Top Ten Cases – Trends & Forecasts

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THE TOP TEN JR CASES – FORECASTS AND TRENDS

Article 8

The Right to Die

1.1 ***R (oao Debbie Purdy) v DPP*** **[2009] UKHL 45** is a good example of people-power (at least if the press are to be believed.) The facts of this case are so well known as not require a detailed outline suffice to say that Miss Purdy is a very determined 'right to die' campaigner who sought clarification from the DPP as to whether her partner is likely to be prosecuted in the event that he accompanies her to the Dignitas clinic when her debilitating illness became intolerable.

1.2 Interestingly the claim had been dismissed both at Admin court and Appellate court level, and it fell to the House of Lords (in its last case in that guise) to grant Miss Purdy the relief that she sought.

1.3 Once again, the under-threat HRA came into play (though one might hope that Article 8 would make the cut in a 'British Bill of Rights.')

1.4 Miss Purdy argued that section 2 (1) of the Suicide Act 1961 amounted to an unlawful interference with her Article 8 rights insofar as the DPP had failed to promulgate an offence-specific policy.

1.5 The Code for Crown Prosecutors would normally provide sufficient guidance as to how decisions should or were likely to be taken as to whether it would be in the public interest to prosecute; however that could not be said of cases where the offence was aiding or abetting the suicide of a person who was terminally ill or severely disabled who had made an informed decision to end their own life.

1.6 The Code was insufficient to satisfy the A8(2) requirements of accessibility and foreseeability in assessing how prosecutorial discretion was likely to be exercised in s.2(1) cases. Interestingly the court had regard to the limited (but then recent) example of Daniel James, whose parents had not been prosecuted after helping him travel to Switzerland to end his life. In that case the DPP had found that many of the factors listed in the Code were irrelevant and that other unlisted factors had to be considered

1.7 In the premises the DPP was required to promulgate an offence-specific policy identifying the facts and circumstances that he would take into account in deciding whether to consent to a prosecution in cases of this type.

1.8 On 25th February 2010 the DPP published his policy, and those so inclined can see a 'snippet' of him introducing the policy at cps.gov.uk. The factors considered relevant are listed at Annex 1.

Sex Offender Notification

2.1 In ***R (oao Thompson & F) v SSJ*** **[2010] UKSC 17** the Supreme Court dismissed an appeal by the Secretary of State against a declaration of incompatibility in respect of the notification requirements within the Sexual Offences Act 2003. Under the current legislation offenders sentenced to 30 months or over are subject to notification requirements for life without review.

2.2 It was not in dispute that Article 8 was engaged, that the interference with such rights was in accordance with the law, and that the provisions pursued legitimate aims pursuant to Article 8 (2.) The issue, therefore, was whether the absence of a right to a review rendered lifelong notification requirements disproportionate to the aims of the legislation. It is noteworthy that the Respondent F was just 11 years old when he committed the index offences.

2.3 Lord Phillips, delivering the leading judgment, determined that the real question was whether offenders who could demonstrate that they no longer posed any significant risk of committing further sexual offences should continue to be subject to requirements. It was also necessary to consider whether it was ever possible to be sure that an offender posed no significant risk of reoffending. Ultimately the latter question could not be determined either way; however such uncertainty could not justify the imposition of notification requirements for life without review.

2.4 The court held that there must be circumstances in which an appropriate tribunal could reliably conclude that the risk of an individual carrying out a further sexual offence could be ruled-out. The court observed that many other jurisdictions provided for review processes (seemingly even the U.S.) but it remains to be seen what the response of the legislature will be.

Housing Trusts

3.1 In ***R (oao Weaver) v London & Quadrant Housing Trust*** **[2009] EWCA Civ 587 (**yet another Article 8 case, this time in the housing law field) the court was required to determine whether the Appellant housing trust was bound by human rights principles when terminating the Respondent's tenancy. The Article 8 argument depended upon establishing that the Trust was a public authority within the meaning of section 6(3)(b) of the Human Rights Act 1998 and that the act of termination was not a private act within the meaning of section 6(5).

3.2 The Trust contended that no legitimate expectation was created, and that in any event it was exercising purely private functions when it dealt with issues relating to the allocation and management of housing, and that all its acts in performance of those functions, including the termination of the tenancy, were private acts.

3.3 The Divisional Court found that there had been no legitimate expectation created and therefore the case failed on the facts on both grounds. Strictly it was unnecessary for the court to determine the wider question raising the public law status of the Trust. However, the court did so. It held, contrary to the submissions of the Trust, that the Trust was a public authority under section 6(3)(b) arising from the exercise of its function of allocating and managing its housing, and that the act of terminating the tenancy was not a private act under section 6(5). The court also held that it was susceptible to judicial review principles in the exercise of that function. Thus the Appellant Housing Trust appealed that aspect of the judgment.

3.4 Section 6 (3) (b) of the HRA 1998 holds, of course, that the term 'public authority' includes any person certain of whose functions are of a public nature; however by section 6 (5) the person is not a public body if the nature of the act is private.

3.5 Elias LJ derived (so far as relevant) the following principles from the authorities (including ***Aston Cantlow*** **[2003] UKHL 37**)**:**

i) a public body is one whose nature is, in a broad sense, governmental. However, it does not follow that all bodies exercising such functions are necessarily public bodies; many functions of a kind historically performed by government are also exercised by private bodies, and increasingly so with the growth of privatisation

ii) In determining whether a body is a public authority, the courts should adopt a "factor-based approach" This requires the court to have regard to all the features or factors which may cast light on whether the particular function under consideration is a public function or not, and weigh them in the round

iii) In applying this test, a broad or generous application of section 6(3)(b) should be adopted

iv) the factors to be taken into account include the extent to which in carrying out the relevant function the body is publicly funded, or is exercising statutory powers, or is taking the place of central government or local authorities, or is providing a public service.

v) as to public funding, it was pointed out that it is misleading to say that a body is publicly subsidised merely because it enters into a commercial contract with a public body

vi) the exercise of statutory powers, or the conferment of special powers, may be a factor supporting the conclusion that the body is exercising public functions, but it depends why they have been conferred. If it is for private, religious or purely commercial purposes, it will not support the conclusion that the functions are of a public nature

vii) generally a public function will be governmental in nature

viii) it is relevant whether the body is providing a public service. This should not be confused with performing functions which are in the public interest or for the public benefit.

