Negligence claims against the police and prosecutorial authorities

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1. At a time when the Human Rights Act 1998 is under mortal threat, the courts have turned to common law torts to try to provide a degree of protection to vulnerable claimants who have fallen victim to police and prosecutorial inaction. Unfortunately, the results of two recent decisions suggest that the real remedy lies not in tort, but under the Human Rights Act 1998.

2. The purpose of this talk is to investigate those two claims and, in particular, to consider:

   2.1. The police duty to protect individuals from harm caused by third parties;

   2.2. The duty to investigate criminal allegations against those in detention;

   2.3. What would the repeal of the Human Rights Act 1998 mean for vulnerable claimants?

A. The police duty to protect and investigate

i. The *Hill* rule

3. There are two distinct bases upon which it is frequently contended that a duty of care is imposed on the police to protect individuals from harm. The first is that the facts satisfy the test coined in *Caparo Industries Plc v Dickman* [1990] 2 AC 605, namely that (i) the relevant damage was reasonably foreseeable, (ii) there is a relationship of "*proximity*" or "*neighbourhood*" between the police and that individual, and (iii) the situation is one in which it is "*fair, just and reasonable*" that a duty should be imposed (*Caparo* at 617-618, per Lord Bridge). The second is that the police have assumed a responsibility towards an individual and application of the three-stage *Caparo* analysis is therefore unnecessary.

4. It is well-established that individual police officers do not owe a duty of care to members of the public when carrying out their functions of controlling and keeping down the incidence of crime. This classic proposition has been established by successive rulings of the highest courts:

4.1. In *Hill v Chief Constable West Yorkshire Police* [1988] 1 AC 53, the claimant was the mother of the last victim of the Yorkshire Ripper, who murdered 13 young women in West Yorkshire between 1975 and 1980. The statement of claim alleged that the police made a number of mistakes in their investigation which should not have been made by a competent police force exercising reasonable care and skill. For the purpose of deciding whether Mrs Hill had a valid claim against the police in negligence, the House of Lords assumed that the factual allegations were true, and that if the police had exercised reasonable care the murderer would have been arrested before he had an opportunity to murder her daughter. It was held that the police were under no liability in negligence. The ruling was phrased as a blanket immunity[1] and predicated on a series of policy objections (per Lord Keith, at 63);

4.2. The House of Lords again upheld the *Hill* principle in *Brooks v Comr of Police of the Metropolis* [2005] 1 WLR 1495. The claimant in *Brooks* was with Stephen Lawrence when he was set on by a gang of white youths in a racist attack. Stephen Lawrence was murdered. The claimant was traumatised. He claimed that the police owed him a duty of care in negligence, amongst other matters, to take reasonable steps to assess whether he was a victim of crime and, if so, to accord him reasonably appropriate protection and support. The House of Lords held that the police owed him no such legal duty of care. All the judges endorsed the correctness of the decision in *Hill* but expressed reservations about the width of some of Lord Keith's policy observations (per Lord Bingham, at [3], Lord Nicholls, at [6], and Lord Steyn, at [28]). Lord Steyn (with whom Lords Rodger and Brown agreed) held, at [27], that the *Hill*

[1] The use of the word "*immune"* with regard to the police (at 63H) led to controversy at Strasbourg - *Osman v United Kingdom* (1998) 29 EHRR 245 and *Z v United Kingdom* (2001) 34 EHRR 97.

principle should be reformulated in terms of the absence of a duty of care rather than a blanket immunity. It was conceded by the police that cases of assumption of responsibility fall outside the *Hill* principle (at [29]);

