PUBLIC LAW PROJECT CONFERENCE: TRENDS AND FORECASTS

MORNING BREAK-OUT SESSION 1

ARTICLE 6 AND THE DUTY TO BE FAIR:

WHAT IS THE SOURCE OF THE DUTY TO BE FAIR?

WHEN DOES IT ARISE?

WHAT DOES IT INVOLVE?

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The sources of the duty to be fair

1. The right to a fair hearing has been described as 'a rule of universal application' in the case of administrative acts or decisions which affect rights: *Ridge v Baldwin* [1964] AC 40.

2. Judges have even speculated that a right to fairness, in the sense of natural justice, goes so deep that courts would simply not accept that Parliament could have intended to, or had, destroyed them: *Fraser v State Services Commission* [1984] 1 NZLR 116 at 121 per Cook LJ.

3. On the other hand, there are some situations where judges will want to find reasons not to impose rigorous hearing procedures: in particular, urgent or provisional cases. For example, *R v Birmingham CC ex parte Ferrero Ltd* [1991] 3 Admin LR 613 (prohibition on selling dangerous toys as an 'emergency holding provision') or preliminary decisions, such as those to prosecute or undertake searches.

4. The decision as to whether a hearing is required by fairness might be thought, therefore, to be a quintessentially common law exercise, applying the principles as to when a hearing is required and what it entails so as to fit the situations to which they apply: see *R(West) v Parole Board* [2005] UKHL 1, para 27, per Lord Bingham.

5. In recent years, public law cases about fair procedure have tended to be framed in terms of Article 6 European Convention on Human Rights. Article 6(1) provides:

   > "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice ...".

   (Articles 6(2) and 6(3) provide for the presumption of innocence and specific protections which arise in determination of criminal charges.)

6. What constitutes a 'determination' of civil rights or obligations such as to engage Article 6(1) has led to a complex caselaw. There must be a dispute or *contestation (Konig v Germany* (1978) 2 EHRR 170 para 87), and the decision must be 'decisive' of civil rights and obligations (*Ringeisen v Austria* (1971) 1 EHRR 466 para 94). Thus a DTI report highly critical of a company director's probity did not engage Article 6 because the

proceedings were essentially investigative and did not themselves determine any dispute: *Fayed v UK* (1994) 18 EHRR 393.

7. Moreover, determinations of issues of 'pure public law' are not regarded as determinations of 'civil' rights for the purposes of Article 6. There is a difficult line to draw as to what is regarded as being a pure public law decision and a decision which, whilst having elements relating to 'pure' exercise of state power, nonetheless also determines property or other civil rights: eg *R(Alconbury Developments Ltd) v SoS for the Environment, Transport & the Regions* [2001] UKHL 23 at [74] per Lord Hoffmann and *Cudak v Lithuania* App No 15869/02, Grand Chamber 23 March 2010 (a rule of state immunity which prohibited the bringing of a sexual harassment claim by a worker in the Lithuanian embassy to Poland breached her Article 6 rights because her employment situation and claim were not matters of public law). See too *Ali v Birmingham City Council* [2010] UKSC 8: a decision by a local housing authority under the terms of the Housing Act 1996 that it had discharged its decision to secure that accommodation was available for occupation by a homeless person was not determinative of that person's 'civil rights' under Article 6(1), bcase it was not a determination of an individual's rights.

8. The government recently sought to rely upon the limited scope of Article 6 in *R(SSHD) v BC* [2009] EWHC 2927 (Admin) per Collins J, in which it was sought to be argued that Article 6 did not determine civil rights (rights of free movement under EU law and ECHR rights apparently not being 'civil'). (The point of this argument, from the SSHD's point of view, was to avoid the effect of the House of Lords' decision in *AF (No 3)* [2009] UKHL 28, which applied an irreducible minimum of disclosure to control orders – discussed below). Collins J dismissed the argument that the Article 6 duty of fairness did not apply to so called 'light touch' control orders, since they obviously engaged and determined civil rights under the HRA.