3.6 It was conceded before the Divisional Court that the Trust is a hybrid authority on the basis that certain of its functions, in particular the power to obtain parenting orders and anti-social behaviour orders, are public functions. Nonetheless the argument developed before the court focused on whether the Trust was a public authority by virtue of its housing and management functions.

3.7 Elias LJ determined **[68]** that the Appellant had a significant reliance upon public finance, operated in close harmony with the LA **[69]**, that the provision of subsidised housing was governmental **[70],** and that the trust acts in the public interest with charitable objectives **[71.]** This disposed on the section 6 (3) (b) questions. As to section 6 (5) Elias LJ determined **[76]:**

> "the act of termination is so bound up with the provision of social housing that once the latter is seen, in the context of this particular body, as the exercise of a public function,

then acts which are necessarily involved in the regulation of the function must also be public acts."

3.8 A petition to the Supreme Court was refused, but with the following caveat:

> "Permission to appeal BE REFUSED. The point is clearly one for the Supreme Court but this is not a suitable case on its facts. If a suitable case can be identified consideration should be given to applying for a leap-frog appeal to the Supreme Court."

3.9 Thus this is plainly an area to watch out for and likely to result in significant volumes of litigation yet.

Constitutional and Jurisdictional Cases

The Binyam Mohamed Litigation

4.1 In 2008 Mr Mohamed had applied for disclosure of documents relating to his detention, treatment and rendition by the US government: **[2008] EWHC 2048 (Admin.)** Certain paragraphs of the judgment were redacted, and but the Admin court acceded to a further application seeking to have the passages disclosed and made public: **[2009] EWNC 2973 (Admin.)**

4.2 In ***R (oao Mohamed) v SSFCA*** **[2010] EWCA Civ 65** the SSFCA appealed against that decision. The redacted details comprised summary accounts from the US intelligence services to the British security services about the treatment of BM whilst he in their custody, and information about an interview by a member of British security. The passages were material to the allegation that BM had been subjected to torture.

4.3 The SSFCA issued PII certificates in respect of the redacted paragraphs claiming that disclosure would jeopardise intelligence-sharing arrangements between the UK and the US and thereby threaten national security. He argued that the confidentiality of the information was vested in the country which disclosed the information and thus could not be waived save by express consent of the US (the so-called 'control' principle), which was rejected by the LCJ.

4.4 The court seemed in little doubt that the case was one of great constitutional importance as is reflected in the language of the judgment. The LCJ had the following to say as to importance of open justice **[38]**

> "Justice must be done between the parties. The public must be able to enter any court to see that justice is being done in that court, by a tribunal conscientiously doing its best to do justice according to law....In reality very few citizens can scrutinise the judicial process: that scrutiny is performed by the media, whether newspapers or television, acting on behalf of the body of citizens. Without the commitment of an independent media the operation of the principle of open justice would be irremediably diminished...**[40]** Expressed in this way, the principle of open justice encompasses the entitlement of the media to impart and the public to receive information in accordance with article 10 of the European Convention of Human Rights. ...**[41]** here litigation has taken place and judgment given, any disapplication of the principle of open justice must be rigidly contained, and

> even within the small number of permissible exceptions, it should be rare indeed for the court to order that any part of the reasoning in the judgment which has led it to its conclusion should be redacted. As a matter of principle it is an order to be made only in extreme circumstances."

4.5 As to national security it was accepted by the Court that the publication of the redacted paragraphs would result in a review of intelligence-sharing arrangements; however it was equally observed that review might not necessarily result in a change, and that the perceived resulting risk to national security could be said to exist in any case involving PII.

4.6 The court noted that publication of the redacted paragraphs would not reveal information which would be of interest to a terrorist, or disclosure of which would be contrary to national security *per se*. It was also considered highly relevant that by the time of the appeal a US court had found that BM had been tortured, such that the information was already in the public domain.

4.7 Ultimately, however, The LCJ's conclusions on the constitutional issues are the most significant source of interest, and they are emphatically expressed:

> "**[57]** In my view, the arguments in favour of publication of the redacted paragraphs are compelling. Inevitably if they contained genuinely secret material, the disclosure of which would of itself damage the national interest, my conclusion might be different. However dealing with this appeal as a matter of practical reality rather than abstract legal theory, unless the control principle is to be treated as if it were absolute, it is hard to conceive of a clearer case for its disapplication than a judgment in which its application would partially conceal the full reasons why the court concluded that those for whom the executive in this country is ultimately responsible were involved in or facilitated wrongdoing in the context of the abhorrent practice of torture. Such a case engages concepts of democratic accountability and, ultimately, the rule of law itself."

4.8 In a development which can properly be described a neat piece of irony, it then transpired that the Master of the Rolls' judgment (on whether the earlier judgment should be redacted) had been.....redacted (well, edited out at least.)

4.9 On 5th February 2010 the draft judgment was circulated to the parties in the usual way and on 8th February 2010 counsel for the SSFCA emailed the court requesting reconsideration of paragraph 168 of the judgment, copying in BM's representatives. There being no objection from BM by 9th February 2010, Lord Neuberger decided to amend the paragraph.

4.10 That decision was subsequently challenged and, unusually, was further considered by the court: **[2010] EWCA Civ 158.** The court was disapproving of the decision to publish the letter from Jonathan Sumption QC **[11]:**

> "Draft judgments are necessarily circulated in confidence. It follows that all communications in response are covered by the same principle. In this case that confidentiality was broken when the letter from Mr Sumption to the court was circulated beyond the parties to the litigation, and published....**[12]** Draft judgments are necessarily

circulated in confidence. It follows that all communications in response are covered by the same principle. In this case that confidentiality was broken when the letter from Mr Sumption to the court was circulated beyond the parties to the litigation."