4.3. The House of Lords again re-visited the issue in *Van Colle and another v Chief Constable of Hertfordshire* [2009] 1 AC 225. The linked appeal in *Van Colle*, *Smith*, arose in the following factual circumstances. The claimant was a victim of violence by a former partner. He had suffered violence at the hands of the other man during their relationship. After it ended, he received a stream of violent, abusive and threatening messages, including death threats. He reported these matters to the police and told a police inspector that he thought that his life was in danger. A week later the man attacked the victim at his home address with a claw hammer, causing him fractures of the skull and brain damage. The assailant was subsequently convicted of making threats to kill and causing grievous bodily harm with intent. The House of Lords held by a majority that the police owed the victim no duty of care in negligence. Lord Bingham, notably, dissented. At [44], he set out a "*liability principle"* under which the police could owe a duty of care. This principle would arise where a member of the public furnishes a police officer with apparently credible evidence that a third party whose identity and whereabouts are known presents a specific and imminent threat to his life or physical safety. In such circumstances, the police officer owes the individual a duty to take reasonable steps to assess such threat and, if appropriate, take reasonable steps to prevent it being executed;

4.4. In 2014, the Court of Appeal reconsidered this issue. In *Robinson v Chief Constable of West Yorkshire Police* [2014] EWCA Civ 15, the Court of Appeal applied an orthodox approach to *Hill* and the police were held not to be liable for an injury caused to a woman who was knocked to the ground and injured during the arrest of an alleged drug-dealer. It is understood that Mrs Robinson has sought permission to appeal from the Supreme Court against this judgment.

ii. ***Michael***

5. Despite this weight of authority, the Supreme Court granted permission to appeal in another police duty of care case in 2013 – *Michael and others v Chief Constable of South Wales Police and another* [2015] 2 WLR 343. The court received full written submissions from the claimants, the defendants and three interveners; Liberty, Refuge and Cymorth i Ferched Cymru (Welsh Women's Aid). Over 350 authorities were put before the Court. The parties also set out competing schedules of comparative common law jurisprudence.

6. In *Michael*, the facts were stark. Joanna Michael was known to police as a potential victim of domestic violence. At 02:29 on 5th August 2009, she telephoned 999 and told a call handler from the Gwent Police that her ex-boyfriend had told her that he was going to come home and "*fucking kill"* her.[2] Due to errors in the call handling and sharing of information with South Wales police, which were the subject of severe criticism in an IPCC report, the police did not attend Ms Michael's home until after she had been stabbed to death.

7. Notwithstanding these clear facts, Lord Toulson, with whom Lord Neuberger, Lord Mance, Lord Reed, and Lord Hodge agreed, refused to find a duty of care at common law. He held:

   7.1. The duty of the police for the preservation of the peace was owed to members of the public at large [33] and did not involve the kind of close or special relationship necessary for the imposition of a private law duty of care [120];

   7.2. It does not follow from the setting up of a protective system from public resources that if it failed to achieve its purpose, through organisational defects or fault on the part of an individual, the public at large should bear the additional burden of compensating a victim for harm caused by the

[2] The call handler did not remember Joanna Michael saying these words at the time, due to being distracted [8].

actions of a third party for whose behaviour the state was not responsible. To impose such a duty which could not be rationally confined, would be contrary to the ordinary principles of the common law [114];

7.3. A development of the law of negligence was not necessary to comply with the rights guaranteed by articles 2 and 3 of the European Convention on Human Rights, since such rights could be vindicated by a claim under the Human Rights Act 1998 [125];

7.4. It is for Parliament to determine whether there should be a scheme for public compensation of victims of certain types of violent crime, in cases of pure omission by the police to perform their duty of prevention, above and beyond those already provided for under the criminal injuries compensation scheme and the Human Rights Act 1998 [130].

8. A powerful minority of the Supreme Court, Lord Kerr and Lady Hale, argued that a duty of care should arise where there was the necessary proximity. Proximity should arise where (a) there is a closeness of association between the claimant and the defendant, which can be created by information communicated to the defendant but need not necessarily come into existence in that way; (b) the information should convey to the defendant that serious harm is likely to befall the intended victim if urgent action is not taken; (c) the defendant is a person or agency who might reasonably be expected to provide protection in those circumstances; and (d) he should be able to provide for the intended victim's protection without unnecessary danger to himself (per Lord Kerr, at [144]), per Lady Hale, at [197]). Lord Kerr's proximity principle provoked a fiery response from Lord Toulson (at [131-137]).

iii. Where now for negligence in police cases?