9. However, the caselaw about what constitutes a 'determination' under Article 6 ought not to detract from the underlying principle, namely, that the principle that a decision

which genuinely impinges upon individual rights should be subject to the incidents of a 'fair determination' in the context. That expectation is at the heart of the common law, as well as the texts of all major international human rights Conventions.

10. Thus, where a person faces sanctions or civil proceedings which may have grave consequences for them, it is an underlying requirement of the common law that they should receive such measure of procedural protection as is commensurate with the gravity of the consequences: see the observations of Lord Bingham in *Secretary of State for the Home Department v MB* [2007] UKHL 46, [2008] AC 440 at [24]; and Lord Scott in *AF (No 3)* (above) at [96].

11. The common law may well need to imply in standards of fairness which go beyond a natural reading of the standards of some particular statutory regime. Thiis an exercise which in recent years it has frequently felt more 'natural' to conduct under s3 Human Rights Act 1998 by reference to Article 6, rather than common law implication or statutory construction. But it need not be so.

12. The House of Lords in *R v Parole Board ex parte West* [2005] UKHL 4 the House of Lords held that – regardless of Article- in resolving challenges to licence revocations, the Parole Board had a public law duty to act in a procedurally fair manner and to adopt a procedure that fairly reflected the interests at stake. In other words, it appeared to regard Article 6(1) as simply supportive of common law notions of fairness.

13. There is also authority at the highest level that the common law requirement of a fair trial should not be cut down save by *express* statutory words to the contrary, and that Parliament should not be presumed to have taken steps which adversely affect the legal rights of the citizen unless a statute makes it clear that this was Parliament's intention: see *R v Secretary of State for the Home Department ex parte Pierson* [1998] AC 539 at 575D per Lord Browne-Wilkinson.

14. One would hope, therefore, that English judges would ask an overarching question as to whether fairness in particular circumstances requires a fair hearing, and, if it does, to require such standards as are required to make the hearing genuinely fair in the context. See per Smith LJ in *Kulkarni v Milton Keynes Hospital NHS Foundation Trust & Secretary of State for Health* [2009] EWCA Civ 789 at [63]:

> "... The important question is whether it is lawful for the employer to restrict the employee's rights of legal representation. ... That question could be framed as a question of natural justice in purely domestic law or of breach of Article 6 rights (if engaged). *I do not think that it should matter how the question is framed; the answer should be the same ..." (emphasis added).*

15. However, the case of *W (Algeria) & 7 others v SSHD* [2010] EWCA Civ 898 shows that the distinction between 'Article 6' fairness and common law fairness can be critical. In that case, secret evidence was used in proceedings before the Special Immigration Appeals Commission. If Article 6 ECHR applied, then on the basis of the judgment of the House of Lords in *AF (No 3)* [2009] UKHL 28 (discussed below), the SSHD would have had to disclose a 'core irreducible minimum' of evidence necessary to enable the appellants to know the case against them. However, because immigration decisions are 'pure public law', Article 6 did not apply, and so the SIAC rules continued to apply and to exclude that evidence. The common law could not displace them, because they were clear on their face.

16. Thus, for the moment, it continues to matter whether the duty to be fair arises under Article 6 ECHR or under the common law alone.

When does the duty arise?

17. The ECtHR adopts a composite approach in considering whether there has been a fair trial. It does not require the full decision-making process to comply with Article 6(1) at every stage: rather, the trial process as a whole must reach the required standard: *Albert, Le Compte v Belgium* (1983) 5 EHRR 533 para 29.

18. A hearing before a tribunal which lacks the incidents of independence and impartiality, for example, may yet comply with Article 6(1) standards if a person aggrieved by the result can bring the dispute before a court of 'full jurisdiction' afterwards: see *R(Alconbury Developments) Ltd v Secretary of State for the Environment* [2001] UKHL 23 para 87.

