranda) v Secretary of State for the Home Department, Commissioner of Police for the Metropolis [2013] EWHC 2609 (Admin)

83. This case concerned the examination and detention of David Miranda by the Metropolitan Police at Heathrow Airport on 18 August 2013 under Schedule 7 to the Terrorism Act 2000, an incident widely covered in national and international media. The questions for the Court concerned interim relief and the future conduct of the proceedings.

84. Mr Miranda, a Brazilian citizen, is the partner of Glenn Greenwald, a journalist with the Guardian newspaper who has written a number of items for the *Guardian* and *New York Times* relating to mass surveillance programmes by the agencies of the United States and the United Kingdom governments. A significant part of the information provided for the stories in the *Guardian* was provided by Edward Snowden. Mr Miranda also regularly assists Mr Greenwald in his journalistic work and was doing so at the time he was stopped and detained by police officers.

85. Mr Miranda was detained for a period of almost nine hours whilst travelling from Berlin to Rio de Janeiro via Heathrow Airport. During that time he was questioned about his laptop, telephone, memory sticks, portable hard drive and other times of his were taken by officers and retained. Mr Miranda sought interim relief to stop the defendants from examining the material detained or informing third parties of its contents.

86. On 21 August 2013, Mr Miranda applied for urgent consideration of his application for permission to apply for judicial review and the grant of interim relief in respect of his examination and detention. He challenged the legality of his detention on three grounds, all concerned with the exercise and effect of Schedule 7 of the Terrorism Act

2000. However, the sole question before the Court for the purposes of the interim relief sought (pending a full hearing on 30 August 2013) was the balance of convenience. The issue before the Court therefore involved balancing the protection of journalistic sources and the protection of national security.

87. The Court concluded that it would be too broad to exclude from the prohibition of inspection and disclosure any inspection and prohibition for the purposes of a criminal investigation and use in criminal proceedings. The defendants would be able to undertake these activities if it prevailed at the inter partes interim relief hearing.

88. The Court did however consider that inspection for the purpose of considering whether the claimant falls within s40(1)(b) of the 2000 Act (as a person "concerned in the commission, preparation or instigation of acts of terrorism") and more generally for the purpose of protecting national security should be permitted pending the *inter-partes* interim relief hearing.

89. The Court noted that one of the exceptions in section 10 of the Contempt of Court Act 1981 to the protection for journalistic sources and in Article 10(2) is where the interests of national security require disclosure. In ***X v Morgan-Grampian (Publishers)*** [1996] 1 AC 1 at [43] it was stated that once it is shown that disclosure will serve one of the interests specified in section 10, i.e. national security and interests of justice, "the necessity of disclosure follows almost automatically".

Community care – meaning of care and attention

SL (FC) v Westminster City Council [2013] UKSC 27

90. The Supreme Court considered whether the respondent (SL) a failed asylum-seeker, was at the relevant time in need of "care and attention", requiring the provision of accommodation by the local authority under section 21(1)(a) of the National Assistance Act 1948 . The entitlement to residential accommodation under s. 21(1)(a) only arose if three conditions were fulfilled. First, the person must be in need of care and attention; second the need must arise "by reason of age, illness, disability or any other circumstances" and third, the "care and attention which is needed must not be available otherwise than by the provision of accommodation under section 21.

91. The case became academic following the grant to the respondent in March 2011 of indefinite leave to remain. The Court of Appeal however agreed to hear the appeal on the basis of the "broader questions of principle". The matter proceeded to the Supreme Court on the same basis.

92. The respondent, a 22 year old man, claimed asylum in the UK because of his fear of persecution in Iran on account of his sexual orientation. His claim for asylum was refused in January 2007 and he became homeless in October 2009. Following his

attempted suicide in December 2009 the respondent was diagnosed as suffering from depression and post-traumatic stress disorder.

93. In April 2010 the local authority gave notice of its decision that SL was not in need of care and attention for the purpose of s21(1)(a) of the 1948 Act. The Council appealed against the decision of the Court of Appeal (1) that as a result of SL's health problems he was in need of "care and attention" or (2) that such care and attention was "not otherwise available" save by provision of residential care.

