PUBLIC LAW PROJECT

WALES CONFERENCE 2013

HUMAN RIGHTS UPDATE NOTES

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CASE NOTES

HOUSING LAW

Sims v Dacorum Borough Council

The Court of Appeal held in *Sims v Dacorum Borough Council* [2013] EWCA Civ 12 that the rule in *Hammersmith and Fulham LBC v Monk* [1992] 1 AC 478, whereby a joint residential tenancy was terminated if one party served a notice to quit on the landlord, was not incompatible with Article 8 of the ECHR, or Article 1 of Protocol 1.

Counsel for the Appellant conceded that the Court of Appeal was bound by *Monk*, but sought permission to appeal to the Supreme Court. The Court of Appeal dismissed the appeal, and refused permission:

i) The ECHR challenge was solely about the relationship between *Monk* and ECHR law, not the facts of the case [33]

ii) Were the Appellant's argument to succeed, it would mean that the Appellant could obtain better rights under human rights law than he had agreed with the Council. This would mean that the Appellant had the right to a three-bedroomed house. "That seems to me to be more a case of interference with the Council's enjoyment of its possessions than of an interference by the Council with the possessions of Mr Sims."[1] [34]

iii) Article 8 is not engaged, since *Monk* simply lays down a substantive rule of property and contract law. The power of each joint tenant to terminate the joint tenancy was inherent in the joint tenancy which they were granted. This did not interfere with the respect for Mr Sims' home. [35]

iv) Article 1 of Protocol 1 was not engaged: all the Council did was to receive Mrs Sims' notice of termination. This was not possibly an interference with Mr Sims' property rights. [36]

v) The proposed appeal to the Supreme Court is unarguable and a waste of public funds. [37]

[1] Although a core public authority does not have human rights: *Aston Cantlow v Wallbank* [2004] 1 AC 546 [8], per Lord Nicholls of Birkenhead.

Corby BC v Scott

In *Corby BC v Scott* [2013] PTSR 141, the Court of Appeal considered the requirement of a proportionality analysis under Article 8 when considering whether to make possession orders, in the aftermath of *Hounslow LBC v Powell* [2011] 2 AC 186 and *Manchester CC v Pinnock* [2011] 2 AC 104. Lord Neuberger MR helpfully summarised the situation with regards to demoted and introductory tenancies:[2]

> "The effect of the reasoning in the Pinnock case seems to me to be that, at least in relation to demoted and introductory tenancies, "it will only be in 'very highly exceptional cases' that it will be appropriate for the court to consider a proportionality argument", although "exceptionality is an outcome and not a guide"…"

Neither of the appeals before the Court was found to be such an exceptional case. His Lordship also drew the following wider lessons:[3]

> "None the less I consider that the Corby Borough Council case emphasises that in such a case a judge (i) should be rigorous in ensuring that only relevant matters are taken into account on the proportionality issue, and (ii) should not let understandable sympathy for a particular tenant have the effect of lowering the threshold identified by Lord Hope DPSC in [*Powell*] at paras 33 and 35. As for the West Kent Housing Association case, it seems to me to emphasise the significance of the height of that threshold or, to put it another way, how exceptional the facts relied on by any residential occupier must be before an article 8 case can have a real prospect of success."

Lord Neuberger MR also indicated that judges should, if possible, make it clear at an early stage that the case is not an exceptional one, to avoid a waste of court time, although this was not an absolute rule.[4]

Birmingham City Council v Lloyd

In *Birmingham City Council v Lloyd* [2012] HLR 44, the Court of Appeal again considered the question of proportionality of possession proceedings under Article 8. In this case, the occupier accepted that he had never had the legal right to occupy the premises, which had been occupied by his brother under a secure tenancy. Lord Neuberger held:[5]

> "It would, I accept, be wrong to say that it could never be right for the court to permit a person, who had never been more than a trespasser, to invoke art.8 as a defence against an order for possession. But such a person seeking to raise an art.8 argument would face a very uphill task indeed, and, while exceptionality is rarely a helpful test, it seems to me that it would be require the most extraordinarily exceptional circumstances."

The facts that Mr Lloyd had depression, and would struggle to find alternative accommodation if the appeal succeeded, were not viewed by the Court of Appeal as exceptional factors. Neither was the fact that he had expected that the Council might allow him to succeed to his brother's tenancy sufficient. The Court again emphasised, as it had in *Corby*, that judges should not be over-influenced by understandable personal sympathy. Lord

[2] [18].
[3] [35].
[4] [39].
[5] [18].

Neuberger also stated that, had the Defence to the possession proceedings been put in in advance, a district judge should not have allowed the matter to proceed to trial.

SOCIAL SECURITY

Humphreys v Revenue and Customs Commissioners

In *Humphreys v Revenue and Customs Commissioners* [2012] 1 WLR 1545, the Supreme Court considered the rule that child benefit is payable to one parent in respect of each child, even if the parents do not reside together. It was not in issue before the Supreme Court that this engaged Article 1 of Protocol 1 to the European Convention. Nor was it in dispute that this constituted indirect discrimination against men. The Supreme Court applied the test in *Stec v United Kingdom* (2006) 43 EHRR 1017, that a difference in treatment is discriminatory if it has no objective and reasonable justification, but the Strasbourg court would generally respect the legislature's policy choice unless "manifestly without reasonable foundation".