9. There are a number of cases in which the Courts have held the police liable in negligence and the Supreme Court did not overrule any of those decisions in *Michael*. These claims include the following:

9.1. *Knightley v Johns* [1982] 1 WLR 349, in which an Inspector of police was found to be liable in negligence for not closing a tunnel at the scene of a road traffic accident and in ordering his subordinates to drive through the tunnel against oncoming traffic. In *Michael*, Lord Toulson referred to *Knightley* on two occasions without seeking to criticize its reasoning (at [37], in which he summarised *Knightley* as a case in which "*a police officer who attended the scene of a road accident carelessly created an unnecessary danger to the claimant"*, and at [75], where he described it as a case, "*where the rescue service created additional danger*");

9.2. *Rigby v Chief Constable of Northamptonshire* [1985] 1 WLR 1242, in which a Chief Constable was held liable in negligence for the actions of a chief inspector who decided to fire a CS gas canister into a shop in an effort to arrest a dangerous psychopath. Having assumed the responsibility of making arrangements to combat any resulting fire at the premises in that way, the chief inspector was negligent in failing to ensure that the fire engine was still in attendance at the time he gave the order to fire the CS canister. In *Michael*, Lord Toulson referred to *Rigby* on two occasions without challenge (at [37], in which he described it as a case "*where a police officer attending a break-in to a gunsmith's shop carelessly caused severe damage to the premises by the firing of a canister into the building in the absence of fire-fighting equipment"*, and at [75]);

9.3. *An Informer v A Chief Constable* [2013] QB 579, in which a Chief Constable was held to owe a duty of care to a particular informer. The three members of the court agreed on the result: that the nature of the relationship between the police and the informer meant that the Chief Constable had assumed a duty of care to protect his physical safety albeit, on the facts, there had been no breach of duty. They disagreed on liability for economic loss. In *Michael*, at [69], Lord Toulson referred to *An Informer* as: *"… an example of a duty of care arising from an assumption of responsibility coupled with reliance by the claimant … The police conceded that they owed a duty of care to protect his physical well-being,*

and that of his family. They had assured him that they would do so and he had acted on the faith of their assurances."

9.4. *Costello v Chief Constable of Northumbria* [1999] ICR 752, in which a duty of care was found to be owed by a Chief Inspector who stood by while the claimant female police constable was attacked by a detainee at the police station. In *Michael*, Lord Toulson referred to *Costello* at [70] as one of a number of cases of, "*a police force being held liable in negligence for failing to take proper care for the protection of a police officer against a criminal attack, but they were based on the duty of care owed to the claimants as employees whose employment exposed them to the risk of such an attack in the performance of their duty"*.

10. Each of these claims, which involved operational decisions and direct harm to the claimants, could be seen as examples of an assumption of responsibility on the part of the police.[3] Another way of interpreting these claims is that, where police officers themselves create the danger which caused the claimant's injury, the claimant should be entitled to recover damages.

11. It follows that the police can still be liable in negligence where:

11.1. A person suffers loss as a direct result of a police officer's acts or omissions (*Hill*, per Lord Keith, at 59B-C);

11.2. The police assume responsibility towards an individual through an express assurance, upon which the individual relies (*Michael*, at [67] and [138], and *An Informer*);

[3] That was how Arnold J and Hallet LJ interpreted *Rigby*, in *Robinson*, at [66] and [50]. *Costello* is also probably best analysed as an assumption of responsibility case, where the public interest considerations in favour of the alleged duty were strong and outweighed the application of the core principle, not least because the senior officer's role at the time had been to assist the constable if required (see the summary of *Costello*, in *Van Colle*, per Lord Brown, at [120]). This assumption of responsibility analysis is consistent with the approach taken to emergency services provided by the Fire Service in Scotland (see, for example, *Burnett v Grampian Fire and Rescue Services* [2007] SLT 61, at [52] and [58]).