94. The Supreme Court held that the Council were entitled to conclude that the provisions for SL, including weekly meetings with his social worker, did not constitute care and attention and that any care and attention that he did require was available otherwise than by the provision of accommodation under section 21.

95. Authoritative guidance had been given by Lady Hale in ***R (M) v Slough Borough Council*** [2008] UKHL 52 as to the natural and ordinary meaning of the words "care and attention" which were to be construed as "looking after" someone. What was involved in providing care and attention had to take some colour from its association with the duty to provide residential accommodation. It could not be confined to care and attention that could only be delivered in residential accommodation of a specialised kind, but the fact that accommodation had to be provided for those who were deemed to need care and attention strongly indicated that something well beyond mere monitoring of an individual's condition was required.

96. The Council's assessment of the respondent was that the risk of self-harm did not warrant the need for him to be "looked after". Such an assessment was not irrational.

97. On the second issue, the services provided by the Council to the respondent were in no sense accommodation related: they were entirely independent of his actual accommodation or his need for it. The judgments in *R. (on the application of Mani) v Lambeth LBC* [2003] EWCA Civ 836 and *R. v Wandsworth LBC Ex p. O* [2000] 1 W.L.R. 2539 failed to an extent to give proper weight to the words "otherwise available" in s.21(1)(a).

Article 8 and the production of criminal records

R (T) v Chief Constable of Greater Manchester, The Secretary of State for the Home Department, The Secretary of State for Justice; R (JB) v The Secretary of State for the Home Department; R (AW) v The Secretary of State for the Home Department [2013] EWCA Civ 25

98. Appeal to the Supreme Court is outstanding in this case concerning the compatibility of certain provisions of the Police Act 1997, the Rehabilitation of Offenders Act 1974 and the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 with Article 8 of the European Convention on Human Rights.

99. T (born in 1991) issued judicial review proceedings claiming that the scheme for issuing criminal records certificates and for requiring a person to disclose spent

warnings to certain future employers was incompatible with Article 8 of the ECHR His claim was issued in the context of two warnings he received at the age of 11 years old in connection with two stolen bicycles.

100. JB issued proceedings claiming that if the legislative scheme which required the disclosure of a caution could not be read down, then it was incompatible with article 8 of the ECHR. She had received a police caution in 2001 after walking out of a shop with a packet of false nails under her arm.

101. AW issued judicial review proceedings claiming that the ROA legislation should be read down so as to be compatible with article 8. She had pleaded guilty to manslaughter and robbery arising out of an incident that occurred in 2003 when she was 16 years old.

102. The Court accepted that the interference with T's article 8 rights pursued both the general aim of protecting employers and children and vulnerable adults in their care and the particular aim of enabling employers to make an assessment as to whether an individual is suitable for a particular type of work.

103. However, the statutory regime requiring the disclosure of all convictions and cautions relating to recordable offences was disproportionate to that legitimate aim. The filtering scheme in place, which excluded offences that were so insignificant that they were not even recorded on the police national computer, was not a proportionate filtering scheme in the context of Article 8 considerations. For the same reason, data retention policies were not considered an appropriate filter mechanism.

104. The fundamental objection to the scheme was that it did not seek to control the disclosure of information by reference to whether it was relevant to the purpose of enabling employers to assess the suitability of an individual for a particular kind of work. Relevance depended on a number of factors including the seriousness of the offence; the age of the offender at the time of the offence; the sentence imposed or other manner of disposal; the time that has elapsed since the offence was committed; whether the individual has subsequently re-offended; and the nature of the work that the individual wishes to do. The same factors also came into the picture when the balance was to be struck (as it must be) between the relevance of the information and the severity of any impact on the individual's Article 8(1) right.

105. Further, a blanket requirement of disclosure was inimical to the ROA and the important rehabilitative aims of that legislation. Where a rule failed in a significant way to achieve its stated purpose and/or was disproportionate, then it was unlikely to be saved merely because it was a "bright-line" rule which had the merit of simplicity and ease of administration.

106. The Court concluded that neither the disclosure provisions of the 1997 Act or the ROA Order were compatible with Article 8. The appeals were allowed in respect of T and JB and dismissed in respect of AW.