Lady Hale JSC (with whom the rest of the court agreed) found that the state was entitled to deliver support for the child in the most effective manner, which may be directing money to the household where the child principally lives.[6] Her Ladyship however pointed out that the better system would be to return to the family courts the power to make appropriate orders regarding the division of such payments.[7]

Burnip v Birmingham City Council

In *Burnip v Birmingham City Council* [2013] PTSR 117, the Court of Appeal considered housing benefit payable to those who suffer from disabilities. Two of the Appellants lived alone, but their disabilities were such that it was required that they had overnight carers stay with them. The relevant local authorities refused to pay housing benefit in respect of the second bedroom. In the third case, two daughters who might normally have been expected to share a room had disabilities such that it was not reasonable for them to be expected to do so. Again, the local authority refused to pay housing benefit for the additional required bedroom. The Appellants argued that the statutory criteria have a disparate adverse impact on the disabled, relying on the principle in *Thlimmenos v Greece* (2000) 31 EHRR 411 [44], that unlike cases in some situations need to be treated differently.

The Court of Appeal found that there were a lack of cases post-*Thlimmenos* where national authorities had been under a positive obligation to provide resources. However, Maurice Kay LJ held:[8]

> "I am not persuaded that it is because of a legal no-go area. I accept that it is incumbent upon a court to approach such an issue with caution and to consider with care any explanation which is proffered by the public authority for the discrimination. However, this arises more at the stage of justification than at the earlier stage of considering whether discrimination has been established."

[6] [29].
[7] [32].
[8] [18].

Having decided that the case falls within Article 14, the Court of Appeal considered whether there was an objective justification, and found that there was not. As concerned the first and second Appellants, the Court found that they should not have to use incapacity benefit and disability living allowance to subsidise their housing costs. Secondly, they objectively required two bedrooms, and the sum provided in housing benefit, on the basis of only one bedroom, left a substantial shortfall. Finally, severely disabled persons should be put in a position where they are able to commit to living in a particular location in the long term, and not be "left at the mercy of short term fluctuations in the amount of…housing-related benefits." Similar reasoning applied to the third Appellant, and the Court found that discretionary housing payments did not provide the necessary justification.

It was argued on behalf of the Secretary of State that a wide margin of appreciation should be accorded to the state in relation to "general measures of economic and social strategy", and upon broader grounds raised in *AM (Somalia) v Entry Clearance Officer* [2009] UKHRR 1073. The Court of Appeal rejected these arguments:[9]

> "The simple point is that, without the benefit of the extra room rate, Mr Burnip would be left in a *worse* position than an able-bodied person living alone: it is only to correct such disparity of treatment that the claim is brought.
>
> Furthermore, there are in my judgment important differences between the circumstances of the present appeals and the position in *AM (Somalia) v Entry Clearance Officer* [2009] UKHRR 1073. First, these are not cases of immigration control, where, as Elias LJ noted, the courts are particularly reluctant to interfere in matters of policy. On the contrary, we are here concerned with a benefit (HB) the purpose of which is to help people to meet their basic human need for accommodation of an acceptable standard. Secondly, there is no question of a general exception from the normal bedroom test for disabled people of all kinds. The exception is sought for only a very limited category of claimants, namely those whose disability is so severe that an extra bedroom is needed for a carer to sleep in (or, in cases like that of Mr Gorry, where separate bedrooms are needed for children who, in the absence of disability, could reasonably be expected to share a single room). Thirdly, such cases are by their very nature likely to be relatively few in number, easy to recognise, not open to abuse, and unlikely to undergo change or need regular monitoring. The cost and human resource implications of accommodating them should therefore be modest, quite apart from the point that in some cases the effect of refusing the claim could well be to force the claimant into full time residential care at much greater expense to the public purse. Fourth, for the reasons which I have already given, the extra assistance which can be provided by discretionary housing payments, valuable though it can be, falls far short of being an adequate solution to the problem. Finally, the fact that Parliament has now seen fit to legislate for cases like those of Mr Burnip and Ms Trengove, and to do so at a time of general economic hardship, may in my view reasonably be taken as recognising both the justice of such claims and the proportionate cost and nature of the remedy."

IMMIGRATION

R (Negassi) v Secretary of State for the Home Department

[9] [64]-[65].

In *R (Negassi) v Secretary of State for the Home Department* [2013] EWCA Civ 151, the Court of Appeal held that refusal of permission to work did not engage Article 8. The Court distinguished *R (Wright) v Secretary of State for Health* [2009] 1 AC 739, on the basis that putting an individual on a barred list from working in the care sector was "far removed from cases of foreign nationals with no pre-existing rights of access to the domestic labour market". [34]

Negassi was also distinguished from *Tekle v Secretary of State for the Home Department* [2009] 2 All ER 193 (Admin), which was decided on its extreme facts, due to extreme delay on the part of the Home Office. There was a "meaningful" threshold, which a case must pass before refusal of permission to work will constitute a breach of Article 8:[10]

> "In the present cases, where it is common ground that Article 8 does not embrace a general right to work, I do not consider that the protected right to respect for private life embraces the right of a foreign national, who has no Treaty, statutory or permitted right of access to the domestic labour market, to an entitlement to work. We have not been referred to any Strasbourg authority which supports the engagement of Article 8 in these circumstances."

