PUBLIC LAW PROJECT ANNUAL CONFERENCE 2017

TOP PUBLIC LAW CASES OF THE YEAR

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Introduction

The number and diversity of public law cases is now such that a review of the year can only hope to cover a small sample of these. The selection of cases below (from September 2016 to August 2017) necessarily reflects our personal choices, and no doubt, there are many others that could have been included. We have each picked three cases. They are summarised below in chronological order.

Article 1 ECHR Extra-territorial Jurisdiction – Articles 3 and 5 Investigative Duties

1) R (Al-Saadoon) v Secretary of State for Defence [2017] 2 WLR 219 (09.09.2016)

1. The Claimants brought a large number of claims for judicial review against the Secretary of State arising out of British military involvement in Iraq between 2003 and 2009, spanning periods of invasion, occupation and post-occupation. A number of preliminary issues arose, including (1) whether, and if so to what extent, Article 1 ECHR applied to the cases; (2) whether there was an Article 3 ECHR investigative obligation in cases where there was an arguable breach of the principle that detainees would not be transferred in the face of a real risk of torture or serious mistreatment or in other handover

cases and the content of the obligation; (3) whether there was an Article 5 ECHR investigative obligation in all cases where detention was arguably in violation of Article 5 or in particular detention cases and the content of the obligation; and (4) whether Article 5 ECHR was modified or displaced by international humanitarian law during an international armed conflict.

2. Leggatt J had held that (1) the essential principle to be derived from *Al-Skeini v UK* (2011) 53 EHRR 18 was that whenever and wherever a contracting state purported to exercise legal authority or use physical force, it had to do so in a way that did not violate Convention rights such that Article 1 ECHR applied not only where the individual concerned was in the custody of British forces overseas but also where they were shot by a British soldier in the course of security operations in the course of which British forces had been exercising public powers normally exercised by the Iraqi Government because this involved the exercise of physical control over a person; (2) an investigative duty could arise under Article 3 ECHR where there had been an arguable breach by reason of a detainee transfer notwithstanding a real risk of torture or other serious mistreatment in cases where a contracting state had perpetrated, aided or assisted mistreatment; (3) an investigative duty could arise under Article 5 ECHR where there was an arguable claim that the arbitrary detention of an individual in violation of Article 5 amounted to an enforced disappearance and the content of the duty was the same as cases where there was a duty to investigate an arguable breach of Article 2 or 3 ECHR; and (4) Article 5 ECHR was not modified or displaced by international humanitarian law during an international armed conflict.

3. The Secretary of State appealed Leggatt J's findings on Article 1 ECHR on the basis that (1) the judge had failed to recognise the exceptional nature of extra-territorial jurisdiction; (2) had incorrectly extended the scope of Article 1 ECHR beyond the circumstances in which it had been held to apply by the ECtHR; (3) should have held that an individual could only ever be under the control and authority of a contracting state where they had been taken into custody following *Al-Skeini*; and (4) should have held that the UK was not exercising any public power normally exercised by the Iraqi Government save during the period of formal occupation.

4. Meanwhile, the Claimants cross-appealed on Article 1 ECHR and Leggatt J's conclusions on jurisdiction and that two test cases did not fall within its jurisdiction. The Claimants

also appealed the findings on Articles 3 and 5 ECHR. The first group of Claimants appealed on the basis that Leggatt J had been wrong to find that (1) the implied duty of investigation in Article 3 cases arose only where there had been ill-treatment after handover, arguably at the direction, instigation or involving complicity on the part of agents of the contracting state and (2) the implied duty of investigation in Article 5 cases arose only where there was a forced disappearance or incommunicado detention, without judicial scrutiny or control, which had been concealed or wilfully defined by the detaining authorities. The second group of Claimants appealed on the basis that Leggatt J had been wrong to find that the Claimants only fell within the UK's jurisdiction after their transfer to the custody of the US (1) for the purposes of Article 3 ECHR where the British authorities had the power to dictate how they were treated in custody for that period; and (2) for the purposes of Article 5 ECHR where the British authorities had the power to decide whether the Claimants should be kept in custody or released.

5. On Article 1 ECHR, the Court of Appeal allowed the Secretary of State's appeal in part and dismissed the Claimant's cross-appeal. Lloyd Jones LJ (with whom the other members of the Court agreed) considered that the exceptional nature of extra-territorial jurisdiction did not require an especially high threshold for to be met (at §27) but that it could only be established consistently with the principles underlying the decisions of the Strasbourg court (at §28). The Grand Chamber appeared to have departed from the principles in *Bankovic v Belgium* (2007) 44 EHRR SE5 in at least 3 respects: (1) recognising that Article 1 ECHR was to be treated as a living provision (at §29); (2) accepting that Convention rights can be divided and tailored (at §30); and (3) identifying the content of the state agent authority and control exception to territoriality, in particular the exercise of physical power and control category (at §32). The category of extra-territorial jurisdiction applied by the Grand Chamber to the cases before it was the *'public powers'* category of *'state agent authority and control'* (at §§34-40). By analogy with the approach to *'effective control of an area'*, the question of whether a state was purporting to exercise public powers normally exercised by the government of the territory in question was one of fact which did not depend on the legal basis of its operations (at §§41-44). During the occupation period, the *'public powers'* exception was not limited to circumstances where state agents purported to exercise public powers normally exercised by the occupied state (at §§48-50); during the invasion, the application of the exception depended on the facts of control and exercise of authority (at