19. Likewise, whether there has been adherence to the common-law duty of natural justice is a question which will be judged by reference to the procedure judged as a whole. In some cases, a defect in a fair hearing at first instance can be cured by a full rehearing of a case on appeal to the High Court: see *Lloyd v McMahon* [1987] AC 625. That case involved the imposition of a surcharge on Liverpool councillors after they had failed to make a valid rate. The House of Lords held that they had been given a fair hearing but that in any case, a full rehearing on appeal to the High Court would have cured any defects which there might have been. However, that was in the context of a statutory appeal process which was far more ample than judicial review.

20. The fact that breaches of Article 6(1) or the common law right to a fair hearing *can* be cured on appeal does not mean that there can never be a breach of Article 6(1) or the common law duty to be fair if there is a fair appeal.

21. The real question is whether an appeal or re-hearing can have a full curative effect in practice. See, in the Convention context *Kingsley v UK* (app 35605/97) [2000] ECHR 528 and *Tsfayo v UK* (app no 60860/00) [2009] 48 EHR 18 para 47.

22. In *Kingsley,* the European Court of Human Rights held that the availability of judicial review could not cure an unfair hearing at first instance where it had no power to order that a decision be re-taken by a body which complied with requirements of independent and impartiality. The procedure as a whole therefore breached Article 6.

23. In *Tsfayo,* decisions of fact concerning eligibility for housing benefit were taken by a housing benefit review board whose members were councillors. It was not therefore 'independent' because they were members of a body with a financial interest in the outcome of the decision. This was not a case where the decision maker was applying a measure of professional knowledge or experience: the issue they were determining was one of fact. Judicial review could not adequately correct errors of fact because the Administrative Court did not have jurisdiction to rehear the evidence or to substitute its own views as to the claimant's credibility. There was a breach of article 6, notwithstanding the availability of judicial review, because the Administrative Court could not correct findings of fact.

24. Article 6(1) does not necessarily require a full judicial rehearing of al matters of fact and discretion when dealing with administrative decision-making in specialist areas (such as a planning inspector's decision): see *Bryan v UK* (1995) 21 EHRR 342.

25. The question of *when* the right to a fair hearing arises has become particularly pertinent given the development of a number of schemes intended to protect members of the public from those who may harm them. Such schemes exist in a number of fields: education, health, other work with children, and other caring professions. Many such schemes involve the creation and maintenance of registers which contain the names of those who *may* be regarded as posing a risk of future harm to the public. Some of these schemes allow for provisional listings, which impose 'protective sanctions' first and give rights of appeal/challenge later.

26. It is arguable that such schemes are part of an ever broader trend to a precautionary approach towards public protection: for example, the making of Anti-Social Behaviour Orders (ASBOs) , or control orders.

27. It is important that courts take a purposive approach to deciding *when* a right to a fair hearing arises. In a society governed by the rule of law, and according to human rights principles, steps to protect the public from potential future harm – no matter how potentially serious it may be - should *always* take place within a framework which also protects the human rights of the individual whom it is feared may be capable of doing such harm.

28. As Lord Hope recently observed in *SSHD v AF (No 3)* [2009] UKHL 28, [2009] 3 WLR 74 at para [76], in the context of control orders designed to protect the public from the possible future actions of those who may be capable of terrorist acts:

> "This case brings into sharp focus once again the acute tension that exists between the urgent need to protect the public ... and the fundamental rights of the individual. ... The first responsibility of government in a democratic society is owed to the public. It is to protect and safeguard the lives of its citizens. **It is the duty of the court to do all that it can to respect and uphold that principle. But the court has another duty too. It is protect and safeguard the lives of the individual. In this case [the right in issue] is a procedural requirement of the controlled persons' right to a fair trial. This is a right that belongs to everyone, as the opening words of article 6(1) of the European Convention on Human Rights remind us – even those who are alleged to be the most capable of doing us harm ..." (emphasis added).**

29. There are three particularly important recent decisions which emphasise the importance of the right to a fair hearing at the point when a decision is taken which is capable of harming the rights of the subject of the decision, in circumstances where a later appeal cannot cure the want of fairness, because by the time of the appeal or further decision, the damage has been done.