Abdullah v Secretary of State for the Home Department

In *Abdullah v Secretary of State for the Home Department* [2013] EWCA Civ 42, the Court of Appeal considered a claim by the Appellant that he could not be removed, and therefore his Article 8 rights required that he be given admission, in part so that he could engage with the community. The Court of Appeal rejected this argument on the basis that all the Upper Tribunal had found was that "it may be that the appellant cannot in fact be removed to Saudi Arabia".[11] The UT Judge found that Article 8 was not engaged. The Court of Appeal agreed:[12]

> "I reject the submission that because the Secretary of State was at the date of the decision of the Upper Tribunal unable to enforce the return of the Appellant to Saudi Arabia, article 8 required her to grant him leave to remain. Article 8 does not confer a right to reside in the country of one's choice. The Appellant chooses to seek to reside in this country, but was not compelled to come here by any threat of persecution. Mr Jacobs accepted that if the Appellant could be returned, he could have no article 8 claim to remain here. That is doubtless because there was no evidence before the Upper Tribunal that he had established any personal or family life here."

The Appellant relied on the *obiter* statement of Lady Hale in *Khadir v Secretary of State for the Home Department* [2006] 1 AC 207, [4]:

> "There may come a time when the prospects of the person ever being able safely to return, whether voluntarily or compulsorily, are so remote that it would irrational to deny him the status which would enable him to make a proper contribution to the community here…"

This is sometimes known as the 'limbo' argument – individuals who cannot be removed should not be left in a limbo whereby they cannot participate in the community where they are essentially forced to stay.

[10] [38].
[11] [16].
[12] [19].

This aspect was dealt with in *Abdullah* in most detail by Beatson LJ. He held:[13]

> "There may at some stage come a time when the "limbo" argument becomes a live question, but I consider it simply unarguable that it had done so at the time of the Tribunal's decision in this case. Given the limited information provided by the Appellant and the inconsistencies in the accounts he has given, the Secretary of State was entitled to further time to make inquiries.
>
> My second observation concerns the length of time for such inquiries before the "limbo" argument could conceivably come into play. I consider that, in this context, some assistance can be gained from the decisions concerning the legality of the detention of persons the Secretary of State seeks to deport while efforts are made to establish their nationality or to obtain the requisite documentation of their nationality. One of the factors which has been held to affect the period of detention which is lawful is whether the detained person has co-operated with attempts to obtain documentation... Similarly, the time after which the "limbo" argument can come into play may depend on the attitude of the individual concerned to efforts to establish his or her nationality or to obtain documentation.

FK and OK (Botswana) v Secretary of State for the Home Department

In *FK and OK (Botswana) v Secretary of State for the Home Department* [2013] EWCA Civ 238, the Court of Appeal considered the role of Article 8(2) of the ECHR in the field of immigration. It had been found in the Upper Tribunal that both the family and private life aspects of Article 8 were engaged by the proposed removal of the Appellants, which therefore required justification under Article 8(2).

The Appellants appealed against the decision of the UT that removal was proportionate. The argument was raised that removal was not justified as it was not pursuant to any particular legitimate aim specified in Article 8(2). They relied upon the finding of the Strasbourg Court in *Golder v UK*,[14] to the effect that there are no implied limitations upon Article 8 rights. Limitations must be restricted to those in the text of the Article, being those necessary in a democratic society:

> "in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

Sir Stanley Burnton, giving the judgment of the Court of Appeal, dismissed this argument for three reasons. Firstly, it was not taken below in the FTT or UT. Secondly, the Court held that the maintenance of immigration control is not an implied limitation on Article 8 rights, but rather stemmed from the need to protect economic well-being, health and morals, and the rights and freedoms of others. The fact that the particular Appellants are law-abiding does not prevent the maintenance of immigration control from being a legitimate aim for the purpose of Article 8(2). The Court of Appeal found that the maintenance of immigration control was not an implied limitation on Article 8 rights, but rather an indirect limitation. The Court of Appeal also found the Appellants' contention to be contrary to authority, including *R (Razgar) v Secretary of State for the Home Department* [2004] 2 AC 368 and *Huang v Secretary of State for the Home Department* [2007] 2 AC 167.

[13] [28]-[29].
[14] (1975) 1 EHRR 524 [44].

Miah v Secretary of State for the Home Department

In *Miah v Secretary of State for the Home Department* [2013] QB 35, the Court of Appeal rejected the argument that, where an applicant under the Immigration Rules has only just failed to meet the requirements, and he claims that removal will breach his rights under Article 8, when considering the balance under Article 8(2), the weight to be given to the breach of immigration control should be reduced.