107. Under the Electricity Act 1989 and statutory instruments made thereunder, public electricity suppliers were required to enter into arrangements to secure electricity from non-fossil fuel sources and could obtain a Renewables Obligation Certificate ("ROC") if those requirements were met. If the requirements were not met, they would have to pay a charge.

108. GEMA appealed against a decision of the Divisional Court that its refusal of accreditation for a ROC for power stations owned and operated by the respondents was unlawful.

109. The Divisional Court had held that GEMA was wrong to refuse accreditation for two power stations on the basis that they fell within exclusions under the statutory scheme. GEMA had argued that there was at the relevant time, an arrangement known under the Renewables Obligation Order 2009 art.21 as a Non-Fossil Fuel Order (NFFO) arrangement, and under the Renewables Obligation Order 2006 art.6(3) and art.6(4) as an extant qualifying arrangement, providing for the building of a generating station which had not yet been commissioned. Since such arrangements existed, the respondents' stations were excluded generating stations and no ROC could be issued for the electricity generated at them. As a result, accreditation could not be granted.

110. The respondents applied for judicial review stating that a Replacement Power Purchase Agreement (RPPA) entered into between its predecessors in title and the interested party, the Non-Fossil Purchasing Agency (NFPA), was of no force and effect by the time GEMA made its decision, because the stations had not been built by a designated date. As a result, no NFFO arrangement existed at the relevant time.

111. The Court of Appeal, dismissing the appeal, accepted that at the time the respondents had applied for accreditation, there was no longer an extant qualifying arrangement or an NFFO arrangement in existence for either of the two sites. GEMA was thus wrong to conclude that the statutory exclusions applied.

112. GEMA had contended that there remained an extant qualifying arrangement providing for the building of generating stations because those provisions of the RPPA which required the respondents to use reasonable endeavours to procure the fulfilment of the commissioning of the facility continued to have force and effect. That obligation necessarily encompassed an obligation to build the facility, since the facility could not be commissioned without first having been built.

113. The Court held that the authority's submission on the obligation to commission the facility might have had some force if the RPPA had contained no other provision for the building of the facility, but they did, and those obligations were no longer in force. The RPPA contained two separate and distinct obligations: to use reasonable

endeavours to (a) install a generating station; (b) commission it. Since the first obligation had been of no force and effect after a certain date, there was simply no basis upon which its existence could be impliedly continued as part of the remaining obligation.

114. At first instance, Lindblom J had found that as a consequence of GEMA's unlawful decision, the respondents had been deprived of a valuable economic benefit since, as they had suffered a clear and calculable financial loss. They were thus awarded damages by way of just satisfaction in respect of the monetary value of the ROCs which should have been issued earlier, based on the principle of restitutio in integrum.

115. The Court of Appeal held that the respondents had a legitimate expectation of the right to accreditation under the statutory scheme and had been wrongly deprived of a pecuniary benefit to which they were entitled by statute. Since the amount of the respondents' lost "benefit" was readily calculable, restitutio in integrum was manifestly appropriate and the judge had been entitled to assess the damages on that basis.

Benefits cases

R (MA and others) v Secretary of State for Work and Pensions [2013] EWHC 2213

116. The Claimants challenged changes introduced into the Housing Benefit Regulations 2006 (the 2006 Regulations) by the Housing Benefit (Amendment) Regulations 2012 (the 2012 Regulations).

117. The measures altered the basis on which maximum HB was calculated in relation to rents in the public sector by reducing the eligible rent where the number of bedrooms in the property exceeded the number permitted. The reduction in eligible rent was 14% where there was one excess bedroom and 25% where there were two or more. The Government sought to off-set any potential adverse effect of the new policy through discretionary housing payments (DHPs).

118. Challenge was mounted on three grounds

    a. The new measures were unlawfully discriminatory because they failed to provide for the needs of people in the position of the Claimants, who were all affected by disability. The Claimants represented a range of individuals who were typical of those adversely affected by the changes for reasons relating to disability in a way that violated their Article 14 rights.

    b. The new measures constituted a violation by the Secretary of State of the Public Sector Equality Duty (PSED), imposed by s.149 of the Equality Act 2010.

    c. The Secretary of State had unlawfully deployed guidance, in the shape of Circular HB/CTB U2/2013, to prescribe the means of calculating the appropriate maximum HB for certain classes of case. That could only be done

by secondary legislation and in any event the guidance could not cure the discriminatory effects of the Regulations.