4.11 The LCJ noted that this was a case of unusual exceptionality in many ways, which had been compounded by the further development. In concluding that the redacted/removed paragraph 168 should in fact be published he remarked **[17[:**

> "The final and compelling feature bearing on the question whether the first draft of paragraph 168 should be published arises from the stark fact that after some 18 months of substantial litigation, the seven redacted sub-paragraphs have been made public and that each of our judgments proceeded on the principle of open justice and its contribution to the preservation of the rule of law in our society. Ever since the publication of the seven redacted paragraphs, part at least of the discussion has understandably focussed on the events narrated in this judgment and the amendment to paragraph 168 following receipt of Mr Sumption's letter... in the context of Mr Sumption's letter, and the events described in this judgment, the most effective way of dispelling any lingering public perception of ministerial interference will be that, notwithstanding that Lord Neuberger's judgment will take the form in which it is finalised, the first draft of paragraph 168 should be published."

4.12 It is perhaps difficult to imagine a case in recent times which has brought into such sharp focus the sometimes fine division between executive and judicial functions, and the competing considerations which can come into play.

4.13 As to paragraph 168, however, it may be that the court ultimately realised that the publication of the Sumption letter in fact undermined its attempts to assert its constitutional functions, and amounted to a spectacular own goal. For those interested, the edited paragraph (which of course is not part of the final judgment) is at Annex 2.

International Terrorism and the Rule of Law

5.1 In ***R (oao Hani El Sayed Sabaei Youssef) v HM Treasury*** **[2010] UKSC 5** again saw the government trying to interfere with a judgment it did not like. HMT applied to suspend the operation of orders quashing the Terrorism (United Nations Measures) Order 2006 and the Al-Qaida and Taliban (United Nations Measures) Order 2006 A3(1)(b), which provided for the indefinite freezing of the assets of designated terrorists by the state. HMT sought a period of eight weeks to enable it to address the effects of the court's earlier judgment in the proceedings **(2010) UKSC 2, (2010) 2 WLR 378,** wherein the SC held that the provisions within the orders were contrary to the rule of law insofar as decisions made under the orders lay entirely with the executive.

5.2 Section 1 of the United Nations Act 1946 was designed to enable the United Kingdom to fulfil its obligations under the Charter of the UN to implement Security Council resolutions. Conferring an unlimited discretion on the executive as to how those resolutions were to be implemented conflicted with the basic rules that lay at the heart of our democracy. By introducing the reasonable suspicion test as a means of giving effect to the relevant Security Council resolution, the Treasury had exceeded its powers under s.1(1) of the 1946 Act. This was a clear example of an

attempt to adversely affect the basic rights of the citizen without the clear authority of Parliament.

5.3 A person who had been designated under the Al-Qaida Order on the sole ground that he had been designated by the Sanctions Committee did not, under the system that the Committee operated, have a means of subjecting his designation to JR. He was therefore denied an effective remedy. Accordingly, A(1)(b) of the Order was *ultra vires* s1 of the 1946 Act.

5.4 As to the attempt to suspend the relief granted by the court, the SC held that whilst it had the power to make such an order, in the instant case the application amounted to a procedure intended to obfuscate the effect of its judgment, which was to be decried. Lord Hope dissenting was concerned at the potential for serious and irreversible harm to national security resulting from a refusal to suspend the order.

The Jurisdiction of the Queen's Bench

6.1 A case of some constitutional importance is ***R (oao Rex C) v Upper Tribunal; R (oao U and XC) v SIAC (the Public Law Project intervening)*** **[2009] EWHC 3052 (QB)** wherein the Divisional Court (Laws LJ and Owens J) considered whether judicial review is available as a remedy in the case of decisions by the Special Immigration Appeals Commission and the Upper Tribunal. The Defendants' position was that the bodies, as superior courts of record, were not susceptible to the supervisory jurisdiction of the high court.

6.2 Section 2 (1) of the SIAC Act 1997 re-routes the right of appeal from the Asylum and Immigration Tribunal (AIT) to SIAC in cases where the appellant's departure from the United Kingdom is deemed by the Secretary of State to be conducive to the public good. The process of a SIAC appeal is very distinct. Rules of procedure facilitate the scrutiny of confidential material on an appellant's behalf by a special advocate, even though for security reasons the material cannot be disclosed to the appellant himself. The Commission has jurisdiction to determine bail in such cases.

6.3 It was common ground that a decision of SIAC to refuse or revoke bail is not an appealable decision. Thus if judicial review is not available, there is no further recourse to any court of the United Kingdom against such a decision.

6.4 One of the UT's principal functions is to determine appeals on points of law from FTT. The right of appeal may be exercised only with permission, which may be given either by FTT or UT. There is a right of appeal to the Court of Appeal against any decision of UT except 'an excluded decision' a decision of UT on an application made to it for permission to appeal against a decision of FTT is an excluded decision. Hence there is no recourse to the Court of Appeal.

6.5 The UT has a further principal function. It is to exercise what the Act calls a 'judicial review' jurisdiction. S.15(1) of the Tribunals Courts and Enforcement Act 2007 empowers UT to grant any of the forms of relief available in the High Court on judicial review, subject to certain conditions (s.15(2)). If it proposes to do so, it must apply the same principles as the High Court would apply in a judicial review case (s.15(4) and (5)). Permission is required (s.16). By s.15(3), relief granted by UT under s.15(1) "has the same effect as the corresponding relief granted by the High Court on an application for judicial review" and "is enforceable as if it were relief granted by the High Court on

an application for judicial review". The conditions on which the jurisdiction may be exercised are given by s.18.

6.6 TCEA s.19(1) inserts a new s.31A into the Supreme Court Act 1981, by which judicial review applications commenced in the High Court are to be transferred to UT if four conditions are met.