Stanley Burnton LJ distinguished the "near miss" argument from a *de minimis* argument – if there has been a truly *de minimis* departure from a rule, then the rule as to be viewed as having been complied with.[15] However, on a thorough review of the authority, his Lordship found that there was no "near miss" rule. This has an impact upon the Article 8(2) adjudication:[16]

> "The Secretary of State, and on appeal the tribunal, must assess the strength of an article 8 claim, but the requirements of immigration control are not weakened by the degree of non-compliance with the Immigration Rules."

R (BB) v Special Immigration Appeals Commission

In *R (BB) v Special Immigration Appeals Commission* [2013] HRLR 7, the Court of Appeal heard a challenge to an immigration bail decision on human rights grounds. The Court of Appeal confirmed that deportation does not concern the determination of civil rights and obligations, and so Article 6 of the Convention is not engaged. The Master of the Rolls held also that the detention of an individual pending deportation does not involve a determination of civil rights under Article 6.[17] He held that it would be most odd were Article 6 to apply to bail, but not to detention. The grant of bail was ancillary to the deportation, and therefore did not engage Article 6.

PRISON LAW

James, Wells and Lee v United Kingdom

In *James, Wells and Lee v United Kingdom* (2013) 56 EHRR 12, a Chamber of the European Court of Human Rights considered the long-running challenges to sentences of Imprisonment for Public Protection (IPPs). The Applicants had been sentenced to IPPs. However, they were not detained in prisons which allowed them to take rehabilitative courses which would be considered by the Parole Board in their applications for release at the end of their tariff. The Court found that there was a causal link between the detention and risk to the public. However, the court held that the detention could nevertheless become arbitrary,[18] and held:[19]

> "The Court reiterates that the right to liberty is of fundamental importance. While its case law demonstrates that indeterminate detention for the public protection can be justified under art.5(1)(a) , it cannot be allowed to open the door to arbitrary detention. As the Court has indicated above, in circumstances where a government seeks to rely solely on the risk posed by offenders to the public in order to justify their

[15] [12].
[16] [26].
[17] [25].
[18] [221].
[19] [218].

> continued detention, regard must be had to the need to encourage the rehabilitation of those offenders. In the applicants' cases, this meant that they were required to be provided with reasonable opportunities to undertake courses aimed at helping them to address their offending behaviour and the risks they posed. As Lord Phillips observed, courses are provided to prisoners because experience shows that they are usually necessary if dangerous offenders are to cease to be dangerous. While art.5(1) does not impose any absolute requirement for prisoners to have immediate access to all courses they may require, any restrictions or delays encountered as a result of resource considerations must be reasonable in all the circumstances of the case, bearing in mind that whether a particular course is made available to a particular prisoner depends entirely on the actions of the authorities. It is therefore significant that the failure of the Secretary of State to anticipate the demands which would be placed on the prison system by the introduction of the IPP sentence was the subject of universal criticism in the domestic courts and resulted in a finding that he was in breach of his public law duty."

R (Whiston) v Secretary of State for Justice

In *R (Whiston) v Secretary of State for Justice* [2012] EWCA Civ 1374, the Court of Appeal considered whether, when a prisoner was released from prison to home detention curfew, whether recall from that curfew to prison engaged Article 5(4) of the European Convention. The Court found that the Article 5(4) consideration was incorporated into the sentencing decision itself. Elias LJ held:[20]

> "The critical question is whether in the particular circumstances of this case the recall from home detention curfew constitutes a fresh deprivation of liberty or whether that renewed detention remains justified by the original sentence of imprisonment. In my judgment, this depends upon the nature, quality and purpose of the liberty afforded to a prisoner who is made subject to such a licence.
>
> I am not persuaded that the release on home detention curfew is properly to be viewed as the restoration of liberty sufficient to engage Article 5 if and when the prisoner is recalled to prison. …"

Since recall to prison concerned the manner of execution of the sentence, Article 6 was not engaged.[21]

THE POLICE

One major theme of recent human rights cases both in the UK courts and in Strasbourg is the weight to be given to the police's view of what is required in terms of their operational efficiency.

Austin v United Kingdom

In *Austin v UK* (2012) 55 EHRR 14, the Strasbourg Court was sympathetic to pleas on the part of the police to operational discretion and effectiveness. The European Court of Human Rights found that the subjection of the Applicants to 'kettling' did not contrary to Article 5 of

[20] [30]-[31].
[21] [37].

the European Convention. The Applicants had been contained within a police cordon at Oxford Circus for several hours.

The Court noted that Article 2 of Protocol 4 protected the right to freedom of movement, but the Applicants did not rely on this Article, on account of the fact that the UK had not ratified it. The Court held, essentially, that Article 5 should not be used to bring in Article 2 of Protocol 4 by the back door. The Court noted that it has allowed a degree of discretion in operational decisions, and held:[22]

> "Article 5 cannot be interpreted in such a way as to make it impracticable for the police to fulfil their duties of maintaining order and protecting the public, provided that they comply with the underlying principle of art.5 , which is to protect the individual from arbitrariness."