119. All three grounds of challenge were dismissed.

120. In respect of the first ground, the Court held that the Claimants' case was best regarded as one of *Thlimmenos* discrimination: that the Claimants should be treated differently (i.e. more favourably) than others effected by the rule.

121. The difficulties in identifying the minority of housing benefit claimants who were unable to share a bedroom due to the nature and extent of their disabilities were material to whether *Thlimmenos* discrimination was shown: in the instant case, there was no precise class of persons, who needed extra bedroom space by reason of disability, which could be identified in practical and objective terms and sufficiently differentiated from other groups equally in need of extra space for other reasons.

122. However, the fact that the position was not clear, that did not mean that art.14 did not apply at all, but rather that the secretary of state was under an obligation to see that the means chosen to achieve his aim was appropriate and not disproportionate in its adverse impact.

123. The critical question was whether the refusal to exclude some disabled persons from the new regime, and the provision made for access to DHPs, constituted a proportionate approach to the difficulties suffered by such people as a consequence of the housing benefit policy. The test was whether the Secretary of State's margin of appreciation was manifestly without reasonable foundation.

124. In the instant case, the measure was plainly not without reasonable foundation. The absence of a class of persons that could be identified in practical and objective terms was a very powerful factor in the question of justification. The Secretary of State's provision of extra funding for DHPs and advice and guidance on its use could not be said to be a disproportionate approach.

125. In respect of the second ground, the Court held that the PSED was fulfilled and the effects of the housing benefit cap were properly considered in terms of proportionality. The duty involved an analysis the relevant material with the specific statutory considerations in mind, but that did not extend to a minute examination of every possible impact and ramification. The Claimants' objections appeared to be a list of objections to the policy under the guise of matters left unconsidered by the Secretary of State. That was an assault on the outcome, rather than the process that led to the new regulations.

126. In respect of the third ground, the Court held that it was right that a departmental circular was not a lawful vehicle to prescribe the means of calculating housing benefit for any class of case: that could only be done by secondary legislation. It was also plainly right that the Secretary of State was obliged to provide by regulations that there should be no deduction of housing benefit where an extra bedroom was

required for children who were unable to share because of their disabilities, following the judgment in ***Burnip v*** Birmingham City Council [2012] EWCA Civ 629.

127. Although it had been over 14 months since the delivery of the judgment in ***Burnip***, as the drafting of new regulations was imminent, declaratory relief in relation to the status and validity of the guidance was refused.

128. A challenge was heard last week to the benefit cap provisions, on the grounds inter alia, that the effect of the cap had an indirectly discriminatory impact on women.

129. Appeal in the Court of Appeal next week in ***R (MM) v Secretary of State for Work and Pensions*** from decision of Upper Tribunal that the Employment Support Allowance scheme fails to make reasonable adjustments under the Equalities Act 2010 for claimants with mental health problems. The Claimants at least partially succeeded in UT, and Secretary of State is now appealing.

Badgers

R (Badger Trust) v Secretary of State for the Environment, Food and Rural Affairs [2012] EWCA Civ 1286

130. The appellant badger trust appealed against a decision that the Secretary of State's policy on bovine tuberculosis, pursuant to which farmers and landowners could cull badgers in order to reduce the incidence of bovine tuberculosis in cattle and prevent the transmission of the disease, was lawful. The proposed policy involved issuing licences to farmers and landowners under s. 10(2)(a) of the Protection of Badgers Act 1992.

131. The appellant submitted that the power under s 10(2)(a) could only be exercised for the purpose of preventing the spread of disease and not for preventing the transmission of disease or to reduce its incidence, and that licences granted under s10(2)(a) were geographically limited to preventing the spread of disease outside the area of the licence.

132. Section 21(2) of the Animal Health Act 1981 provided that a minister could order the destruction of wild animals in an area if it was necessary to reduce the incidence of disease in that area. The appellant drew a contrast between the words "preventing the spread of disease" in s.10(2)(a) of the 1992 Act and "reduce the incidence of disease" in s.21(2) of the 1981 Act to support its argument that s.10(2)(a) had a geographical context which meant that the secretary of state's policy was unlawful.