30. In two recent cases before the House of Lords, it has been held that an unfair procedure to have a person or body 'provisionally listed' as unsuitable to work in a particular sphere of professional activity is capable of determining rights for the purposes of Articles 6 and 8 ECHR. That was so, notwithstanding the right to have the matter reconsidered at a substantive stage, because by then it would have been too late to cure the practical damage.

31. In *Jain v Trent Strategic Health Authority* [2009] UKHL 4, [2009] 2 WLR 248, the House of Lords held that the procedural safeguards to protect the rights of the owners of a nursing home upon a local authority's application to cancel its registration under section 30 Registered Homes Act 1984 were inadequate to protect their civil rights.

32. In *R(Wright) v Secretary of State for the Home Department* [2009] UKHL 3, [2009] 1 AC 739, the House of Lords held that the procedure for banning care workers from working with vulnerable people on an interim basis under section 82(4) Care Standards Act 2000 without giving them an adequate opportunity to answer any allegations of unsuitability was incompatible with the right to a fair hearing under article 6 ECHR. This was because the interim ban had the practical effect of terminating the worker's reputation in that field and career, and the (much later) right of appeal could not cure it.

33. A third case is going to the Supreme Court in April 2011 which may offer further elaboration as to the *stage* in linked proceedings at which the 'necessary incidents' of fairness are applied. In *R(G) v Governing Body of X School* [2010] EWCA Civ 1, the Respondent (G) was a 23-year old part-time music teacher who was disciplined by the governors of X School following allegations of inappropriate conduct with a 15 year old boy. G sought, but was refused, the right to be represented by a lawyer before the governing body's disciplinary hearing. (He was entitled to be represented by a TU representative or colleague, by virtue of s10 Employment Rights Act 1999, but neither was available to him). He was dismissed, appealed, and sought to challenge the refusal to allow him a lawyer by way of judicial review.

34. G argued that although the Appellant's disciplinary proceedings ostensibly determined only his employment relationship with it, in practice, the outcome of the disciplinary proceedings was determinative of facts which would determine whether he should be referred to the Secretary of State for Children Schools and Families in accordance with regulation 4 of the Education (Prohibition from Teaching or Working With Children) Regulations 2003, and which would be used by the Secretary of State to decide whether to make a direction under s142 Education Act 2002, as a result of which he would be placed on the list of those barred from working with children, which was then kept under s149 Education Act 2002 ("List 99"). Since the case started, the process for safeguarding children has changed[1].

35. The Court of Appeal upheld the court of first instance in finding that Article 6(1) was engaged by these proceedings. The test for engagement was held to be whether there was a 'sufficiently close nexus' between the proceedings in issue and the procedure for determining entry onto the list of those barred from working with children (para 43). The Court of Appeal held that there was 'every likelihood' that the outcome of the disciplinary process would have a 'profound influence' on the decision-making procedures relating to the barred list, that barring procedures would have a 'substantial effect' on G, and that consequently his right to practice his profession would be 'irretrievably prejudiced' by the disciplinary proceedings (paras 48-49). Accordingly, the Court of Appeal determined that G was entitled to procedural protection under Article 6(1), and that in the circumstances fairness demanded that he be given the right to arrange legal representation for the disciplinary proceedings should he so choose (para 53).

[1] The Independent Safeguarding Authority (ISA) has taken the role of the Secretary of State, and the relevant legislation is now the Safeguarding of Vulnerable Groups Act 2006 and the relevant list is the "Children's Barred List".

36. The governing body's appeal to the Supreme Court is supported by the LEA and the Secretary of State. The Court of Appeal decision that a fair hearing is required before a decision is taken by which a person's interests will be 'irretrievably prejudiced' is supported by G, and the EHRC which has sought to renew its intervention in the Supreme Court.