The Court found that there was no deprivation of liberty, "based on the specific and exceptional facts of this case".

MS v United Kingdom

In *MS v United Kingdom* (2012) 55 EHRR 23, the Strasbourg Court held that holding a severely mentally ill man for longer than the statutory maximum of 72 hours under the Mental Health Act 1983 s136, when he was "in dire need of appropriate psychiatric treatment"[23] constituted degrading treatment, and a breach of Article 3.

ZH v Commissioner of Police of the Metropolis

In *ZH v Commissioner of Police of the Metropolis* [2013] EWCA Civ 69, the Court of Appeal held that police officers had acted unlawfully in their restraint of a boy who suffered from severe autism and epilepsy. The police had ample opportunity to take advice from the boy's carers as to how to coax him away from water by which he was transfixed. They however touched him, causing him to jump into the water. They then restrained him, which was neither necessary nor proportionate.

This decision is particularly important as regards the approach which the Court of Appeal took to the operational discretion of the police:[24]

> "As I have said, I reject Ms Studd's submission that this decision unreasonably interferes with the operational discretion of the police or that it makes practical policing impossible. I accept that operational discretion is important to the police. This was recognised by the judge. It has been recognised by the ECtHR (see Austin at para 56). And I have kept it well in mind in writing this judgment. But operational discretion is not sacrosanct. It cannot be invoked by the police in order to give them immunity from liability for everything that they do. I doubt whether Ms Studd intended to go so far as to suggest that it can. Each case must be carefully considered on its facts. I do not believe that anything said by the judge or by me in this judgment should make it impossible to carry out policing responsibly. One is bound to have some sympathy for the police in this case. They were intent on securing the best interests of everyone, not least ZH. But as the judge said, they behaved as if they were faced with an emergency when there was no emergency; and PC Colley and PC

[22] [56].
[23] [44].
[24] [90].

> McKelvie did not in fact believe that there was an emergency. Had they consulted the carers, the likelihood is that ZH would not have jumped into the pool in the first place. The police should also have consulted the carers before lifting ZH from the pool. Had they done that, it is likely that with their help, the need to restrain him would have been avoided. Finally and most seriously of all, nothing could justify the manner in which they restrained ZH."

R (Catt) v Association of Chief Police Officers; R (T) v Commissioner of Police of the Metropolis

The Court of Appeal dealt with a similar theme in *R (Catt) v Association of Chief Police Officers of England, Wales and Northern Ireland* [2013] EWCA Civ 192. The Claimant was a non-violent attender at protests, as a result of which he was placed on the National Domestic Extremism Database. He attended protests organised by a group named Smash EDO, some of the core members of which had in the past committed violent and criminal behaviour. However, this did not justify keeping records regarding Mr Catt:[25]

> "We do not doubt the importance to modern policing of detailed intelligence gathering and we accept the need for caution before overriding the judgment of the police themselves about what information is likely to assist them in their task. For present purposes that task is to obtain a better understanding of how Smash EDO is organised, to be in a position to forecast the place and nature of its next protest and to anticipate the number of people likely to attend and the tactics they are likely to adopt. It is not easy to understand how the information currently held on Mr. Catt can provide any assistance in relation to any of those matters."[26]

Catt was heard in combination with the appeal in *T*, where a woman challenged the decision of a police authority to keep a copy of a letter warning her against committing harassment for a long period. The Court of Appeal upheld this challenge:[27]

> "The respondent's current policy is to retain police information letters and CRIS reports relating to single allegations of conduct of a kind which, if repeated, could constitute harassment, for a period of twelve years. In the case of CRIS reports that is a consequence of a blanket policy which does not discriminate between serious offences, minor offences and conduct that does not amount to an offence at all. There is an obvious justification for retaining a copy of the letter for a limited period, because it may help to identify a course of conduct amounting to harassment and may be useful in providing evidence that the suspect was aware of the nature and consequences of his actions. However, since harassment requires a course of conduct, it is difficult to see how the retention of the letter or the CRIS report for a period of more than a year or so at the most could possibly be of any assistance in connection with a prosecution for that offence. … Although we agree that the court should be slow to interfere with the judgment of the police in matters of this kind, retention of information of this kind for more than a matter of months needs to be justified by evidence."

[25] [44].
[26] This could also be relevant to the 'deference to the police' point.
[27] [61].

STATE RECORD-KEEPING

A related matter came before the Court of Appeal in *R (T) v Chief Constable of Greater Manchester* [2013] EWCA Civ 25. The Appellants challenged the compatibility of the enhanced criminal record certificate regime with Article 8 ECHR. The Secretary of State for the Home Department sought to justify the requirement that all convictions and cautions must be disclosed. The Court of Appeal recognised the legitimate aim of protecting employers and vulnerable children and adults. It also assisted employers in determining whether potential employees were suitable for certain kinds of work. However, it was found to be disproportionate:[28]

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

The Court of Appeal did not find itself bound by the decision of the Supreme Court in *R (L) v Commissioner of Police of the Metropolis* [2010] 1 AC 410.