6.7 The significance of the issues to be determined are summarised in the following passage of Laws LJ's judgment **[28]:**

> "The defendants' primary case rests on the proposition that a superior court of record is *ipso facto* immune from the judicial review jurisdiction; and that is hotly contested. But to my mind there is a prior, and in some ways greater question. Let it be supposed that a review of past cases, and the evolution of our courts since the *Curia Regis* of King William I, demonstrate that the prerogative writs have not run to superior courts of record and indeed that the expression "superior courts of record" has consistently been used by judges and commentators to refer to courts not amenable to the writs. Does it follow that the bare designation by Parliament of an institution as such a court, as has been done by SIACA s.1(3) and TCEA s.3(5), excludes the judicial review jurisdiction? I think not..... In my judgment the proposition that judicial review is excluded by ss.1(3) and 3(5) is a constitutional solecism. The supervisory jurisdiction (to the extent that it can be ousted at all: itself a question to which I will return) can only be ousted "by the most clear and explicit words": see *per* Denning LJ in ***R v Medical Appeal Tribunal ex p. Gilmore*** **[1957] 1 QB 574, 583."**

6.8 And in even stronger terms thus **[39]:**

> "The rule of law requires that statute should be mediated by an authoritative and independent judicial source; and Parliament's sovereignty itself requires that it respect this rule."

6.9 The court went on to give consideration to the historical background to the supervisory jurisdiction of the High Court, and the primacy of the King's Bench. The digest is of some interest, and is reproduced at Annex C.

6.10 Laws LJ determined that unreviewable courts of limited jurisdiction are exceptional and that the term "superior court of record" cannot be taken to delineate, in principle, those courts which are immune from judicial review. Neither the 2007 Act nor the 1997 Act could be construed as excluding the judicial review jurisdiction from either the commission or the tribunal. The overriding foundation for the exercise of judicial review by the High Court was an excess of jurisdiction by the subject court, and it was courts whose jurisdiction was limited which were amenable to judicial review

6.11 Judicial review could not, however, be deployed to challenge SIAC's appealable decisions. In respect of bail, judicial review could not be used as a means of appeal where the statute had not provided for such an appeal. Attempts to condemn the refusal of bail as being ***Wednesbury*** unreasonable would be doomed to failure and a sharp-edged error of law would have to be shown.

6.12 On the facts it was held that A5 (4) required the Claimant to be provided with sufficient information as to be able to give his special advocate instructions. This had not happened in the case of U and X, and accordingly their applications succeeded.

6.13 The position at common law in relation to the UT was, however, very different. The UT was said to be the apex of a new and comprehensive judicial structure designed to rationalise and re-organise in a single system the means of adjudication for a multitude of claims previously determined by a variety of disparate tribunals with no common appeal mechanism. Though it is not a court of unlimited jurisdiction, its jurisdiction is very wide. Subject to the fact that some tribunals presently remain outside the fold, it may be said to be an appeal court of general jurisdiction in relation to matters which are consigned to adjudication at first instance by statutory tribunals.

6.14 The tribunal was held to be an authoritative, impartial and independent judicial source for the interpretation and was, for the relevant purposes, an *alter ego* of the High Court. It possesses the final power to interpret for itself the law that it has to apply and it is not, therefore, susceptible to judicial review in respect of errors of law made within the boundaries of its permitted subject-matter. It was held that the Admin court could only correct the approach of the Upper Tribunal if it embarked on a case that was beyond the extent of its statutory remit or where there had been a wholly exceptional collapse of fair procedure. C's application therefore failed.

Baby P Litigation

7.1 In ***R (oao Shoesmith) v Ofsted and Secretary of State*** **[2010] EWHC 852 (Admin)** Sharon Shoesmith applied for judicial review of a direction by the SS that her post as Director of Children's Services in Haringey should be filled by another after the furore which followed the Baby Peter trial.

7.2 There was a further challenge to a report by OFSTED which underpinned that decision, which held that the LA's children's services were inadequate, and that there were systemic failures at a management level. Consequently, C was summarily dismissed from her employment; an appeal against that decision was unsuccessful.

7.3 The broader question was whether a LA employee with statutory status could protect her position against arbitrary dismissal by central government. C submitted that there had been political interference with the OFSTED report, which she had been denied the opportunity to comment upon; further that she had enjoyed no opportunity to make representations to the SS, and that the LA's internal disciplinary procedures were a charade to retrospectively justify a decision that had already been made.

7.4 Foskett J found (in a judgment which ran to 170 pages) that there was no evidence to support the contention that the OFSTED report reflected political interference, and that the process had necessarily been truncated by reason of the public (media) outcry. Nevertheless it was conceded that individuals had not had a full and fair opportunity to comment on their personal involvement.

7.5 However, the court found that the rights of vulnerable children within the borough to be protected took precedence of C's right to be treated fairly, Foskett J stating the position thus **[376]:**

> "it is a question of balancing the competing considerations, interests and rights. It is very difficult, if not impossible, to envisage any circumstances in which the right of an individual to be treated fairly would take precedence over, or should delay, an urgent decision concerning the interests of a large number of vulnerable children who may be exposed to the risk of significant injury or death, particularly if the decision is perceived to affect not just children in a particular locality, but nationwide."

7.6 As to the disciplinary procedures the learned judge concluded (somewhat controversially) **[387]:**

> "At all events, my ultimate conclusion is that, (a) since what the Secretary of State was engaged in was not a true disciplinary process, (b) the issue had a real local and national dimension that affected vulnerable children and (c) since he was entitled to adjudge it to be urgent, the traditional safeguards concerning the rights of an individual to a fair hearing and/or a fair opportunity to put his or her case, whilst not removed totally, of necessity assumed a considerably lower profile than it might otherwise have done."