§§51-54); and during the post-occupation period, the exception applied as British forces were part of the multi-national forces asked by the Iraqi Government to maintain Iraq's security (at §§55-57). There was no separate principle of extra-territorial jurisdiction to the effect that whenever or wherever a contracting state uses physical force it must do so in a way that does not violate Convention rights; rather the concept of physical power and control over a person would necessarily cover a range of situations involving different degrees of power and control but the use of lethal or potentially lethal force alone was insufficient (at §§58-73). As a result, 7 of the 9 test cases in the first group of Claimants were within the Article 1 ECHR jurisdiction of the UK (not the cases concerning individuals killed in a US-led operation during which British forces were not present or the man killed accidentally by a British army truck driving along a road) (at §§74-97); and the second group of Claimants were not within the Article 1 ECHR jurisdiction of the UK while they were in US custody as the UK did not have the power to decide how they were treated or whether they should be released.

6. In relation to Article 3 ECHR, the Court of Appeal dismissed the Claimant's appeal. Lloyd Jones LJ (with whom the other members of the Court agreed) found that a state did not have a duty to investigate whenever there was an arguable claim that a person had been exposed to a real risk of treatment contrary to Article 3 ECHR by reason of their transfer to another state but only where there was an arguable claim that the state had violated Article 3 ECHR through instruction or complicity in torture or other serious mistreatment at the hands of the receiving state (at §§111-138). The obligation in such a case was to conduct an investigation which was effective in the sense of being designed to find out the true facts and identify those responsible for any criminal conduct, as well as being independent (at §139). Accordingly, the two Claimants who alleged serious ill-treatment while in US custody after having been handed over to US forces by British forces did not have an arguable claim for a violation of Article 3 ECHR so as to require an investigation.

7. In relation to Article 5 ECHR, the Court of Appeal dismissed the Claimant's appeal. Lloyd Jones LJ (with whom the other members of the Court agreed) found that while it was common ground that a procedural duty to investigate arose under Article 5 ECHR where there was an arguable claim that a person within the jurisdiction of a state had been the subject of enforced disappearance because where agents of the state had assumed

control over an individual it was incumbent on the authorities to account for his or her whereabouts (at §§147-162 and §176). However, there was no reason in principle to extend the obligation to all cases in which a person had been detained in the absence of judicial scrutiny or control, even if the detention was not secret or unacknowledged (at §§163-175 and §177). Article 5 ECHR co-existed with the provisions of international humanitarian law giving rise to a need to effect an accommodation between the two (at §184). Accordingly, in none of the cases did an investigative duty arise in relation to detention (at §§186-187).

The "bedroom tax": disability discrimination under Article 14

2) R (On the Application of (1) Carmichael (2) Rourke (Formerly known as MA & ORS)) v Secretary of State for Work and Pensions: R (On the Application of Daly (Formerly known as MA & ORS)) v Secretary of State for Work and Pensions: R (On the Application of A) v Secretary of State for Work and Pensions: R (On the Application of Rutherford & Anor) v Secretary of State for Work and Pensions (2016) [2016] UKSC 58 (09.11.2016)

8. The Supreme Court considered whether the cap on housing benefits, the 'bedroom tax', introduced under the Housing Benefit Regulations, Regulation B13 ("**Reg. B13**"), violated the Claimants' rights under Article14 ECHR, taken with Article 8 ECHR.

9. The Claimants in each appeal lived in social housing and either had disabilities, lived with dependent family members who had disabilities, or lived in 'sanctuary scheme' accommodation. Each Claimant had had their housing benefit capped as the number of bedrooms in their home exceeded their entitlement under Reg. B13. Housing benefit is a means tested benefit which has the purpose of helping Claimants with their rental costs. This benefit may, however, be reduced where the number of bedrooms in a house exceeds the number of bedrooms to which the claimant is entitled to under Reg. B13.

10. The Claimants challenged Reg.B13 on the basis that it violated their rights under Article 14 ECHR on equality grounds, taken with Article 8 ECHR and/or Article 1 of the First Protocol. They made a further argument that the Secretary of State had breached the Public Sector Equality Duty ("**PSED**") under the Equality Act 2010.

11. The Court of Appeal had asked whether the Secretary of State's policy was *"manifestly without reasonable foundation"*. The Claimants however argued the correct test was whether weighty reasons justified the discrimination rather than the broader policy itself, on the basis that there was discrimination against a vulnerable group.

12. The Supreme Court held that:

    (1) The correct test had been applied, on the basis that the Claimants' objections to Reg. B13 related to their social and medical needs, and this was a clear example of a question of economic and social policy integral to the structure of the welfare benefit scheme.

    (2) The test had been correctly applied as there was a reasonable foundation for the Secretary of State's decision not to create a blanket exemption for anyone suffering from a disability within the meaning of the Equality Act and thought the discretionary housing benefit scheme was more appropriate than an exhaustive set of rules designed to cover every contingency. However the Court found that there were some people who had clear medical needs for an additional bedroom due to their disabilities.

