

'A Year in Judicial Review': October 2012

(or, a lecture in search of a theme)

Constitutional Law

1. At the end of the summer term (18 July 2012), the Supreme Court gave judgment in two major cases concerning the scope of the royal prerogative and the nature of immigration rules: *R(Munir) v Secretary of State for the Home Department* [2012] UKSC 32 and *R (Alvi) v Secretary of State for the Home Department* [2012] UKSC 33.
2. The first, *Munir*, concerned the withdrawal of the 'long residence concession' known as DP5/96, which was withdrawn in 9 December 2008 on the basis that it had been superseded by the HRA and changes in the Immigration Rules. DP5/96 had never been laid before Parliament or formed part of the Immigration Rules. It was contended for Mr Munir, in the CA, that the withdrawal of DP5/96 amounted to a statement of a change in the immigration rules and that, as a result, it should have been laid before Parliament and its withdrawal had no effect unless it was. See s3(2), Immigration Act 1971:

"The Secretary of State shall from time to time (and as soon as may be) lay before Parliament statements of the rules, or of any changes in the rules, laid down by him as to the practice to be followed in the administration of this Act for regulating the entry into and stay in the United Kingdom of persons required by this Act to have leave to enter...."

3. The Government argued that everything done by the Secretary of State for the purpose of regulating the entry into and stay in the United Kingdom of persons who required leave to enter or remain was done in exercise of the prerogative power. The SoS was under no legal (as opposed to political) obligation to lay any rules before Parliament. "[Mr Swift QC] therefore submits that (i) the making and laying of immigration rules before Parliament is an exercise by the Secretary of State of the prerogative power and (ii) the publication of a policy which identifies the circumstances in which there may be a relaxation of legislation or the rules which regulate entry into and stay in the United Kingdom is also an exercise of the prerogative power and not a statement within the meaning of section 3(2)."
4. This argument was rejected by Lord Dyson, with whom the other members of the Supreme Court agreed. He analysed the history of the development of the statutory control of the entry of 'aliens'. He noted that the Crown's prerogative powers had always related only to the control of aliens – not British or Commonwealth citizens (although the latter had lost the right of abode in 1962 with the Commonwealth Immigrants Act 1962). Further, the intention of the Immigration Act 1971 was that those prerogative powers (in respect of aliens) should, thereafter, be exercised

pursuant to the Act. The ‘saving’ provision for the use of the prerogative contained in s33(5) IA was intended only to apply exceptionally, to enemy aliens. Thus, Lord Dyson concluded: “In particular, the power to make rules and to grant and vary leave to enter and remain is vested in the Secretary of State by the Act. The exercise of that power is an exercise of statutory power and not the prerogative” [para 33]. It followed that the power had to be exercised subject to the control of Parliament (i.e., via the negative resolution procedure specified by the IA).

5. All that said, Mr Munir failed because DP5/96 concerned a concession, relating to when leave might be granted outside the rules. Lord Dyson held that this discretion, too, was exercised by virtue of the IA. But it did not fall within the terms of s3(2) (“the practice to be followed”) because it did not lay down a fixed rule, but merely that the rules “may” be relaxed. “It was not a statement as to the circumstances in which overstayers would be allowed to stay. It did not have to be laid before Parliament.” [para 45].
6. *R (Alvi) v Secretary of State for the Home Department* [2012] UKSC 33 considered related issues, in the context of the long line of cases which started with *Pankina v Secretary of State for the Home Department* [2010] EWCA Civ 719. This concerned the ‘points-based’ system for entry of non EEA nationals who wish to study or work in the UK. We might note, at the outset, the sentiments at paragraph 11 of Lord Hope’s judgment:

“In *DP (United States of America) v Secretary of State for the Home Department* [2012] EWCA Civ 365, para 14 Longmore LJ lamented, with good reason, the absolute whirlwind which litigants and judges now feel themselves in due to the speed with which the law, practice and policy change in this field of law.”

7. Mr Alvi had been given leave to remain and work prior to the entry of the points-based system. When he needed to renew his leave, he applied under the new scheme, seeking leave as a “Tier 2 (General) Migrant”. But his application was rejected in February 2010 because his job as an Assistant Physiotherapist did not lead to the award of sufficient points to enable him to qualify for leave. It was not above NVQ level 3. The challenge concerned the importance of the fact that the list of skilled occupations, for the purpose of the award of points, had not been laid before Parliament. In other words, did s3(2) IA bite? The Court of Appeal had held that it did. The Supreme Court was therefore concerned with the issue of to what extent it was permissible for the SoS to refer, in the Rules, to ‘extrinsic’ materials; and then to change them.