7.7 Consequently it was deemed that the employment tribunal was the appropriate venue for determining the fairness of C's summary dismissal. As to the inter-relationship between the SS's power to dismiss and the LA's contractual obligations it was undesirable for the court to fill the gap and the court advised that a protocol should be drawn up to govern such situations.

7.8 This case, when considered in light of the decisions in ***Mohamed*** and ***XC***, could be interpreted as demonstrating a lesser willingness to make bold decisions at AC level than at the CA or the SC, when perhaps the reverse is more frequently perceived to be the case.

International Law

War Crimes

8.1 In ***R (oao JS (Sri Lanka) v SSHD*** **[2010] UKSC 15** the SSHD appealed a decision by the CA as to the approach to be taken to the Convention relating to the Status of Refugees 1951 (United Nations) A1F(a), which provided that a person was not to be recognised as a refugee where there were serious reasons for considering that he had committed a crime against peace, a war crime or a crime against humanity.

8.2 The Claimant (Respondent) was a Sri Lankan Tamil who had been a member of the Tamil Tigers for several years. His claim for asylum had been refused by the SSHD, who concluded that the evidence demonstrated that he had engaged in voluntary membership and command responsibility within an organisation responsible for widespread and systemic war crimes and crimes against humanity.

8.3 It was held that there could be no doubt that A1F disqualified not merely those who personally committed war crimes but also those who instigate or otherwise participate in the commission of

such crimes. Neither Article 12(3) of Directive 2004/83 or A25 (3) of the Rome Statute enlarged upon the application of art.1F, but merely gave expression to what was already well understood in international law. Each recognised that persons other than those who committed the crime itself could be criminally liable, and were brought together in the Statute of the International Criminal Tribunal for the former Yugoslavia 1993 which ascribed individual criminal responsibility to anyone who "planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution" of the relevant crime.

8.4 As to *mens rea,* if a person was aware that in the ordinary course of events a particular consequence would follow from his actions, he would be taken to possess the necessary intent.

8.5 The court considered the decision in ***Gurung v SSHD*** **(2002) UKIAT 4870, (2003) Imm AR 115** and determined that it would be preferable to focus on:

> i) the nature and size of the organisation, particularly that part of it with which the asylum seeker was himself most directly concerned;
> ii) whether and, if so, by whom the organisation was proscribed;
> iii) how he came to be recruited;
> iv) the length of time he remained in the organisation and what, if any, opportunities he had to leave it;
> v) his position, rank, standing and influence within the organisation;
> vi) his knowledge of the organisation's unlawful activities; and
> vii) his involvement and role in the organisation, including the contribution he made towards the commission of any war crimes.

8.6 Accordingly ***Gurung*** was disapproved, the court holding that it is unhelpful to attempt to carve out from amongst organisations engaging in terrorism a sub-category consisting of those "whose aims, methods and activities are predominantly terrorist in character", and to suggest that membership of one of these gives rise to a presumption of criminal complicity, with very little more necessary.

8.7 The second major criticism to be made of ***Gurung*** related to its introduction of the idea of a "continuum" for war crimes cases. It was held that the reality is that there are too many variable factors involved in each case, some militating one way, some the other, to make it helpful to try to place any given case at some point along a continuum. And further, per Lord Brown **[32]:**

> "Whether the organisation in question is promoting government which would be "authoritarian in character" or is intent on establishing "a parliamentary, democratic mode of government" is quite simply nothing to the point in deciding whether or not somebody is guilty of war crimes. War crimes are war crimes however benevolent and estimable may be the long-term aims of those concerned. And actions which would not otherwise constitute war crimes do not become so merely because they are taken pursuant to policies abhorrent to western liberal democracies."

8.8 In the premises the appeal was dismissed and the matter referred back to the SSHD for a fresh determination.

Fair Trials Abroad

9.1 In ***R (oao Orabator) v Governor HMP Holloway & SSJ*** **[2010] EWHC 58 (Admin)** C applied for JR of a decision by the SSJ not to release her from prison upon her repatriation from Laos. C had been convicted of drugs offences and sentenced to life imprisonment, having become impregnated to avoid the death penalty.

9.2 C claimed duress, and was interviewed without a lawyer. When eventually provided with a lawyer he far from met Western standards, and failed to deploy key evidence. C submitted that she had suffered a flagrant denial of justice as the court was not impartial such that it was not competent for the purposes of A5 and A6.

9.3 The Divisional Court (Dyson LJ and Tugendhat J) held that a 'flagrant denial of justice' was apt to describe only situations where A6 had been breached. On the facts there was little evidence that trials in Laos were dictated by the executive, although there was ample evidence that cases were decided before the judges came into court.

9.4 In the premises, and despite shortcomings in the process which amounted to a clear breach of A6, there was insufficient to conclude that the court lacked independence, and the following features of the case led to the conclusion that there was not a flagrant denial of justice (which was the test to be applied):

i) the trial took place within a legally constructed framework in which the court system, the procedural rules and substantive offences were clearly defined;
ii) O was present at the trial and had the benefit of an interpreter; the trial was held in public and was reported;
iii) she was represented by a lawyer at public expense;
iv) her lawyer knew what the charges were and put forward her defence that she was acting under duress;
v) the lawyer could call O to give evidence; she was able to make a statement at the close of proceedings;
vi) an appeal was available;
vii) there was no evidence that the judges had been chosen for the case because they were likely to convict or that they were "leaned on" by the executive.

9.5 The conclusion of the court is somewhat troubling **[140]:**

> "We are in no doubt that, by the standards of our justice system, the claimant was treated unjustly in Laos. If she had been tried and convicted in that way in our courts, a complaint that her rights under article 6 of the ECHR had been violated would surely have succeeded. But her claim that she has been detained in the UK unlawfully cannot succeed unless it is shown that she suffered a *flagrant* denial of justice in Laos. For the reasons that we have given, she has not been able to satisfy this high test. The test is rightly set very high. That is because it is important not to jeopardise or undermine the treaties for the repatriation of prisoners which the UK now has with many countries, so that those who are convicted abroad can serve their sentences here. If persons who have been convicted and sentenced abroad and have procured their transfer to the UK were easily able to obtain their liberty

by challenging the fairness of their convictions, there would be a grave danger that these important treaties would be set at nought. That would be highly regrettable."