    (3) The cap did unlawfully discriminate against two Claimants who needed an additional bedroom by reason of their disability. The first Claimant could not share a bedroom with her husband as her disability resulted in her requiring a special bed with an electronic mattress and the second Claimants required regular 24 hour care for their severely disabled grandson and needed a room for those carers to stay the night. The other Claimants had their appeals dismissed.

Welfare orders for incapacitated individuals accommodated and treated privately to prevent breach of Article 5

1) **Secretary of State for Justice v (1) Staffordshire County Council (2) SRK (by his Litigation Friend, SK) (3) RK (4) Irwin Mitchel Trust Corp (2016) [2016] EWCA Civ 1317 (22.12.2016)**

13. The Court of Appeal considered whether a welfare order should be made in order to avoid the UK being in breach of Article 5(1) ECHR, where an incapacitated individual, who was cared for and accommodated under a purely private care regime, was not protected by sufficient procedural safeguards against arbitrary detention to satisfy the State's positive obligation under Article 5 to prevent unlawful deprivation of liberty.

14. The individual, SRK, was the victim of a road traffic accident and required full time care as a result of his injuries. He received substantial damages for the funds for his care, which were managed by a trust corporation. The local authorities had no knowledge of SRK's circumstances until it was informed by the trust corporation that the arrangements for SRK's accommodation and care may amount to a deprivation of his liberty.

15. The Mental Capacity Act 2005 does not authorise any person to deprive another of their liberty, however, this is subject to provisions of that Act which provide that a person may be deprived of their liberty in order to give effect to a decision of the Court of Protection in relation to a matter concerning that person's welfare. No welfare order had been made in relation to SRK.

16. The Secretary of State argued that the alleged deprivation of liberty was not imputable to the State and therefore such an order was not necessary. The court at first instance held that the deprivation was attributable to the State.

17. On appeal, the Secretary of State argued:

    1) that the combination of existing criminal and civil law and the safeguarding obligations of public bodies were sufficient to satisfy the State's positive obligations under Article 5; and

    2) that responsibility for private deprivation of liberty could not be attributed to the State where there was no reason for any public body to have any suspicions about abuse.

18. Two of the three established components of deprivation of liberty, confinement and a lack of valid consent, were clearly satisfied. The issue before the Court was the attribution of responsibility to the State. While the State had no direct involvement in SRK's care, his deprivation of liberty was held to be imputable to the State because it failed to discharge

it's positive obligation under Article 5. The Secretary of State argued that the current domestic regime of law, supervision and regulation was sufficient to satisfy its positive obligation. However, the Court held that many of the bodies which held such responsibilities would only act if there were allegations of wrongdoing.

19. A Court of Protection welfare order would introduce a form of independent review at periodic intervals. In the absence of making such an order, there were insufficient procedural safeguards against arbitrary detention in a purely private regime. The Court of Appeal rejected the Secretary of State's argument that, since each case of an alleged breach by Article 5 is fact dependent; there was no breach by the State of its positive obligation here as SRK's care regime was the best available option for him.

Human Rights Claims – Limitation – Extensions of Time

2) P v Tameside Metropolitan Borough Council [2017] EWHC 65 (20.01.2017)

20. The Claimant was an adult who, as a result of a learning disability arising from Down's syndrome, lacked capacity to make residence decisions for himself such that the Defendant was required to meet his assessed needs under the Mental Capacity Act 2005. Following an allegation of neglect against his mother, the Defendant removed the Claimant from his family home and placed him in respite accommodation for some 2 ½ years. Some 2 ½ years after he had returned home (and so some 1 ½ years out of time), he brought a claim under section 7 of the HRA 1998 against the Defendant local authority alleging that in placing him into respite accommodation it had violated his rights under Article 5 and Article 8 ECHR. A preliminary issue was whether the Court should extend its discretion under s.7(5)(b) of the HRA 1998 to extend the one-year limitation period in s.7(5)(a) for bringing a human rights claim. The Claimant argued that his lack of capacity gave rise to a rebuttable presumption by reason of s.28 of the Limitation Act 1980 that the requisite extension would be *"equitable having regard to all the circumstances"* within s.7(5)(b).

21. The report of an independent social worker had provided the basis for a claim some 5 months after the Claimant had returned home and his litigation friend and brother had sought legal advice on it some 3 months later leading to a letter before claim some 4

months thereafter. The fact that proceedings were not issued for a further 18 months was said to be explained by correspondence relating to offers, obtaining funding and finalising the issue of proceedings. The Claimant argued that the Defendant had been on clear notice of a potential human rights claim from at least the report of the independent social worker. The Defendant argued that the Claimant's family and his legal advisers had known of the facts giving rise to the claim for a number of years and that the Defendant would be prejudiced by the claim proceeding.

22. King J applied *Rabone v Pennine Care NHS Foundation Trust (INQUEST intervening)* [2012] 2 AC 72 and *Dunn v Parole Board* [2009] 1 WLR 728 to the effect that it was for the court to determine what is *'equitable in all the circumstances"* without reference to a prescribed list of factors to be taken into account cf. s.33 of the Limitation Act 1980. As Lord Dyson made clear in *Rabone* (at §75), although it would not be inappropriate for a court to have regard to those factors if it considers it proper to do so in the circumstances of a particular case, s.7(5) of the HRA 1998 is not to be interpreted as if it contained the language of s.33 (at §§65-68).