11.3. The police creates a new or different danger has been created from that which the police were seeking to guard against (*Rigby* and *Knightley*, as interpreted in *Capital and Counties PLC v Hampshire CC* [1997] QB 1004, at 1031 and 1042);

12. Finally, there can be exceptional situations involving the investigation or suppression of crime, but falling outside of the concept of assumption of responsibility, where the core *Hill* principle should not be applied. Although the potential existence of such exceptions was acknowledged in *Brooks*, little guidance was given as to when they might arise. Lord Nicholls indicated that there might be exceptional cases where the circumstances compelled the conclusion that the absence of a remedy in damages would be an affront to the principles that underlie the common law [6]. Lord Bingham observed that he would be reluctant to endorse the full breadth of what was thought to be the reasoning in *Hill* [3]. Lord Steyn said that he did not rule out cases arising of "*outrageous negligence*" by police which could fall beyond the reach of the *Hill* principle, but that such cases would have to be determined as and when they occurred [34].

13. The majority in *Van Colle* was also prepared to countenance exceptional cases arising, although again little guidance was given. Lord Phillips, referred to the core principle applying "*in the absence of special circumstances*" [97]. Lord Carswell "*prefer(ed) to leave the ambit of such exceptions undefined at present*" [109]. Lord Brown also noted the possibility of exceptional cases [135]. The majority in *Michael* does not mention this exceptional possibility.

14. One of the few examples of such an exceptional case is *Rush v Police Service of Northern Ireland and The Secretary of State for Northern Ireland* (Unreported, judgment of 22nd March 2011). This was a claim in negligence brought by a relative of a victim of the Omagh bombing that had been struck out initially as offending the *Hill* core principle. It was alleged that police had owed the victim a duty of care because police had advance information as to the timing and location of the bomb attack, but had failed to apprehend the bombers or otherwise prevent it and had failed to evacuate the area or

effectively warn the public. Gillen J allowed the Claimant's appeal on the basis it was arguable the circumstances fell within the exceptionality exception to the *Hill* principle. He noted that the possibility of such an exception had been recognised in *Smith* and that the categories of exceptional cases was not closed. He did not attempt to define the boundaries of such situations but focused upon the particular (alleged) facts before him and reasoned that a distinguishing feature between this case and *Van Colle* was that in his case the claimant alleged police knew the attack would take place but failed to prevent it. The precision of the officers' foreknowledge meant that the need to protect persons imminently about to be killed arguably outweighed the public interest in protecting police officers from liability in the performance of their duties. Although cited to the Supreme Court in *Michael*, *Rush* was not over-ruled (or even mentioned).

iv. A human rights alternative?

15. The one glimmer of hope in *Michael* was the dismissal of the police cross-appeal on article 2. The police argument that the police call handler ought not to have been aware of a real and immediate risk to Ms Michael's life was dismissed in a single paragraph [139].

16. It follows that, although the article 2 cross-appeal in *Michael* raised a number of novel and difficult points of law, the Supreme Court judgment leaves the central principles undisturbed. Those principles involve two obligations on the state that arise equally under article 2 and article 3 of the Convention:

16.1. The "*systemic"* obligation to establish a framework of laws, precautions, procedures and means of enforcement which will, to the greatest extent reasonably practicable, protect individuals from threats of death or threats of a breach of article 3;[4]

[4] *Osman v UK* [1998] 29 EHRR 245 at [115]; *Van Colle*; *R (Middleton) v West Somerset Coroner* [2004] 2 AC 182, at [2].

16.2. The "*operational*" duty to take all reasonable preventative measures to protect an identified individual whose life is at risk, where the authorities know or ought to know of the existence of a real and immediate risk to the life of that identified individual.