What does a 'fair hearing' require?

37. The right to a fair hearing has a number of incidents, which are easy to state, but difficult to apply. These are:
    a. Access to a court;
    b. Which offers a real and effective hearing;
    c. Before an independent and impartial tribunal established by law;
    d. In public (subject to restrictions);
    e. Within a reasonable time;
    f. Where there is a real opportunity to present a case, including 'equality of arms' and an oral hearing if the circumstances require it; and
    g. A reasoned decision.

38. It is not practical, in a paper of this kind, to offer a survey of the caselaw on all these aspects of the right to a fair hearing. This paper therefore focuses on four topical aspects of the overarching right of 'access to justice':
    a. The right of access to a court;
    b. Access to legal help;
    c. The right to know the case against you.

a) Access to a court

39. This is not an express right, either in the common law, or under Article 6(1) ECHR. It is only implicit – though very deeply and constitutively implicit - in the concept of the rule of law, which is the concept underpinning our unwritten constitution, (what Lord Steyn in *Pierson* called 'a spirit of legality'), as well as the right to a fair trial in Article 6 ECHR and the right to an effective remedy in Article 13.

40. Lord Diplock said in *Bremer Vulcan v South India Shipping* [1981] AC 909 at 977 said that "every citizen has a constitutional right of access in the role of claimant to obtain the remedy to which he claims to be entitled'.

41. The right of access to a court was implied into Article 6(1) by the ECtHR in *Golder v UK* (1975) 1EHRR 524 on the basis that it was a fundamental prerequisite for the exercise of procedural rights elaborated in Article 6(1). In that case, a restriction on a prisoner's right of access to a lawyer was held to violate his right of (effective) access to a court.

42. The House of Lords applied this judicial policy in *Raymond v Honey* [1983] AC 1. A prison governor, in application of Prison Rules, had stopped a prisoner from making an application to the High Court for permission to commit him for contempt of court. The Judicial Committee invoked a constitutional right of access to justice in holding that to block the prisoner's right of access to court was itself a contempt of court, and that nothing in the Prison Act 1952 could be held to justify the making of such a rule.

43. If a measure has the practical effect of depriving a person of a right of access to a court, or unfairly limiting it, then it will be struck down. In *R v SSHD ex parte Leech* [1994] QB 198, the Court of Appeal held that the power to make prison rules was ultra vires insofar as it purported to permit interference with privileged correspondence.

b) Access to legal help

44. As Lord Justice Jackson recognised in his recent magisterial review of the costs of civil litigation, the cost of justice is the biggest barrier to access to it.

45. In *R v Lord Chancellor ex parte Witham* [1998] QB 575, the Divisional Court struck down a rule, contained in a statutory instrument, which abolished the exemption to very high court fees for people on income support. It held that such a rule effectively prevented them from bringing proceedings at all, and so was unlawful.

46. The European Court of Human Rights often repeats its incantation that rights of access to a court must be 'real and effective', not theoretical or illusory (*Airey v Ireland* (1979) 2 EHRR 305). *Airey* was an important case, in establishing that in a complex and emotionally distressing case in which a right to a lawyer was the only genuine and effective means of access to a court, Article 6(1) implied access to some form of legal funding.

47. Members of the Council of Europe have freedom of choice as to how access to lawyers should be given. It was held in *X v UK* [1984] 6 EHRR 136 that it a right to free legal aid could be invoked only in exceptional circumstances – namely where the withholding of legal aid would make the assertion of a civil claim practically impossible, or where its absence would lead to obvious unfairness.

48. This has led to incremental changes to English practice: for example, by extending access to legal aid. In *R (Jarrett) v LSC* [2001] EWHC Admin 389, cuts in legal aid introduced by the Access to Justice Act 1999 meant that legal aid was not available for business matters unless there was a significant wider public interest, or in cases against public authorities alleging serious wrongdoing or (in guidance) of overwhelming importance. Ms Jarrett's case was not such a case, but her English was poor, and the

case in which she was embroiled involved very complex law. The court held that there must be a power for the LSC to consider cases where exceptional funding should be given, where access to justice would otherwise be effectively denied. This has made available a residual class of funding called "Jarrett funding" – used for social security cases at tribunal level, ETs, inquests etc.