General

Prisoners' Rights in the North

10.1 ***R (oao Guittard) v SSJ*** **[2009] EWHC 2951 (2951)** is a good (and seemingly more rare) example of a judge in the regional courts taking a more bold decision in relation to JR on traditional public law grounds.

10.2 The Claimant was an IPP prisoner, whose minimum term was due to expire on 31st December 2009. His target oral hearing date was set for February 2010. Probation and prison service personnel have supported the Claimant's move to open conditions since at least June 2009. Accordingly, in August 2009, the Claimant's solicitors requested that the Defendant transfer him to open conditions immediately, outside of his parole review. The Defendant failed to respond to the request.

10.3 The Court found that the Defendant had adopted an unduly rigid and unlawful approach to the transfer of IPP prisoners to open conditions; [24]:

> "....I conclude that PSO 6010, being the only document/evidence relied on by D in this regard, does not evince a true discretion to depart, in exceptional circumstances, from the general policy of referring to the Parole Board the question of transfer of IPP prisoners from closed to open conditions. The reality is, as I find, that D has unlawfully fettered the discretion which he must have. In the alternative, there is no evidence that in practice any proper consideration is given to the exercise of the discretion, a fact amply borne out by the inadequate response in this case to the letters of 12th August 2009."

10.4 HHJ Stewart observed that even though the Defendant had accepted that he had a discretion to consider the transfer of IPP prisoners to open conditions, without a Parole Board review, this was not made sufficiently known **[23]**

> "That the relevant discretion actually exists is something which should be apparent not only to D's officers but also to anyone else e.g. IPP prisoners themselves and those acting for them."

Public Funding – Inquests

11.1 In ***R (oao Humberstone) v LSC*** **[2010] EWHC 760 (Admin)** the Claimant successfully applied for the quashing of a decision by the LSC to refuse public funding for her to be represented at an inquest into the death of her 10-year-old son.

11.2 The deceased boy had suffered from severe asthma and was supposed to take a steroid inhaler twice a day. It appeared that he was not capable of complying with that treatment plan without supervision, which he did not always receive, and that his asthma was not as well controlled as it might have been, because of a failure to take his chronic medication.

11.3 The deceased boy subsequently suffered an asthma attack one evening and a paramedic and ambulance attended. He was taken to hospital but died later that evening. The Claimant was later arrested on suspicion of manslaughter on the basis that she might not have cared the boy properly by not supervising his asthma medication; however no charges were ever pursued.

11.4 The LSC refused to recommend the case for exceptional funding under the AJA 1999 but the Coroner was concerned that the Claimant should be represented for reasons which are largely self-explanatory. It maintained that Article 2 was not engaged and that even if it were there could nonetheless be an effective investigation into the death without C being represented.

11.5 Hickinbottom J held that A2 was engaged despite there being no *prima facie* evidence of wrongdoing by the agents of the state. This did not obviate the need for an investigation. In any event a duty to investigate could arise under A2 even where there was no possibility that a state agent breached the primary to protect individuals from threats to life whilst in his care.

11.6 Further, the decision by the LSC was based on a false premise that a duty to investigate could only arise when there was a possibility that an agent of the state had breached the primary duty to protect life under A2. It was clear that where a patient died in an NHS hospital an obligation to investigate the death arose due to the patient being in the care of the state at the time of death, and because of the inherent possibility of state agents being responsible for the death.

11.7 Hickinbottom J held further that the views of the coroner were relevant to the decision which the Defendant had to make. It was open to the LSC to reject his view, but only where cogent reasons were advanced. The LSC had overlooked the possibility that C could face allegations regarding her failure to supervise the boy's use of his inhaler, which fatally undermined the contention that she could properly participate unrepresented, something which was compounded by her personal circumstances and attributes.

11.8 This is plainly a prime example of JR being used as a necessary tool for achieving a common sense outcome.

And Finally - Law and Politics

12.1 If the existing cases within this presentation were not politically sensitive enough the case of ***British Airways plc v Unite the Union*** **[2010] unreported** certainly was.

12.2 This well-publicised case concerned an appeal by the Unite Union against a judgment of Mitting J granting an injunction to the Respondent airline preventing its cabin crew workers from striking pending trial of the issue.

12.3 In a ballot of Union members an overwhelming majority voted in favour of strike action. Part V (Industrial Action, s 219 ff) of the Trade Union and Labour Relations (Consolidation) Act 1992 provides:

> "As soon as is reasonably practicable after the holding of the ballot, the trade union shall take such steps as are reasonably necessary to ensure that all persons entitled to vote in the ballot are informed of the number of (a) votes cast in the ballot; (b) individuals

answering yes to the question, or as the case may be, to each question; (c) individuals answering no to the question or as the case may be, to each question; and (d) spoiled voting papers".

12.4 BA asserted that the Union had not provided its members with information as to the number of spoiled ballot papers and that, having failed to comply with s 231, the union was not entitled to statutory protection under Part V of the Act from liability in tort. The union appealed on the grounds, *inter alia*, that s 231 was not to be given the strict interpretation adopted by the judge in the lower court.

12.5 The CA held (Lord Neuberger MR dissenting) that s231 of the Act was poorly drafted, and in particular the meaning of the words 'reasonably necessary' was unclear. Regard to the policy underlying the applicable part of the Act, and a review of authority and of other provisions within the Act, demonstrated that the union was not required by s231 to prove that literally every eligible member was personally sent the applicable results, particularly where in the instant case the workforce was highly computer-literate and information had been made available on relevant websites.