23. Similarly, King J held that s.7(5) of the HRA 1998 did not create a rebuttable presumption in favour of the grant of an exemption, absent exceptional circumstances, in the case of a claimant who lacks capacity and therefore has to depend on others to make a claim; rather, such a factor was one to be placed into the balance when determining where the equity of the situation lay in considering whether to grant an extension of time, but the weight to be given to it would depend on the particular facts of the case and matters such as when a claimant first had someone acting on his behalf and looking after his human rights interests, when that person had come into or had been in a position to come into possession of knowledge of the essential facts giving rise to the claim and the expertise held by that person in identifying human rights claims (at §§72-73).

24. As Jay J noted in *Bedford v Bedfordshire County Council* [2003] EWHC 1717 (at §76), the one-year limitation period for bringing a human rights claim under the HRA 1998 reflected the policy that such claims should be dealt with swiftly and economically such that delay was always a relevant consideration whether or not there was actual trial prejudice to the defendant as noted in *Dunn* (at §33); however, the burden of persuasion on a claimant seeking to extend time was not necessarily a heavy one and there was no burden on him to establish a lack of prejudice to the defendant. *A v Essex County*

Council [2011] 1 AC 280 and *AB v Ministry of Defence* [2013] AC 78 reflected the principle that a relevant consideration was also the court's assessment of the broad merits and value of the underling claim (at §§77-80).

25. Having regard to all the circumstances, King J concluded that it would not be equitable to grant an extension of time as those looking after the Claimant's interests had access to specialist legal expertise and knowledge of what they needed to know to bring a claim at the latest by 5 months after time began to run, the delay pursuing the claim has been considerable, the explanations for this delay did not make it equitable to extend time, legal aid matters being ones which in principle should be accommodated within the primary limitation period, applying *R (Kigen) v SSHD* [2016] 1 WLR 723, and the unfairness and prejudice to the defendant if the claim proceeded was very real given the lack of communication from the Claimant's solicitors for a year (§§74-76 and §§81-90). Although the Claimant would undoubtedly suffer prejudice in not being able to pursue his claim he would not suffer injustice so long after the facts giving rise to the claim crystallised and the primary limitation period had expired, even on the assumption that his underlying claim was a good and valuable one (§§91-94).

Brexit: the requirement for Parliamentary authorisation to trigger Article 50

3) R (Miller) v Secretary of State for Exiting the European Union & 2 References [2017] UKSC 5 (24.01.2017)

26. On 24 January 2017, in a landmark constitutional law ruling, the Supreme Court held that the UK Government could not trigger Article 50 of the Treaty on the European Union ("**Article 50**") without authorisation through an Act of Parliament. Following this decision, the European Union (Notification of Withdrawal) Act 2017 was passed on 16 March 2017 which empowered the Prime Minister Theresa May to trigger Article 50. Formal notification of our intended departure was given to the EU on 29 March 2017, triggering Article 50 and marking the start of two years of negotiations for Britain's exit from the EU.

27. EU law became a source of UK law when the UK joined the EU in 1973 by signing the Treaty of Accession and by Parliament enacting the European Communities Act 1972

("**the ECA**"). As a result, EU law takes precedence over all other domestic sources of UK law. The key question in this case was whether the Government was entitled to give notice of the UK's decision to leave the EU under Article 50 by exercising the Crown's prerogative powers without reference to Parliament.

28. The Government's argument focused on the executive's prerogative power to make and unmake treaties. It argued that the scope of this prerogative power, which it was claimed was sufficient to give notice under Article 50, had not been altered through the ECA or any other legislation which enacted EU law domestically. The claimants however based their argument on the higher constitutional principle of Parliament supremacy, arguing that the executive could not rely on prerogative powers to override rights conferred through legislation enacted by Parliament.

29. By a majority of 8 Justices to 3, the Supreme Court dismissed the Government's appeal and, in a joint judgment of the majority, held that an Act of Parliament was required to authorise ministers to give notice of the UK's decision to leave the EU under Article 50. The constitutional importance of the issue was demonstrated by the fact the appeal was heard by the full bench of 11 Justices.

30. Withdrawal from the EU will result in a fundamental change to the UK's constitutional arrangements. It was held that this can only take effect through Parliamentary legislation. Withdrawal will also remove a number of existing domestic rights of UK residents. The Supreme Court agreed with the High Court's findings that only Parliament had the power to take these rights away as they had originally legislated to confer these rights in domestic law; therefore this was not something the UK Government could do through the exercise of its prerogative powers.

31. The Government also advanced the argument that by triggering Article 50, it would simply be giving effect to the will of the people expressed in the June referendum. The Supreme Court made it clear that under UK constitutional law a referendum can only be advisory unless very clear language to the contrary is used in the referendum legislation in question. This is not the case with the Referendum Act 2015, which was passed on the basis a referendum would only have advisory effect.