RESTRAINT TECHNIQUES

Children's Rights Alliance for England v Secretary of State for Justice [2013] EWCA Civ 34, the Court of Appeal held that there was no obligation on the part of the Secretary of State to inform children that they had been subjected to unlawful restraint techniques while detained in secure training centres. The Claimant sought to counteract fears of "floodgates" arguments. However, Laws LJ held that the proposition that a potential party to a civil suit must declare himself as such could not be uniquely applicable in this case: [31]. There was clearly no right at private law. Regarding public law, the duty on the State is not to impede access to justice: [34]. But this went no further. To do so would "be as discordant with the common law's adversarial system of justice" [37]. Article 6 did not take the matter any further. This was different to situations where there had been a breach on the part of a State to provide factual information which should have been provided in order to secure the effectiveness of a human right.

In a postscript to his judgment, with which Black LJ did not agree, Laws LJ questioned the continuing appropriateness of the *Ullah* principle, whereby (save in special circumstances) domestic protection of human rights is not to exceed that which would be provided by the European Court of Human Rights.[29] He stated:[30]

> "But perhaps I may be forgiven for stating, with great deference to the House of Lords and the Supreme Court, that I hope the Ullah principle may be revisited. There is a great deal to be gained from the development of a municipal jurisprudence of the Convention rights, which the Strasbourg court should respect out of its own doctrine

[28] [38].
[29] *R (Ullah) v Special Adjudicator* [2004] 2 AC 323.
[30] [64].

> of the margin of appreciation, and which would be perfectly consistent with our duty to take account of (not to follow) the Strasbourg cases. It is a high priority that the law of human rights should be, and be seen to be, as sure a part of our domestic law as the law of negligence. If the road to such a goal is clear, so much the better."[31]

The approach of the Court of Appeal in rejecting arguments that a decision cannot be restricted to its individual facts appears to contrast with the decision of the Strasbourg Court in *Austin*. As quoted above, the Court of Human Rights held that there was no deprivation of liberty, "based on the specific and exceptional facts of this case". The difference of emphasis between the Court of Appeal and the Strasbourg Court may be explained by the more formalised dependence on precedent in the English and Welsh legal system.

EXTRADITION

In *H v Lord Advocate* [2012] 3 WLR 151, the Supreme Court considered a challenge to a decision to extradite two parents to the United States on the grounds of Article 8. The Supreme Court found that the father's Article 8 rights were not breached in acceding to the request, since, having a history of abusing children, it was very unlikely that he would ever live with his children as a family again.[32] Moreover, the interests of the children, even when combined with the interests of the mother, did not overcome the overwhelming public interest in acceding to the extradition request. Lord Hope DPSC held:[33]

> "cases where both parents of young children are at risk of being extradited may be regarded as being of an exceptional character, so as to raise the need to consider the possibility of a prosecution in this country a bit higher than the bar which the observations in Norris have set for it. The issue remains one of proportionality. The more compelling the interests of the children the more important it will be for the alternatives to extradition, if there are any, to be carefully examined and brought into the balance to see if they carry any weight. This is not to diminish the importance to be given to this country's treaty obligations. Rather it is to recognise that in cases involving the separation of parents from young children there is another powerful factor which is likely to make the scales more finely balanced than they would be if the children were not there.
>
> …
>
> I would however accept Mr Wolffe's submission that the scales are not finely balanced in this case and that taking account of the best interests of the children does not change the analysis.
>
> …
>
> As I have already said, I would refuse Mr H's appeal. I am satisfied that the Scottish Ministers' order that he must be extradited was not incompatible with his Convention rights. For obvious reasons the balance is not so easy to strike in the case of Mrs H. But I have come to the conclusion that the best interests of the children, even when weighed together with her own article 8 right to respect for her family life with them, are not strong enough to overcome the overwhelming public interest in giving effect

[31] It is also interesting to note a recent speech of Lord Kerr on this theme, available on the Supreme Court website: "The UK Supreme Court: The modest underworker of Strasbourg?", available at http://www.supremecourt.gov.uk/docs/speech_120125.pdf.

[32] [55].

[33] [65], [69], [71].

to the request. I would hold that it was not incompatible with her Convention rights for the Scottish Ministers to order her extradition, and I would refuse her appeal also."

In *Pomiechowski v Poland* [2012] 1 WLR 1604, the Supreme Court held that extradition proceedings against a national do involve the determination of a civil right or obligation, and therefore engage Article 6(1) ECHR, even those involving a non-national do not.[34] Moreover, the time periods for bringing appeals were capable of impeding the "very essence of the right" under Article 6. The Court found that courts making extradition decisions regarding British nationals must have discretion in exceptional circumstances to extend time for filing and service of appeals. The appeals of non-nationals were in any event successful, since the requirement that notices of appeals be filed and served within the tight statutory deadlines in fact meant that notices of appeal must be filed, with the respondents on notice of this.[35]

The Court however found that extradition proceedings are not subject to the procedural guarantee in Article 5(4).[36]

LANGUAGE RIGHTS

The Commission on a Bill of Rights has recently referred to the "delicate balancing" achieved in Wales by the Welsh Language Measure. Language rights were the subject of a decision of the Grand Chamber of the Strasbourg Court in *Catan v Moldova and Russia* (43370/04) 19 October 2012. The Moldovan Republic of Transdniestria separated from the rest of Moldova with the support of Russian forces. The MRT passed a Law on Languages forbidding language using the Latin alphabet. Moldovan, the first official language of Moldova, is written in Latin alphabet. Three schools were subjected to closure or had to relocate as a result of pressure from the MRT regarding the Law on Languages.