133. The Court rejected the appellant's submissions. It made little sense if s. 10(2)(a) contemplated the spread of disease outside the licence area but not within it. The 1981 and 1992 Acts contemplated alternative routes for tackling the problem of

controlling disease in wildlife: the 1981 Act conferred compulsory powers of entry, whereas the 1992 Act operated by voluntary cooperation with landowners.

134. If the Secretary of State made an order under s.21(2) of the 1981 Act for the destruction of animals, anyone killing animals pursuant to that order would, on the face of it, commit an offence under s.1(1) of the 1992. The Court reflected that the wording of s.1(1) might have impliedly repealed s.21(2), but did not decide the point. It suggested that Parliament might need to review the issue of whether s.21(2) had been impliedly repealed.

Right to die – articles 2 and 8

R (Nicklinson) v Ministry of Justice [2013] EWCA Civ 961

135. The appellants suffered from catastrophic physical disabilities but their mental processes were unimpaired. They wished to die but were incapable of ending their own lives without the assistance of a third party or euthanasia carried out by a third party. Those who provided such assistance were likely to be found guilty under s. 2(1) of the Suicide Act or guilty of murder.

136. After the decision of the House of Lords in *R (Purdy) v DPP* [2009] UKHL 45, the DPP had set out in a policy statement the factors to be taken into account when considering whether to prosecute assisted suicide cases.

137. The Court was required to determine whether (i) to grant a declaration that necessity should be a defence to a charge of euthanasia and assisted suicide where certain conditions were met; (ii) the blanket legal prohibition on providing assistance to those wishing to die constituted a disproportionate interference with Article 8 of the ECHR; (iii) the DPP should set out in greater detail how he would exercise his discretion to initiate prosecution in cases of assisted suicide in order to make the law more accessible and foreseeable.

138. The Court held that it could not create a defence of necessity to a charge of murder or assisting suicide. Sanctity of life was a fundamental principle of common law, reflected in the unqualified right to life found in Article 2 of the ECHR. There was no self-evident reason why it should give way to the values of autonomy or dignity, and there were cogent reasons as to why it should not. Further, as there was no right to commit suicide, there could be no right to require the state to allow others to kill you or assist you to die.

139. It was not appropriate for the Court to fashion a defence of necessity in such a complex and controversial field: that was a matter for Parliament, which had already stated in unequivocal terms that assisted suicide was a serious offence carrying a maximum sentence of 14 years imprisonment.

140. The blanket legal prohibition on providing assistance to those wishing to die was not a disproportionate interference with Article 8 of the ECHR. This was clear from the decision of the European Court of Human Rights in *Pretty v United Kingdom* (2346/02) [2002] 2 F.L.R. 45. It would be inappropriate for the courts to create domestic art.8(1) rights that exceeded the protection afforded by the ECtHR in direct opposition to the will of Parliament.

141. However, the majority held that the DPP's policy concerning the factors to be taken into account when deciding whether to prosecute such cases was insufficiently clear in relation to healthcare professionals.

142. The policy had to satisfy the requirements of accessibility and foreseeability, so that a person who was considering providing assistance to a victim to commit suicide was able to foresee, to a degree that was reasonable, the consequences of providing such assistance. In the instant case, the policy should give some indication of the weight that the DPP would accord to the fact that the helper was acting in his capacity as a healthcare professional and the victim was in his care. The crucial question was the extent to which the suspect was motivated by compassion for the victim.

Article 6 and positive obligations

R (Children's Rights Alliance for England) v Secretary of State for Justice and others [2013] EWCA Civ 34

143. The genesis of this case lay in the fact that until about July 2008 (and possibly until 2010) there was widespread unlawful use of bodily restraint techniques upon many of the children and young persons within Secure Training Centres (STCs). Very few, if any, of the children appreciated at the time that what was done to them was unlawful.

144. In the Divisional Court the appellant's application for judicial review was dismissed by which it sought an order that the Secretary of State provide information to stated categories of children as to the illegal use of restraint techniques on them when they were detained in STCs.