17. As regards the "*systemic"* duty:

17.1. This includes a duty to employ and train competent staff, and to adopt appropriate systems of work that will protect the right to life;[5]

17.2. Central to this duty is the duty to adequately train staff to avoid risks to life. In *Mitchell v Glasgow City Council* [2009] 1 AC 874, Lord Rodger held, at 902A, that the systemic duty meant that *"the authorities must therefore take general measures to employ and train competent staff and to adopt appropriate systems of work that will protect the lives of the people for whose welfare they have made themselves responsible".* Similarly, in *Smith v Ministry of Defence* [2014] AC 52, Lord Hope held, at 121F, that the systemic duty "*could extend to issues about training and the procurement of equipment*". Accordingly, whether there is evidence of inadequate training or inadequate systems that impact on a risk to life, the article 2 systemic duty will be breached;

17.3. This duty includes the requirement to have in place sufficient systems and resources to ensure the prompt despatch of emergency vehicles (see, by analogy, *R (Humberstone) v Legal Services Commission* [2011] 1 WLR 1460, at [69]). In *Humberstone*, the Court of Appeal found an arguable breach of the systemic duty where an ambulance "*took a long time to arrive"* at an incident and that the "*operational provisions"* of the ambulance service were "*inappropriate"*. Such conclusions are plainly open to a court in a police case.

[5] *Savage v South Essex Partnership NHS Foundation Trust* [2009] 1 AC 681, at [30] and [50].

18. The following principles in relation to the "*operational duty"* may be of assistance:

18.1. The test derives from the decision of the European Court of Human Rights in *Osman v UK* [1998] 29 EHRR 245, a case that, like *Van Colle* and *Michael*, involved threats made by a third party to an individual, about which the police ought to have been aware. At [116], the European Court held:

> "*It must be established to [the court's] satisfaction that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk*."

18.2. In order for the duty to be breached, there is no need to show gross negligence or willful disregard of the duty to protect life. Nor is the presence of a systemic failure a necessary ingredient of this test;[6]

18.3. A "*real*" risk to life is one that is "*a substantial or significant risk and not a remote or fanciful one*". It is not as high as a "*likelihood or fairly high degree of risk*", a threshold for which there is no support in the Strasbourg authorities.[7] A risk of 5-20% has been held to be "*real*" for these purposes;[8]

18.4. An "*immediate*" risk to life is one that is "*present and continuing*".[9] It is not necessary for the risk to be apparent just before death. In one case, the

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[6] *Van Colle*, per Lord Bingham, at [30] and [31].

[7] *Rabone v Pennine Care NHS Foundation Trust* [2012] 2 AC 72, at [38].

[8] *Rabone v Pennine Care NHS Foundation Trust* [2010] EWCA Civ 698, at [73]. This conclusion was not varied or criticised by the Supreme Court in *Rabone*, at [33-43].

[9] *Rabone v Pennine Care NHS Foundation Trust* [2012] 2 AC 72, at [39-40].

deceased had attempted suicide 18 days before his death and thereafter continued to show signs of worrying behaviour, without making further attempts at self-harm. The European Court said: "*Although his condition and the immediacy of the risk of a fresh suicide attempt varied, the court considers that that risk was real and that [the deceased] required careful monitoring in case of any sudden deterioration*." The risk of death was sufficiently immediate for the article 2 claim to succeed. It was not necessary for the risk to be apparent just before death;[10]

18.5. The test is not merely what the authorities did know. It is also what the authorities "*ought to have known"*. Stupidity, lack of imagination and inertia do not afford an excuse to an authority that reasonably ought, in the light of what it knew or was told, to have made further inquiries or investigations. The authority is then to be treated as knowing what such further inquiries or investigations would have elicited;[11]

18.6. Cumulative failures on the part of different state bodies may give rise to a breach of duty.[12]

19. Where there is an arguable breach of one of these duties, there is an obligation on the police to investigate. Accordingly, where there is a credible of arguable claim, by a victim or third party, that a person has been subjected to treatment at the hands of a private party which met the description of inhuman or degrading treatment, there is a duty on the police to carry out an efficient and reasonable investigation, which is capable of leading to the perpetrator's identification and punishment.

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[10] *Renolde v France* [2008] 48 EHRR 969, at [89], cited with approval in *Rabone v Pennine Care NHS Foundation Trust* [2012] 2 AC 72, at [40].

[11] *Van Colle,* per Lord Bingham at [34].

[12] "*Whose tort is it anyway"*, 23 September 2014, Jude Bunting, available to members of the Police Action Lawyers Group. This issue was at the heart of the human rights cross-appeal in *Michael*, but the police defendants chose not to pursue it at the substantive hearing.