32. The dissenting Justices, whilst accepting the constitutional importance of the principle of Parliamentary supremacy, agreed that the prerogative power to make or withdraw from

international treaties remains intact and unrestricted by the UK Parliament in relation to the ability to withdraw from the EU. Withdrawal could therefore be done by the executive alone, without first needing to be authorised by an Act of Parliament. Lord Reed took the view, with which the other dissenting Justices agreed, that the EU legislative framework gives EU law effect in domestic law so as to track the UK's treaty obligations at international level. There is no requirement for the UK to remain a member of the EU and rights given effect under the ECA may be added to, amended or revoked without a further legislation.

33. The Supreme Court went on to agree unanimously on the outcome in relation to the interaction between the triggering of Article 50 and the constitutional arrangements of Northern Ireland, Scotland and Wales. The Supreme Court considered an appeal against the McCord decision relating to Northern Ireland. It was held that the Northern Ireland Act 1998 did not require the consent of the majority of people of Northern Ireland to the withdrawal of the UK from the EU. The Scottish and Welsh governments argued that triggering Article 50 and withdrawing from the EU would lead to a significant change to the devolution settlements, therefore altering the competence of the Scottish and Welsh legislative. Under the Sewel Convention, the UK Parliament normally seeks consent from the devolved legislatures before legislating with regard to devolved matters. Therefore it was argued that if Article 50 was triggered under by way of the prerogative, the Sewel Convention would be bypassed as there would be no opportunity for the UK Parliament to seek assent of the devolved legislature. This provided an additional reason for finding that the Government could not rely on the prerogative to trigger Article 50.

Legal Aid – Applications to Strasbourg – The Law of England and Wales

4) R (Minton Morrill Solicitors) v The Lord Chancellor [2017] EWHC 612 (Admin) (24 March 2017)

34. The Claimant solicitors challenged refusals by the Legal Aid Agency to allow payments for work done on applications to the European Court of Human Rights. The first claim raised the issue of whether possession proceedings and the grant of a possession order violated an individual's rights under Articles 8, 14 and A1P1 ECHR (at §§6-9). The second claim raised the issue of whether the decision to offer 'bricks and mortar'

accommodation as *"suitable"* to an Irish traveller and the lack of a remedy in the domestic courts violated her rights under Articles 8, 13 and 14 of the ECHR (at §§10-15).

35. The Lord Chancellor argued that s.19 of the Access to Justice Act 1999, and its successor provision, s.32 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, did not permit funding for such applications being services *"relating to any law other than that of England and Wales, unless any such law is relevant for determining any issue relating to the law of England and Wales"* which in this case it was not (at §3).

36. Mr Justice Kerr agreed with the Lord Chancellor that work done to prepare applications to the ECtHR related to a *"law other than that of England and Wales*", namely the autonomous law of the European Convention, applied by the ECtHR. The HRA 1998 had not incorporated Convention rights into the law of England and Wales but simply enacted provisions in identical terms to the Convention in Schedule 1 to the Act which could be differently interpreted. This might be because of a decision to depart from a decision of the Strasbourg court or because of a higher domestic authority binding on the court, whether statute or jurisprudence inconsistent with Strasbourg authority. The work done to prepare the applications therefore related to services relating to the autonomous law of the Convention as applied by the ECtHR (at §§25-33).

37. The Judge then considered whether work done on applications to the ECtHR could be said nevertheless to be *"relevant for determining any issue relating to the Law of England and Wales"* as *"domestic human rights law is inspired, shaped and influenced by"* the decisions of the ECtHR. However, again the Court accepted the Lord Chancellor's argument that the provision was ambiguous, and that the Parliamentary history of this part of the provision demonstrated that its intended purpose was to allow funding for issues of foreign law arising in domestic proceedings. The law of the Convention was such foreign law but since an application could only be made to the ECtHR when domestic remedies had been exhausted, it followed that any decision of the ECtHR on a subsequent application to the United Kingdom arising from the failure of domestic proceedings could have no purchase on the outcome of those domestic proceedings which, by definition, would already have been terminated, adversely to the applicant. At best, on a favourable outcome such an application would generate remedies against the United Kingdom. The work done to prepare the applications was therefore

not *"relevant for determining any issue"* in domestic proceedings as those issues had already been determined (at §§36-55).

Cuts in legal aid for prisoners: unacceptable risk of inherent or systemic unfairness

5) Regina (Howard League for Penal Reform and another) v Lord Chancellor (Equality and Human Rights Commission Intervening) [2017] EWCA Civ 244 [2017] 4 WLR 292 (10.04.17)

38. The Howard League and the Prisoners Advice Service challenged cuts to legal aid for prisoners which were introduced in December 2013 following the 'Transforming Legal Aid' consultation earlier that year. The December 2013 cuts removed criminal legal aid for advice and representation in connection with a range of procedures in prisons. The challenge was brought on the grounds that the absence of legal aid meant that the system was inherently or systemically unfair; the Lord Chancellor argued that there was adequate alternative provision including the prisoners complaints scheme (including access to the Prisons and Probation Ombudsman), the role played by Independent Monitoring Boards (IMBs) and HM Chief Inspector of Prisons and the availability of civil legal aid for judicial review proceedings to ensure fairness in proceedings concerning prisoners which did not directly determine their liberty.