12.6 The key complaints of British Airways were that active communication had not been used and that alternative means could have been used, such as post and text messaging, to inform members of the ballot details. However, there was a high probability that, at trial, the union would succeed in establishing that it had satisfied the requirements of s 231 of the Act even if BA were able to demonstrate that more could have been done. Accordingly the appeal was allowed, and it is noteworthy that the LCJ (along with Smith LJ) allowed the appeal.

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ANNEX 1

DPP Policy On Assisted Suicide – Factors To Be Considered

Public interest factors tending in favour of prosecution

A prosecution is more likely to be required if:

1. the victim was under 18 years of age;
2. the victim did not have the capacity (as defined by the Mental Capacity Act 2005) to reach an informed decision to commit suicide;
3. the victim had not reached a voluntary, clear, settled and informed decision to commit suicide;
4. the victim had not clearly and unequivocally communicated his or her decision to commit suicide to the suspect;
5. the victim did not seek the encouragement or assistance of the suspect personally or on his or her own initiative;
6. the suspect was not wholly motivated by compassion; for example, the suspect was motivated by the prospect that he or she or a person closely connected to him or her stood to gain in some way from the death of the victim;
7. the suspect pressured the victim to commit suicide;
8. the suspect did not take reasonable steps to ensure that any other person had not pressured the victim to commit suicide;
9. the suspect had a history of violence or abuse against the victim;
10. the victim was physically able to undertake the act that constituted the assistance him or herself;
11. the suspect was unknown to the victim and encouraged or assisted the victim to commit or attempt to commit suicide by providing specific information via, for example, a website or publication;
12. the suspect gave encouragement or assistance to more than one victim who were not known to each other;
13. the suspect was paid by the victim or those close to the victim for his or her encouragement or assistance;
14. the suspect was acting in his or her capacity as a medical doctor, nurse, other healthcare professional, a professional carer [whether for payment or not], or as a person in authority, such as a prison officer, and the victim was in his or her care;
15. the suspect was aware that the victim intended to commit suicide in a public place where it was reasonable to think that members of the public may be present;
16. the suspect was acting in his or her capacity as a person involved in the management or as an employee (whether for payment or not) of an organisation or group, a purpose of which is to provide a physical environment (whether for payment or not) in which to allow another to commit suicide.

On the question of whether a person stood to gain, (paragraph 43(6) see above), the police and the reviewing prosecutor should adopt a common sense approach. It is possible that the suspect may gain some benefit - financial or otherwise - from the resultant suicide of the victim after his or her act of encouragement or assistance. The critical element is the motive behind the suspect's act. If it is shown that compassion was the only driving force behind his or her actions, the fact that the suspect may have gained some benefit will not usually be treated as a factor tending in favour of prosecution. However, each case must be considered on its own merits and on its own facts.

Public interest factors tending against prosecution

A prosecution is less likely to be required if:

17. the victim had reached a voluntary, clear, settled and informed decision to commit suicide;
18. the suspect was wholly motivated by compassion;
19. the actions of the suspect, although sufficient to come within the definition of the offence, were of only minor encouragement or assistance;
20. the suspect had sought to dissuade the victim from taking the course of action which resulted in his or her suicide;
21. the actions of the suspect may be characterised as reluctant encouragement or assistance in the face of a determined wish on the part of the victim to commit suicide;
22. the suspect reported the victim's suicide to the police and fully assisted them in their enquiries into the circumstances of the suicide or the attempt and his or her part in providing encouragement or assistance.

The evidence to support these factors must be sufficiently close in time to the encouragement or assistance to allow the prosecutor reasonably to infer that the factors remained operative at that time. This is particularly important at the start of the specific chain of events that immediately led to the suicide or the attempt.

These lists of public interest factors are not exhaustive and each case must be considered on its own facts and on its own merits.

If the course of conduct goes beyond encouraging or assisting suicide, for example, because the suspect goes on to take or attempt to take the life of the victim, the public interest factors tending in favour of or against prosecution may have to be evaluated differently in the light of the overall criminal conduct.

ANNEX 2

1. The first draft of paragraph 168 in ***Mohamed*** reads:

> "Fourthly, it is also germane that the SyS were making it clear in March 2005, through a report from the Intelligence and Security Committee that "they operated a culture that respected human rights and that coercive interrogation techniques were alien to the Services' general ethics, methodology and training" (paragraph 9 of the first judgment),

indeed they "denied that [they] knew of any ill-treatment of detainees interviewed by them whilst detained by or on behalf of the [US] Government" (paragraph 44(ii) of the fourth judgment). Yet that does not seem to be true: as the evidence in this case showed, at least some SyS officials appear to have a dubious record when it comes to human rights and coercive techniques, and indeed when it comes to frankness about the UK's involvement with the mistreatment of Mr Mohammed by US officials. I have in mind in particular witness B, but it appears likely that there were others. The good faith of the Foreign Secretary is not in question, but he prepared the certificates partly, possibly largely, on the basis of information and advice provided by SyS personnel. Regrettably, but inevitably, this must raise the question whether any statement in the certificates on an issue concerning such mistreatment can be relied on, especially when the issue is whether contemporaneous communications to the SyS about such mistreatment should be revealed publicly. Not only is there an obvious reason for distrusting any UK Government assurance, based on SyS advice and information, because of previous "form", but the Foreign Office and the SyS have an interest in the suppression of such information."

ANNEX 3

(the judgement in *XC*)

"44. The first common law court was the King's court, *curia regis* or *aula regis*, in the time of King William I (1066 – 1087). After the Norman conquest the King's court began to impose its law across the country. Its jurisdiction gradually superseded the plethora of local jurisdictions which had hitherto governed or regulated the lives of the people. And so the common law of England began to grow and spread its influence.

45. At length the single court which had originally followed the King was divided into two. The Common Bench or Court of Common Pleas, as it came to be called, heard private claims. The other court became known as the King's Bench. It continued to follow the King. It heard cases concerning the King; and its jurisdiction developed so that it came to correct and supervise the decisions of all other courts and judges. The King's Bench and the Common Pleas were clearly established by the end of the thirteenth century. They remained at the centre of the English judicial system until their powers were transferred to the newly created High Court in 1873.