The Court was robust in its defence of language rights, through Article 2 of Protocol 1. Moldova was found to have implicitly acknowledged that rights had been violated.[37] However, the Court found that there had been no violation, since Moldova had taken all reasonable steps to rectify the situation, which was caused by the fact that the MRT was outside of Moldova's control. Russia was however found to have violated Article 2 of Protocol 1: although it had not been shown that Russia exercised detailed control over the policies of the local administration, the fact that it provided necessary support to the MRT meant that Russia had assumed responsibility for the protection of human rights in that region.[38]

OPEN JUSTICE

<u>R (Guardian News and Media Ltd) v City of Westminster Magistrates' Court</u>

[34] [31], [33].
[35] [18].
[36] [26].
[37] [132].
[38] [150].

In *R (Guardian News and Media Ltd) v City of Westminster Magistrates' Court* [2012] 3 WLR 1343, the Court of Appeal considered an application by The Guardian to have access to documents which had been referred to in open court, for the purposes of examining the working of the United Kingdom's extradition agreement with the United States.

Toulson LJ held that open justice is a principle of the Common Law and not of statute.[39] There was no implied restriction as a result of the checks and balances in the Freedom of Information Act 2000: the matter was one for the court's discretion. In reaching its conclusion, the Court of Appeal held:[40]

> "The Guardian has a serious journalistic purpose in seeking access to the documents. It wants to be able to refer to them for the purpose of stimulating informed debate about the way in which the justice system deals with suspected international corruption and the system for extradition of British subjects to the USA.
>
> Unless some strong contrary argument can be made out, the courts should assist rather than impede such an exercise. The reasons are not difficult to state. The way in which the justice system addresses international corruption and the operation of the Extradition Act 2003 are matters of public interest about which it is right that the public should be informed. The public is more likely to be engaged by an article which focuses on the facts of a particular case than by a more general or abstract discussion."

There were no strong countervailing reasons, and so the newspaper was allowed access to the documents.

R (A) v Lowestoft Magistrates' Court

The principle of open justice was also considered by the Divisional Court in *R (A) v Lowestoft Magistrates' Court* [2013] EWHC 659 (Admin). The Claimant, A, had pleaded guilty to being drunk in a public place in charge of a child under 7. A was likely to be well-known. A applied for an order under s.39 of the Children and Young Persons Act 1933 that she should not be identified, on grounds of her health. This application was rejected, and A argued before the Divisional Court that this decision represented an error of law. The Divisional Court rejected this argument:[41]

> "Having, therefore, set out in general the relevant considerations and how they are likely to apply in the particulars of this case, I have come to the conclusion that the magistrates had a reasonable basis for concluding that no order under section 39 was justified in this case. In my view, the balance of the relevant competing principles came down firmly in favour of Article 10 and open justice, given the immediate, direct and considerable extent of the interference with those rights in the case as explained earlier, and taking due account of the much weaker, remote and uncertain impact on B [A's child]'s rights under Article 8 and on her best interests. In a judicial review of the legality of the magistrates' decision, I believe that that conclusion is sufficient for dismissing the claim. However, for the avoidance of doubt, if it were necessary, I would also hold, for the same reasons, that the decision that the magistrates reached was correct.

[39] [69].
[40] [76]-[77].
[41] [27].

FREE SPEECH AND INTERNATIONAL RELATIONS

In *R (Lord Carlisle of Berriew) v Secretary of State for the Home Department* [2013] EWCA Civ 199, a group of parliamentarians, including a Deputy High Court Judge, brought a challenge to the decision of the Home Secretary to allow entry to a dissident Iranian politician. Despite undertaking a proportionality analysis, the Court of Appeal made it clear that the decision was one for the Secretary of State. A wide margin of judgment must be allotted to the executive in the field of foreign policy and security when considering Article 10. Arden LJ held:[42]

> "The division of functions between the court and the Secretary of State runs a risk that the executive might be motivated by some misplaced wish to preserve the goodwill of a totalitarian regime. The appellants say that the 1996 exclusion decision in this case was made simply as a goodwill gesture to the regime. The Secretary of State rejects this analysis. But the answer to this is that the Secretary of State remains accountable to Parliament. The statutory test for exclusion decisions is a wide and general one as it stands, and if Parliament wishes to narrow it, it has of course the power to do so. The examination of the decision by the court serves a different purpose, namely that of ensuring a high standard of decision-making and that careful thought is given to whether it is a decision that meets the requirement for rationality and procedural regularity. I am satisfied that this different purpose is a beneficial one."