20. In *DSD v Commissioner of Police of the Metropolis* [2014] EWHC 436 (QB), the High Court found a breach of this investigative duty in cases brought by victims of the black cab rapist, John Worboys. The Court found that the following failures were arguable: (a) a failure properly to provide training, (b) a failure to supervise and manage; (c) a failure properly to use available intelligence sources; (d) a failure to have in place proper systems to ensure victim confidence; and (e) a failure to allocate adequate resources ([13] and [245]). The liability and quantum judgments are subject to an ongoing appeal.

B. The police duty to investigate

21. Prosecuting authorities do not owe a duty of care to those suspected of crime to speedily progress their investigations. That duty was comprehensively rejected in a series of judgments, including, in particular, *Elguzouli-Daf v Commissioner of Police of the Metropolis* [1995] QB 335, at 349. In *Zenati v Commissioner of Police of the Metropolis* [2015] EWCA Civ 80, the key issue was whether there should be a similar duty of care under the Convention.

22. Sofian Zenati was arrested and remanded in custody for possession of a false passport on 10 December 2010. The police and CPS took limited steps to investigate whether the passport was genuine until mid-January 2011. Although the police became aware that the passport was genuine on 19 January 2011, the police did not tell the CPS about this until 4 February 2011, after a plea and case management hearing on the same day at which bail had not been addressed. The Central London County Court struck out his article 5 and false imprisonment claims.

23. Article 5 of the Convention provides as follows:

> *1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:*
>
> *…*

> *c. the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;*
>
> *…*
>
> *3. Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.*

24. Articles 5(1)(c) and 5(3) of the Convention provide an overall scheme for the investigation and prosecution of a person for a criminal offence. The detention of an individual under article 5(1)(c) is lawful only if it is effected for "*the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence"* or when "*it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so"*. Article 5(3) ensures that such detention is subject to judicial oversight.

25. The Master of the Rolls developed these principles in a careful judgment. He held:

25.1. It is implicit in article 5(1)(c) and article 5(3) that investigating / prosecuting authorities are required to bring the relevant facts to the attention of the court as soon as possible, where they cease to have a reasonable suspicion that the detained person committed the offence in question [20];

25.2. If delay on the part of the investigating / prosecuting authorities causes a court to fail to conduct proceedings with special diligence, then those who are responsible for the delay will be responsible for the breach of article 5(3) [43];

25.3. If the investigating authorities fail to bring to the attention of the court material information of which the court should be made aware when reviewing a detention, this may have the effect of causing a decision by the court to refuse bail to be in breach of article 5(3) [44].

26. It was therefore arguable that the police had breached article 5(1)(c) in Mr Zenati's case between 19 January 2011 and 9 February 2011, when bail was finally granted [21]. It was also arguable that the police and the CPS had conducted the investigation in a dilatory fashion, causing Mr Zenati to be held in custody for an unreasonably long time. There was an arguable breach of article 5(3) by the police and the CPS between 10 December 2010 and 4 February 2011 [47-48].

27. Lord Justice Lewison [58] and Lord Justice McCombe [60] agreed. They stressed different aspects of the article 5 duty:

27.1. Lewison LJ stressed that the result in *Zenati* does not amount to imposing a general duty of care (or indeed any other general duty) upon the police or the CPS. It applies only in circumstances in which a person is detained in custody despite not having been convicted of anything [59];

27.2. Lewison LJ was also careful to suggest that the facts of any case must be considered realistically and in the round, and the court must not impose impossible burdens on the police or the CPS [58]. Lord Dyson MR agreed [44];

27.3. McCombe LJ, however, expressly doubted that resources could play any role in the assessment of whether the article 5 duty has been breached [65].

28. All three members of the Court of Appeal held that a breach of the article 5 duty did not render any detention unlawful at common law. Accordingly,

Zenati, like *Michael*, is another example of the Human Rights Act 1998 filling a gap in the common law protection of vulnerable individuals.