46. Other courts included the Court of Exchequer, which Blackstone (Book III, Chapter 4, pages 43-45) describes as inferior to both the Common Pleas and the King's Bench. Its principal purpose was to order the revenues of the Crown and recover the King's debts and duties. The Court of Chancery was the last court to develop from the *aula regis*. In or by the late 15th century there developed in that court an independent equitable jurisdiction which was exercised over cases falling outside the common law, and where the common law could not provide a remedy or provided an unjust remedy.

47. These four courts, King's Bench, Common Pleas, Exchequer and Chancery, each exercised an original jurisdiction; but the King's Bench also enjoyed a general supervisory jurisdiction and an appellate jurisdiction – "in error". Later there developed two superior courts whose jurisdiction was only in error or appeal: the Court of Exchequer Chamber (which from the 14th century heard writs of error from the Court of Exchequer and from the 16th century writs of error from the King's

Bench); and the House of Lords (which heard appeals from the Chancery Court (from the 17th century) and writs of error from the Court of Exchequer Chamber and the King's Bench.

48. In very general terms that is the background. Before turning to the use and significance of the expression "superior court of record" it is helpful to consider the particular status of the King's Bench as it was perceived and applied over the centuries. Writing in 1768 Blackstone described the King's Bench (*Commentaries* Book III, Ch 4, p.41) as "the supreme court of common law in the kingdom". He said (p.42): "The jurisdiction of this court is very high and transcendent. It keeps inferior jurisdictions within the bounds of their authority." Holdsworth (*History of English Law* vol 1, p.212), referring to Coke's Fourth Institute, described the supremacy of the King's Bench over other courts as follows: "It has jurisdiction 'to examine and correct all and all manner of errors in fact and in law of all the judges and justices of the realm in their judgments, process, and proceedings in courts of record, and not only in pleas of the crown, but in all pleas, real, personal and mixt, the court of Exchequer excepted as hereafter shall appear.'"

49. There are very many cases. In *Cummins v Massam* (1643) March 196 Heath J stated: "[T]here is no Court whatsoever but is to be corrected by this
Court [sc. the King's Bench]." Later, in *Groenwelt v Burwell* (1695) 1 Salk 144, a case concerning the application of the writ of *certiorari* to a judgment of the censors of the College of Physicians relating to an allegation of malpractice, Holt CJ stated:
"[N]o Court can be intended exempt from the superintendency of the King in this Court of [*Banco Regis*]. It is a consequence of every inferior jurisdiction of record, that their proceedings be removeable into this Court, to inspect the record, and see whether they keep themselves within the limits of their jurisdiction."

50. The means by which the King's Bench kept other courts "within the bounds of their authority" (and also required them to exercise that authority) were the prerogative writs, of which of course *certiorari* was one. The others were *habeas corpus*, prohibition and *mandamus*. (For present purposes we may disregard *habeas corpus*, notwithstanding its magisterial place in the common law.) Prohibition was the oldest. The writs had different origins and were used in different ways (see the account given by Wrottesley LJ in *R v Chancellor of St Edmundsbury and Ipswich Diocese ex parte White* [1948] 1 KB 195, 208-9). Although at various times some of the writs were issued out of the Court of Common Pleas and the Chancery, they were pre-eminently issued out of the King's Bench exercising its supervisory jurisdiction. In *Warner v Suckerman* (1615) 3 Bulst 119 Lord Coke CJ said this of the King's Bench and the writ of prohibition: "We here in this Court may prohibit any Court whatsoever, if they transgress and exceed their jurisdiction. And there is not any Court in Westminster-Hall but may be by us here prohibited, if they do exceed their jurisdictions, and all this is clear and without any question." Compare *James' Case* (1631) Hob 17 and *Case of the Company of Horners in London* (1642) 2 Roll. R 471.

51. The King's Bench, then, was a common law court of unlimited jurisdiction which had developed a general power by means of the prerogative writs to supervise other courts – courts of limited jurisdiction – to ensure that the limitations were respected. These powers devolved to the High Court upon the coming into effect of the Judicature Act 1873 (which also abolished proceedings in error from decisions of the High Court and created the Court of Appeal). They have in practice

been exercised since then by the Queen's Bench Division, and in recent years more particularly by the nominated judges of the Crown Office List, now the Administrative Court.

52. Cases decided since the Judicature Act reflect the earlier primacy of the King's Bench but tend to speak of "inferior courts" as being the proper subject of the prerogative writs. Mr Eadie naturally relies on this, as tending to show that "superior courts" were not amenable to the supervision of the King's Bench. I give two examples. In *R (on the Prosecution of the Penarth Local Board) v The Local Government Board* (1882) 10 QBD 309 Brett LJ stated (321): "I think I am entitled to say this, that my view of the power of prohibition at the present day is that the Court should not be chary of exercising it, and that wherever the legislature entrusts to anybody of persons other than to the superior Courts the power of imposing an obligation upon individuals, the Courts ought to exercise as widely as they can the power of controlling those bodies of persons if those persons admittedly attempt to exercise powers beyond the powers given to them by Act of Parliament." Then in *R v Justices of the Central Criminal Court, ex parte London County Council* [1925] 2 KB 43, where the question was whether the High Court had jurisdiction to issue a writ of *certiorari* for the purpose of removing into that Court an order of the Central Criminal Court with a view to it being quashed, Lord Hewart CJ sitting in this court said after reviewing the authorities: "To put these judgments together and to consider them in the light of s16 of the Judicature Act 1873 (36 & 37 Vict c66), one may express the conclusion which they support in this way: judges of assize exercise powers upon the same plane with the powers exercised by judges of the High Court in that Court; the Central Criminal Court is a Court of not less authority than a Court of assize; the Central Criminal Court is, therefore, a superior Court, and a writ of certiorari from the King's Bench Division does not lie to it for the purpose of quashing its order."(see also Avory J at 61-62)"