39. During the course of proceedings, the Lord Chancellor accepted that Exceptional Case Funding (**"ECF**") under s.10 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (**"LASPO"**) would in principle be available in cases concerning placement in mother and baby units, licence conditions, segregation, and resettlement cases in so far as they concern prisoners' accommodation or care following release (at §28). By the time of the hearing, therefore, the challenge was focused on five types of case where criminal legal aid was no longer available and the Lord Chancellor did not accept that ECF might be available. The five categories were (i) pre-tariff parole reviews where the Parole Board had no power to direct release; (ii) category A reviews; (iii) access to offending behaviour programmes (**"OBP"**); (iv) disciplinary proceedings where no additional days could be awarded; and (v) placement in close supervision centres (**"CSC"**).

40. The issue for the Court of Appeal was whether, in each of these five categories, *"looking at the full run of cases in that category that go through the system, the other forms of assistance relied on by the Lord Chancellor are adequate and available to enable a prisoner to participate effectively"* (at §51). In order to decide this question, the Court directed itself to consider *"the importance of the issues at stake, the complexity of the procedural, legal and evidential issues, and the ability of the individual to represent himself or herself without legal assistance having regard to age and mental capacity"* (at §51). In doing so, it drew on both common law and ECHR/HRA authorities as to the requirements of fairness (notably, *Gudanaviciene* [2015] 1 WLR 2247 and *Osborn* [2014] AC 1115).

41. The Court also identified three factors to be taken into account when considering in respect of each category whether the high threshold for demonstrating systemic or inherent unfairness had been shown: (i) the inherent difficulty in differentiating between systemic problems and individual failings, as to which it identified a need to *"to distinguish examples which signal a systemic problem from others which, however numerous, remain cases of individual operational failure"* (at §53); (ii) the need to approach with caution evidence which was anonymous, unparticularised, or *"related to an individual response after something had gone wrong rather than to a systemic safeguard that was in place before that time"* (at §54); and (iii) that although the threshold is a high one, that must not dilute the principle that in some contexts *"only the highest standards of fairness will suffice"*, and the Court is well placed to judge for itself whether the safeguards relied on are sufficient to make the system fair and just (at §55).

42. The Court of Appeal went on to consider each of the five areas in light of these factors and concluded that in three, the system was inherently unfair, namely: (i) pre-tariff Parole Board reviews (at §92); (ii) category A reviews (at §109); and (iii) placement in CSCs (at §126). In relation to decisions about OBPs, the Court found that the issues at stake were less important, the issues less complex, and offender managers able to offer adequate support to mean that the absence of legal aid did not render the system inherently unfair (at §137). With respect to disciplinary proceedings, where legal aid is not available the availability of judicial review to challenge the incorrect application of the Tarrant criteria was a key factor in the Court's conclusion that the absence of legal aid did not make the system inherently unfair (at §143).

Appeals against deportation exercisable only after removal: right to an effective remedy

6) Kiarie v Secretary of State for the Home Department (Bail for Immigration Detainees intervening); Regina (Byndloss) v Secretary of State for the Home Department (Bail for Immigration Detainees and others intervening) [2017] UKSC 42 [2017] 1 WLR 2380 (14.06.2017)

43. Mr Kiarie and Mr Byndloss challenged the decision by the Secretary of State to certify their appeals against their deportation from the UK under s.94B of the Nationality, Immigration and Asylum Act 2002, inserted by the Immigration Act 2014. The effect of s.94B certification was that the Appellants could only pursue their appeals, brought on Article 8 ECHR grounds, after their deportation from the UK. The Secretary of State accepted that in neither case was the Article 8 ground of appeal *"clearly unfounded"* (otherwise she would have certified under a different provision, s.94), but certified that removal before appeal would be compatible with their Article 8 rights because they would not suffer serious irreversible harm on removal and could effectively exercise their right of appeal from abroad; if successful, they would be permitted to return to the UK.

44. The central issue in the appeals was whether an out of country appeal to the First-tier Tribunal (Immigration and Asylum Chamber) ('FTT') was capable of meeting the procedural requirements of Article 8 ECHR thereby ensuring effective respect for the Appellants' Article 8 rights. Lord Wilson JSC, with whom the majority of the Supreme Court agreed, emphasised the public interest in ensuring that where Parliament had conferred a right of appeal, that right should be effective. He directed himself that *"the public interest in a foreign criminal's removal in advance of an arguable appeal is outweighed unless it can be said that, if brought from abroad, the appeal would remain effective"* (at §35) (emphasis added).

45. In considering that question, Lord Wilson JSC first considered the correct approach which the Court should take to determining whether certification was compatible with Convention rights. There could be little doubt that on an application for judicial review, as on an appeal to the FTT, the Court would be required to decide for itself whether the decision breached Convention rights and in doing so to make its own assessment of proportionality (at §43). In doing so it would attach *"considerable weight to the considerations of public policy upon which the Home Secretary has relied and to any*

other part of her reasoning which, by virtue of her position and her special access to information, should carry particular authority" (at §43). The Court held that this duty to make up its own mind about proportionality would include, where necessary and appropriate, reconsidering the Home Secretary's findings of fact, including with the benefit of oral evidence if necessary (at §47).