Arden LJ held that the Article 10 rights of Parliamentarians is particularly high.[43] McCombe LJ disagreed, doubting that the right to freedom of expression of a Parliamentarian is of more value than other persons. He distinguished Strasbourg caselaw giving priority to political speech, as primarily about alleged defamation or prosecution for political statements. Patten LJ expressly gave no view on the matter. This debate may potentially be of wider application than Westminster Parliament, since Arden LJ's reasoning could arguably apply to the expression rights of any who have a representative function.

ARMED FORCES, EXTRATERRITORIAL APPLICATION OF THE CONVENTION

In *R (Smith) v Ministry of Defence* [2013] 2 WLR 27, the Court of Appeal considered again the question of the extra-territorial application of the European Convention to armed forces operating abroad. The claims arose from allegations that deaths were caused by insufficient equipment or 'friendly fire'. The Court of Appeal considered the recent decisions of the Supreme Court and the Strasbourg Court on the matter of extraterritorial application, and found that the jurisdiction of the Convention was essentially territorial, and that there had to be special justification for extra-territorial application. This could arise where a state used force to gain control over a person, and had effective control over territory (*Al-Skeini v United Kingdom* (2011) 53 EHRR 589). Therefore, the armed forces of a state could be used to extend the application of the Convention outside the state's own territory, but that did not mean that the armed forces themselves had the protection of human rights principles.

[42] [74].
[43] [7].

THE ROLE OF THE OFFICIAL SOLICITOR

In *RP v United Kingdom* (38245/08) 9 October 2012, the European Court of Human Rights considered a complaint by RP regarding her daughter being adopted outside of the family. RP had learning difficulties, and the Official Solicitor was appointed to act on her behalf in care and placement proceedings. Whilst making it clear to the court that RP's wishes were that her daughter should not be adopted, the Official Solicitor said that, as RP's litigation friend, he was not able to oppose the grant of the orders.

RP claimed in the European Court of Human Rights that this constituted a breach of her Article 6 and 8 rights. The Court found that there was no breach of Article 6, as it is for Contracting States to determine how rights are to be effectively transposed into domestic law, so long as the very essence of the right is not impaired. The Court also assessed the proportionality of the appointment of the Official Solicitor. The right of access to court is subject to a margin of appreciation. The Court acknowledged the fact that the case was deeply important to RP.[44] The Court gave weight to the fact that the Official Solicitor was appointed only after the recommendations of a psychologist report. Moreover, RP was able to challenge the appointment of the Official Solicitor. This was not a formal right of appeal, and there was no need for RP to have been encouraged to seek independent legal advice, since she did not have capacity to instruct a solicitor. The fact that the Official Solicitor bore in mind the interests of RP's daughter was a violation of RP's rights, since this was relevant to the question of whether the case was arguable or not.[45] Neither was it essential that the Official Solicitor advanced any argument in court which RP wished. On the basis of its findings under Article 6, the Court found that there was no need to consider Article 8.

EMPLOYMENT

In *Turner v East Midlands Trains Ltd* [2012] EWCA Civ 1470, the Court of Appeal considered the "band of reasonable responses" test in employment law. The Appellant was a former employee of the Respondent, and had been dismissed, having been suspected of fraudulent manipulation of her ticket machine for profit. The Appellant sought relief from an Employment Tribunal. The Tribunal considered that the decision of the Respondent was within a band of reasonable responses. The Appellant argued before the Court of Appeal that it was not sufficient for the purposes of Article 8 for the Tribunal to perform a review function.

The Court of Appeal held that, since the band of reasonable responses test allows for heightened scrutiny where the impact upon the individual is particularly grave, and the tribunal forms an assessment of the procedure, there is no breach of Article 8.

HUMAN RIGHTS IN WALES AND THE BILL OF RIGHTS

Equality and Human Rights Commission Wales submitted a response to the Commission on Devolution in Wales. This response contained:[46]

[44] [66].
[45] [75].
[46] At 3.7.

> "The opportunity should be taken to clarify and confirm that the National Assembly should have powers enabling it to add to, but not subtract from, UK equality and human rights legislation as required."

EHRCW suggested that such a power would allow Wales to go beyond the UK Parliament's protection of human rights, by adding new human rights obligations.[47]

However, the Commission on a Bill of Rights noted a general level of satisfaction with the Human Rights Act in Wales:[48]

> "In general, there was satisfaction with the Human Rights Act and the current system of rights protection developed by the Welsh Government and Assembly within its devolved competence under the Government of Wales Act 2006. This included legislation such as the Welsh Language (Wales) Measure 2011 and the Rights of Children and Young Persons (Wales) Measure 2011. As a result, it was suggested that these and other policy areas were now a matter for the devolved institutions in Wales and not issues which should figure in any discussion on a UK Bill of Rights. Concern was also expressed that if a UK Bill of Rights contained justiciable provisions that touched on devolved areas of competence, such as language, they could disturb the delicate balancing which had been achieved in Wales the through instruments such as the Welsh Language Measure."

[47] At 6.1.

[48] The Commission on a Bill of Rights report - A UK Bill of Rights? - The Choice Before Us (2012).