145. The appellant's primary argument was that the common law's well established insistence on access to justice entitled the appellant to an order to that effect. Further, even if the Secretary of State owed no duty in the name of access to justice to provide the material information, it was unreasonable of him (in the public law sense of the term) to decline to do so. In addition, the Secretary of State's failure to make the information available was a violation of Articles 3, 6 and 8 of the ECHR.

146. The Court of Appeal rejected a submission by the appellant that the Secretary of State was "responsible" for the fact that the children did not appreciate that what

was done to them was unlawful, in the sense that he knowingly concealed the fact from them. This was not established by the evidence.

147. The Court stated that the law recognised a duty owed by the State not to impede access to justice. That the duty was so limited was not a coincidence but a matter of principle.

148. If there were a positive duty upon the State to provide a potential claimant with the legal elements of his case, that would be as discordant with the common law's adversarial system of justice as if it were suggested that a non-State party might owe such a duty. Moreover unless this positive duty was owed universally, it would be to provide selected beneficiaries with a distinct advantage over other potential litigants who may one way or another lack the information required to mount a claim, but to whom, nevertheless, the duty was not owed.

149. Such a state of affairs would be inimical to a signal feature of access to justice: that it should be even-handed. There was no principled basis upon which to identify a class of beneficiaries beyond these trainees but short of all potential litigants, so that the duty's reach was neither unique nor universal but somewhere in between. The Secretary of State had not broken his duty not to place obstacles in the way of access to justice.

150. The appellant's irrationality argument was also rejected. Although it was possible that there could be a case, where on such grounds as legitimate expectation the government might owe a duty of care to act as urged by the appellant, no argument based on rationality could succeed in the instant case.

151. In respect of the ECHR argument, the Court found that there was no Strasbourg jurisprudence that identified expressly the positive obligation contended for in the case. Any attempt to find in Article 6, a duty of the type contended for by the appellant, must founder on the same difficulties as beset the attempt to locate it in the common law. The duty could not be owed in the instant case alone but there was no proper basis upon which to identify a class of beneficiaries beyond the trainees but short of all potential litigants, so that the duty's reach was neither unique nor universal but somewhere in between.

152. Further, this was not a case in which the obligation contended for could be seen as required to fulfil the State's ancillary duty to investigate Article 3 ill-treatment. The ECHR case had no more force than the arguments founded on the common law.

R (Keith Haney) v Secretary of State for Justice; R (Peter Jarvis) v Secretary of State for Justice [2013] EWHC 803 (Admin)

153. Appeal to the Court of Appeal is outstanding in this case concerning the Secretary of State's policy of prioritising the transfer to open conditions of post-tariff prisoners ahead of pre-tariff prisoners.

154. The Claimants were pre-tariff indeterminate sentence prisoners (ISPs) in closed condition prisons. Because of constraints on resources, a policy was put in place that prioritised the transfer of post-tariff prisoners to open conditions. As a result of the policy, the Claimants experienced delay in their transfer to open conditions. In addition, the relevant prison rules and policies contained no mention of any policy or arrangement for prioritising some categories of prisoners over others when implementing transfers to open conditions.

155. The Court found that there was excessive delay in implementing the transfer of the Claimants to open conditions and thus the Secretary of State was in breach of his public law duty.

156. There was also a public law duty to publish the new arrangements for the transfer of prisoners to open conditions. The prioritisation scheme affected the timing of their transfer which could affect the outcome of a Parole Board review and thus release. Importantly, prisoners could not make an individual request for their cases to be treated as exceptional if they were not aware of the arrangements. It was not appropriate to quash the policy merely because of a failure to publish when it was lawful and J had suffered no detriment. The appropriate public law remedy for an unlawful failure to publish was a mandatory order requiring publication.

157. However, the prioritisation of post-tariff prisoners was rational and fair because they were already eligible for release and there was a pressing need for the Secretary of State to address their position.

158. The Secretary of State's discretionary powers to place prisoners under s. 12 of the Prison Act 1952 was sufficiently wide to entitle him to adopt a policy on the prioritisation of certain categories of prisoners when deciding how to clear the backlog. The policy had included an express provision providing for exceptional circumstances to be considered upon request in individual cases. The Claimants were unable to point to anything exceptional about their cases that justified applying that provision.

159. The Claimants' rights had not been breached under Articles 5, 8 or 14 of the ECHR.