49. Other means of promoting access to justice which has received particular recent attention are:

    a. measures promoting more certainty as to costs (eg Protective Costs Orders); (though ostensibly only in public law context where no 'private interest');
    b. by ensuring that legal funding is not unfairly withdrawn (*E v Legal Services Commission – application in R(E) v Governing Body of JFS* [2009] UKSC 1)
    c. in the environmental context, by creative use of the Aarhus Convention: *Pallikaropoulos v The Environment Agency* 15 1 10.

50. The issue of access to a lawyer is partly a question of legal funding but – as *R(G) v Governing Body of X School* demonstrates – not always.

c The right to know the case against you

51. Even access to the court and access to a lawyer does not, in every case, guarantee fairness. The right to know the case against you, and to challenge it, is fundamental to the concept of a 'fair trial'. Yet in recent years, the scope of this entitlement has been subject to extensive limitations. An extensive case-law, as to permissible limits on access to documents has developed, as the use of the special advocate procedure has spread widely through the legal system. (This is principally – but not exclusively - in the context of SIAC, control orders and other anti-terrorism provisions).

52. If person subject to such legislation does not have a realistic idea of the case against him, he cannot instruct a special advocate; and if the special advocate does not know what that person's case in connection with certain specific allegations then anything which he or she may do to seek to assist is (as one judge graphically put it) taking potshots in the dark.

53. An important aspect of a special advocate's role has always been to ensure that as much material as possible goes into open – in other words, that if the state seeks to keep material closed, it does not inappropriately keep material closed that should be in open.

54. Until 2007, the approach of the courts was that if state (usually the Secretary of State for the Home Department) satisfied the court that any particular matter was of significant national security concern, then it could not be disclosed to the person affected and his open advocates, whatever its significance and whatever the effect on the fairness of the hearing.

55. That position was radically altered by the ruling of the House of Lords in *SSHD v MB & AF* [2007] UKHL 46, [2008] AC 40. That case decided that there must be a balancing between two competing principles: the protection of national security and the need to ensure fair trials. In other words, legitimate national security concerns no longer automatically trumped the need for a fair trial.

56. With the House of Lords' ruling in *SSHD v AF (No 3)* [2009] UKHL 28, the pendulum swung firmly back towards the need for a fair process. Giving effect to the decision of the Grand Chamber of the ECtHR in *A v UK,* the House of Lords held that in control order proceedings, if failure to disclose a particular allegation in sufficient detail to enable a controlled person to give effective instructions to the special advocate which are sufficient to allow for an effective challenge would result in an unfair hearing, the government department which seeks to rely upon the closed material is now put to an

election as to whether to disclose the material or to withdraw reliance upon the allegation.

57. The standard of disclosure required by the *AF* test is relatively high. "It suggests that where detail matters, as it often will, detail must be met with detail" (per Lord Hope at 87). There is no longer any room for an argument – as there was after *MB* – that non-disclosure makes no difference. The *Johns v Rees* principle as been restored. Thus the apparent strength of a case against an individual or the apparent impossibility of any credible defence to it being mounted does not obviate the need for disclosure. (If anything, indeed, it increases it).