46. Lord Wilson concluded that the certification of the appellants' cases had failed to strike a fair balance between their Article 8 rights and the interests of the community (at §78). In reaching that conclusion, he considered the importance of what was at stake for them (at §53), the high threshold they would have to cross in order to succeed (at §55), the likelihood of their being legally represented (at §60), the difficulties they would face in securing important professional or expert evidence (at §74), and the importance of being able to give oral evidence to the FTT given the issues in the appeals (at §§61-63). He concluded that in order to have an effective right of appeal they would have to be able to give oral evidence; that it was unrealistic to suppose they would be allowed to return to the UK to do so; and that there was no realistic or effective possibility for them to give their evidence by video link (at §76). The Home Secretary had failed to ensure that there was a Convention-compliant system for the conduct of appeals from abroad (at §76).

47. Lord Carnwath JSC delivered a concurring judgment in which he emphasised the duty on the Secretary of State to satisfy herself, in order to comply with her duties under the HRA, that there will be an effective appeal procedure available after deportation, if she is to exercise the power to certify under s.94B (at 87). He was less convinced than Lord Wilson of the importance of the appellant being able to give oral evidence in a deportation appeal but considered that it would be *"wrong in principle for the Secretary of State, as the opposing party to the appeal, to be allowed to dictate the conduct of the appellant's case or the evidence on which he chooses to rely"*: the Secretary of State had to satisfy herself that an appellant would be able to effectively participate in person in the appeal – whether by giving oral evidence or otherwise – if he wished to do so (at §102). On the evidence, she could not have been so satisfied at the date of the certification decisions (at §103).

Disclosure of previous convictions: compatibility with Article 8

7) R (P) v Secretary of State for the Home Department [2017] EWCA Civ 321 (03.05.2017)

48. The Court of Appeal considered the lawfulness of the revised statutory scheme for the disclosure of convictions and its compatibility with Article 8 ECHR in relation to four linked appeals.

49. The original scheme had been challenged in *R (T) v Chief Constance of Greater Manchester* [2013] EWCA Civ 25, which ultimately led to the scheme being revised, albeit the original scheme was considered again by the Supreme Court: [2014] UKSC 35; [2015] AC 49. It was argued in this case that the measures introduced as a result of the revision were insufficient and inadequate to address the failure of the original scheme to comply with Article 8 ECHR. The issues were whether the interferences with Article 8 ECHR rights were in accordance with the law and necessary in a democratic society ie. whether the right balance had been struck by the executive between the legitimate aims of protecting the rights of employers, children and vulnerable adults, and the right to privacy and concerns for the rehabilitation of released offenders.

50. Certain criminal certificates are required where an individual's suitability is being assessed for particular forms of employment, such as those which involve exposure to children or vulnerable adults. While the revised scheme does not require disclosure of every spent conviction and caution, disclosure is still required in certain circumstances. In this case, the Court considered the disclosure required under the regime's 'serious offence rule' and 'multiple conviction rule.'

51. The Court held that:

    (1) The ratio of the Supreme Court in *T* was that a regime requiring indiscriminate disclosure of personal data by the state would not contain adequate safeguards to prevent interference with Article 8 ECHR, and therefore would not be lawful unless discriminators existed which were sufficient to draw appropriate distinctions and ensure that there was a relevant link between the disclosure and the public interest, and a mechanism for independent review. There was no one particular safeguard which could convert what was otherwise arbitrary into a scheme which accorded with the law and the requirement of a mechanism for independent review

was not absolute. However some form of filter was required to ensure that nexus between requiring the disclosure and the public interest served by that disclosure.

(2) The serious offence rule and multiple conviction rule were not in accordance with the law. The multiple conviction rule was indiscriminate as it applied automatically, irrespective of the nature of the offence and without regard to the time since the offence occurred or the relevance of the data to the employment sought. The serious offences rule, while not totally indiscriminate as a distinction was made between offences included in Schedule 15 of the Criminal Justice Act 2003 and those not so included, applied in a blanket way to all those who had been convicted of a serious offence.

(3) The Court held the proper approach to achieving the appropriate balance between the rights of individuals to move on from their past and what is necessary to protect the public in a democratic society was to look at the purpose for which the relevant criminal certificate was required and provided and to implement appropriate safeguards to enable that disclosure.

(4) In the case of the Claimants in the case, there was no rational connection between the interference with their Article 8 ECHR rights and the aim of ensuring, for the remainder of their lives, their suitability for employment across the entire range of activities covered by the scheme so the interferences were unnecessary.

Employment Tribunal fees: right of access to justice

8) Regina (UNISON) v Lord Chancellor (Equality and Human Rights Commission and another intervening) (Nos 1 and 2) [2017] UKSC 51 [2017] 3 WLR 409 (26.07.17)

52. UNISON, supported by the Equality and Human Rights Commission (**"EHR**C") and the Independent Workers Union of Great Britain (IWGB) as interveners, challenged the vires of the Employment Tribunals and the Employment Appeal Tribunal Fees Order 2013 (**"the Fees Order**") which, for the first time, introduced fees for proceedings in the Employment Tribunal (**"ET"**) and the Employment Appeals Tribunal (**"EAT"**). The Fees

Order prescribed issue and hearing fees, and fees for various types of application. ET claims were divided into two 'types' broadly based on complexity and the amount of time disputes typically take to resolve. Type B claims were unfair dismissal claims, equal pay claims and discrimination claims, and the fees for type B claims were higher. As the Supreme Court noted, *"Counsel for the Lord Chancellor were unable to explain how any of the fees had been arrived at"* (at §19). There was a fee remission scheme which aimed to ensure that *"those who could not afford to pay fees were not financially prevented from making a claim"* (at §14). As with the fees, there was no *"explanation of how [the disposable capital limit], or any of the other figures relating to remission, were arrived at"* (at §21).

