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TOP PUBLIC LAW CASES OF THE YEAR

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Introduction

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

Consultation – duty to refer to discarded alternatives?

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

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

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

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

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

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

Judicial Review – Convention Rights – International Relations - Deference

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Benefits cap – Article 14 ECHR and Article 3 UNCRC

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

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

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

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

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

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

Loss of British Citizenship- Stateless Persons

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Judicial Review – Constitutional Law

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

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

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

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

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

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

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

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

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

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

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

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

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

Judicial Review – Public Body

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

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

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

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

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

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

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

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

Judicial Review – Quality Assurance Scheme for Advocates

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Retention of 'communications data' – compatibility with EU Charter

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

89. Applying the four-fold test for justification:

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

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

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

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

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

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

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