58. In the past year, the principles in this case have been applied in a number of cases, both private law (but with public law implications) and public law. These cases illustrate the important role of Article 6 in guarding against the spread or unjustifiably broad use of closed proceedings in a wide range of contexts:

    a. As noted above, in *R(SSHD) v BC* [2009] EWHC 2927 (Admin) Collins J, it was held that Article 6 applied to the euphemistically named 'light-touch' control orders. There remained an irreducible minimum of disclosure even when it was suggested that the restrictions imposed were light. (This case is awaiting an appeal by the SSHD).

    b. *Home Office v Tariq* [2010] EWCA Civ 462 – this was a discrimination claim brought against the Home Office in the ET. The Home Office sought to rely upon secret material, as was permitted by the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004. It was held that *AF (No 3)* and Article 6 applied to modify the procedure, but that it was not otherwise inherently unlawful by reference to EU law or Article 6 ECHR.

c. In *Bank Mellat v HM Treasury* [2010] EWCA Civ 483, a foreign bank's assets were frozen by a Financial Restrictions Order made under schedule 7 Counter-Terrorism Act 2008. The bank was not informed of the full reasons for this, because the closed procedures under CPR Part 79 were used. However, the Court of Appeal held that in the light of *AF (No 3),* these procedures had be modified so as to ensure that the Bank got the 'core irreducible minimum' of disclosure required to achieve compliance with Article 6.

d. *Al-Rawi & Others v SSHD* [2010] EWCA Civ 482 concerns the long-running civil proceedings brought by British residents who had been detained in Guantanamo Bay. They allege that the UK government was complicit in their illegal detention, rendition and mistreatment, and are bringing civil damages claims. The Court of Appeal (overturning a first instance decision) held that there could be no 'closed evidence procedure' (other than conventional public interest immunity) in the absence of statutory authority: at 11-12:

> "we should say firmly and unambiguously that it is not open to a court in England and Wales, in the absence of statutory power to do so or (arguably) agreement between the parties that the action should proceed on such a basis, to order a closed material procedure in relation to the trial of an ordinary civil claim, such as a claim for damages for tort or breach of statutory duty.
>
> The primary reason for our conclusion is that by acceding to the defendant's argument, the court, while purportedly developing the common law, would in fact be undermining one of its most fundamental principles."

e. In *A (A child) v Chief Constable of Dorset Police* [2010] EWHC 1748 (Admin), Blake J applied the principle in *Al Rawi* in the public law context. A was a 16 year old, who brought a judicial review against the police based on Article 5 ECHR and sought declaratory relief and damages. An interested party sought to prevent

disclosure of material to A by the police, which he said was confidential and disclosure of which he said would breach his rights under Article 8 ECHR. The court applied *Al Rawi* and held that there was no basis upon which the court could prevent disclosure of information relevant to the issues in the case.

f. However, in *W(Algeria) v SSHD* [2010] EWCA Civ 898 it was confirmed that Article 6 ECHR and the House of Lords' decision in *AF (No 3)* did not apply to proceedings before the Special Immigration Appeals Commission (because immigration decisions are matters of 'pure' public law to which Article 6 does not apply). Accordingly, the SIAC rules, which are statutory, continue to apply, without an Article 6 mitigating effect. (See paragraph 15 above).

59. In *R v Davis* [2008] UKHL 36, para 34, Lord Bingham said (in the context of criminal trials and witness anonymity) that "the right to be confronted by one's accusers is a right recognised by the common law for centuries, and *it is not enough if counsel see the accusers if they are unknown to and unseen by the defendant*". In *Al Rawi*, the Court of Appeal held that the principle that a litigant should be able to see and hear all the evidence which was seen and heard by a court was

> "so fundamental, so embedded in the common law, that *in the absence of parliamentary authority* no judge should override it ... At least so far as the common law is concerned, we would accept the submission that this principle represents an irreducible minimum requirement of an ordinary civil trial... " (para 30, emphasis added).

60. There is not really a dispute now that the *standards* of fairness required by the common law are the same as those required by Article 6 ECHR. However, it is clear that in the present state of the law, the *contexts* in which they apply are different, since there are

some areas (clear statutory rules which limit fair hearing rights) which the common law cannot reach. The next frontier is the question raised by Lord Phillips (and discussed by Mike Fordham QC) as to whether the common law could be developed so that it became, in effect, co-extensive with s3 HRA.

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