29. The Court of Appeal refused an application for permission to appeal to the Supreme Court made by the police and the CPS. The police renewed their application for appeal to the Supreme Court on 11 March 2015.

C. What if the Human Rights Act 1998 is repealed?

30. Both *Michael* and *Zenati* underline the limits of the common law in protecting the fundamental rights of the citizen:

30.1. In *Michael*, Lord Toulson expressly held that there was no need to develop the common law to reflect the Article 2 duties because the Human Rights Act 1998 already provided for such protection. This was regrettable;

30.2. Similarly, in *Zenati*, all three members of the Court of Appeal held that a breach of the Article 5 duty did not render any detention unlawful at common law.

31. The Supreme Court's enthusiasm for developing the common law has been apparent in a number of recent judgments (see, for example, *R (Osborn) v Parole Board* [2014] AC 1115, *A v BBC* [2014] 2 WLR 1243, and *Kennedy v Information Commissioner* [2014] 2 WLR 808). Even the traditional *Wednesbury* approach to irrationality challenges is under attack from the march of a human-rights-influenced proportionality test (*Pham v Secretary of State for the Home Department* [2015] 1 WLR 1591, per Lord Carnwath, at [60], *Kennedy v Information Commissioner* [2014] 2 WLR 808, per Lord Mance, at [51–55]). As these judgments each make clear, human rights authorities should not be treated as if they are "*Moses and the prophets"*.

32. The potential repeal of the Human Rights Act 1998 therefore gives rise to an opportunity. If the opportunities given by the Human Rights Act 1998 disappear, should the common law not develop to reflect its protections?

33. The minority judgment of Lord Kerr in the recent "*benefit cap"* challenge, *R (JS) v Secretary of State for Work and Pensions* [2015] 1 WLR 1449, provides some assistance in how the common law could develop. In *JS*, one of the issues was the extent to which Ian Duncan-Smith had complied with his duties at international law, under Article 3 of the UN Convention on the Rights of the Child, when introducing the benefit cap. A majority of the Supreme Court found that he had not complied with this duty (per Lady Hale at [225], per Lord Kerr at [268], and per Lord Carnwath at [128]). The Court was therefore required to grapple with the consequences in national law of breaching an unincorporated international treaty.

34. The judgment of Lord Kerr provides a helpful overview of the relevant principles and a helpful hint of where a particularly radical Court may be prepared to travel:

34.1. At [241]: "*Developments of the common law should ordinarily be in harmony with the United Kingdom's international obligations ... Unincorporated treaties may also be used to resolve ambiguities in the common law … reference to the Convention for guidance was found to be inappropriate in context as there was no doubt about the content of the common law. By implication, at least, where [there is doubt about the content of the common law], consideration of an international convention or treaty such as the Convention on Human Rights would be appropriate in order to determine what the common law position is or should be"*;

34.2. However, the common law cannot be used to incorporate treaties "*through the back door*" [242]. In *Lewis v Attorney General of Jamaica* [2001] 2 AC 50, Lord Slynn acknowledged the argument that an exception might be read into this rules when the treaty in question was a human rights

treaty: "*even assuming that that [rule] applies to international treaties dealing with human rights …"* (cited by Lord Kerr, at [247]);

34.3. There is a "*growing view"* that human rights treaties hold "*a special status"* (at [248-249]). This view stands in contrast with academic commentary about the dualist structure of our law, which treats international law as operating on a separate plane [250-251];

34.4. The time has come for the exception to the dualist theory in human rights conventions to be openly recognised [254];

34.5. Standards expressed in international treaties or conventions dealing with human rights to which the United Kingdom has subscribed must be presumed to be the product of extensive and enlightened consideration. There is no logical reason to deny to United Kingdom citizens domestic law's vindication of the rights that those conventions proclaim [256].

35. These views were in the minority, but they provide one suggestion as to how the common law could be developed in the event that the Human Rights Act 1998 is repealed. Even if the UK does not remain a signatory to the European Convention on Human Rights, there are still a wealth of similar treaties that provide similar protections, which could be developed in the manner described by Lord Kerr.

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