53. The Supreme Court unanimously allowed UNISON's appeal, holding that the Fees Order was unlawful from the outset because it constituted an unlawful and disproportionate restriction on the common law right of access to the courts, as well as being contrary to EU law, and (probably) unjustifiably indirectly discriminatory. The judgment of Lord Reed JSC (with whom all other members of the Court agreed) is an important statement of key principles underpinning the constitutional right of access to the courts, which he emphasised is inherent in the rule of law (at §66). He was highly critical of the assumption underpinning the Government's consultation documents and reports, that *"the administration of justice is merely a public service like any other, that courts and tribunals are providers of services to the 'users' who appear before them, and that the provision of those services is of value only to the users themselves and to those who are remunerated for their participation in the proceedings"* (at §66). The extent to which this assumption appeared to have gained currency in the Government's thinking led him to set out a detailed exposition of the importance of court proceedings in upholding the rule of law, enabling disputes to be resolved, and ensuring that the laws passed by Parliament are worth more than the paper that they are written on. As he explained, without the right of unimpeded access to the courts, *"laws are liable to become a dead letter, the work done by Parliament may be rendered nugatory, and the democratic election of Members of Parliament may become a meaningless charade"* (at §68).

54. Lord Reed JSC's judgment accordingly contains a number of significant statements about the scope and importance of the common law right of access to the courts, including the following:

(1) *"the right of access to justice, both under domestic law and under EU law, is not restricted to the ability to bring claims which are successful"* (at §29);

(2) *"impediments to the right of access to the courts can constitute a serious hindrance even if they do not make access completely impossible"* (at §78);

(3) *"any hindrance or impediment [of the right of access to the courts] by the executive requires clear authorisation by Parliament"* (at §78);

(4) *"Even where a statutory power authorises an intrusion upon the right of access to the courts, it is interpreted as authorising only such a degree of intrusion as is reasonably necessary to fulfil the objective of the provision in question"* (at §80).

55. Applying these principles and after an extensive recitation of the authorities, Lord Reed JSC directed himself that the Fees Order would be ultra vires *"if there is a real risk that persons will effectively be prevented from having access to justice"* (at §87) and that *"the degree of intrusion must not be greater than is justified by the objectives which the measure is intended to serve*" (at §88). Thus even if the interference in access to courts resulting from the Fees Order was not *"insurmountable",* it *"will be unlawful unless it can be justified as reasonably necessary to meet a legitimate objective"* (at §89). Applying these principles to the specific context, he held that in order to be lawful, the fees *"have to be set at a level that everyone can afford, taking into account the availability of full or partial remission"* (at §91) (emphasis added). Further, the fees had to be *"affordable not in a theoretical sense, but in the sense that they can reasonably be afforded"* (at §94). The Fees Order failed those tests on the evidence before the Court: *"Where households on low to middle incomes can only afford fees by sacrificing the ordinary and reasonable expenditure required to maintain what would generally be regarded as an acceptable standard of living, the fees cannot be regarded as affordable"* (at §94).

56. Lord Reed JSC also found the Fees Order to be unlawful on the following grounds:

(1) The level at which fees were set, difficulty in predicting the outcome of claims, and absence of certainty that fees would be recovered if successful rendered it in many cases *"futile or irrational to bring a claim"*, particularly where the primary objective of any proceedings was a non-monetary or modest value remedy (at §96);

(2) The interference was disproportionate because it had not been shown that a lower level of fees, or a more generous system of fee remission, would not be effective in achieving the objective of shifting the cost burden to tribunal users (at §100);

(3) The Fees Order had also not been shown to be necessary to achieve its secondary aims of disincentivising unmeritorious claims or encouraging earlier settlement (at §101);

(4) There had been a failure to *"to consider the public benefits flowing from the enforcement of rights which Parliament had conferred, either by direct enactment, or indirectly via the European Communities Act 1972"* (at §102).

57. The claim also succeeded under EU law, on essentially the same grounds, namely that the fees constituted a disproportionate interference with EU law rights, in particular the right to an effective remedy (at §117).

58. In a concurring judgment, with which Lord Reed JSC also agreed, Lady Hale [then] DPSC considered whether the Fees Order was also unlawful for being indirectly discriminatory contrary to the Equality Act 2010 and EU law. She emphasised the importance of considering whether the provision, criterion or practice (**"PCP"**) being challenged was justified as being proportionate to a legitimate aim, rather than its effects (at §126). The PCP here was the distinction drawn between 'Type A' and 'Type B' claims which disproportionately affected women (and others with protected characteristics), who were substantially more likely to bring Type B claims (at §125). She concluded that charging higher fees for type B claims had not been shown to be a proportionate means of achieving any of the three aims identified by the Government in introducing the Fees Order (at §§129-131).