“[The Respondents] accepted that it was open to the Secretary of State to refer in a rule to another document which was available when the rule, or a statement of changes in the rules, was laid before Parliament. But it would be so only if the content of that other document was fixed and thus not open to change at the Secretary of State’s discretion without further reference to Parliament. Put more precisely to fit the facts of this case, was it sufficient for the Secretary of State to state in paragraph 82(a)(i) that no points would be awarded for

sponsorship unless that job for which the person was being sponsored appeared on UKBA's list of skilled occupations if that list was not fixed but was open to change at the discretion of the Secretary of State?"

8. Lord Hope echoed the conclusions of Lord Dyson in Munir on the nature of the changes wrought by the IA 1971:

"31. In *R v Secretary of State for the Home Department, Ex p Ounejma* (1989) Imm AR 75, 80 per Glidewell LJ said that the residual prerogative powers remain, and in Macdonald, *Immigration Law and Practice in the United Kingdom* 8th ed (2010), para 2.35 it is asserted that the prerogative power is not impaired or superseded, merely put in abeyance. But these propositions understate the effect of the 1971 Act. It should be seen as a constitutional landmark which, for all practical purposes, gave statutory force to all the powers previously exercisable in the field of immigration control under the prerogative. It is still open to the Secretary of State in her discretion to grant leave to enter or remain to an alien whose application does not meet the requirements of the Immigration Rules. It is for her to determine the practice to be followed in the administration of the Act. But the statutory context in which those powers are being exercised must be respected. As their source is the 1971 Act itself, it would not be open to her to exercise them in a way that was not in accordance with the rules that she has laid before Parliament."

9. This laid the ground for stressing the Importance of the Parliamentary scrutiny enabled by s3(2). That being so:

"any requirement which, if not satisfied, will lead to an application for leave to enter or to remain being refused is a rule within the meaning of section 3(2). A provision which is of that character is a rule within the ordinary meaning of that word. So a fair reading of section 3(2) requires that it be laid before Parliament."
[para 57]

10. This test replaces the test that the lower Courts have sought to formulate and apply since Pankina (in cases such as *R (English UK) v Secretary of State for the Home Department* [2010] EWHC 1726 (Admin), *R (Joint Council for the Welfare of Immigrants) v Secretary of State for the Home Department* [2010] EWHC 3524, *R (Ahmed) v Secretary of State for the Home Department* [2011] EWHC 2855, *R (Purzia) v Secretary of State for the Home Department* [2011] EWHC 3276 and *R (New London College Limited) v Secretary of State for the Home Department* [2012] EWCA Civ 51). These cases revealed "a variety of approaches, and the use of a variety of expressions, to determine where the line must be drawn in order to determine whether material in an extraneous document which is not set out expressly in the rules can validly be relied on to determine an applicant's claim." Their Lordships recognized that the test which they had

formulated – whilst agreed by all – still was capable of yielding inconsistent results, insofar as Lord Hope disagreed with Lord Dyson¹ as to whether or not the statements in the guidance to employers upon how the resident labour test should be satisfied amounted to a ‘rule’ or not. Lord Hope hoped that the decision maker would therefore err on the side of caution, in deciding what changes must be laid before Parliament.

11. It is apparent that the real impact of this decision is likely to be, not upon the SoS, but on the Secondary Legislation Scrutiny Committee of the House of Lords, which has the difficult task of scrutinizing the merits of changes to the Immigration Rules. “The situation that has created this problem is so far removed from what it was in 1971 that one wonders whether the system that was designed over forty years ago is still fit for its purpose today.” (Lord Hope, para 65; see also Lord Wilson at paragraph 128, expressing similar concerns).
12. The *New London College* case (which concerns the system for the removal of sponsor licences) is now awaiting a permission decision from the SC.
13. Another very recent decision upholding the supremacy of Parliament is *R(Child Poverty Action Group) v Secretary of State for Work and Pensions* [2012] EWHC 2579 (Admin). The CPAG challenged the failure of the government to establish a Child Poverty Commission, as required by the Child Poverty Act 2010. Singh J held: “It is important to recall certain fundamental constitutional principles. The first is that under our constitutional system the executive has no power to make law save in those circumstances where it is granted power to do so by primary legislation. As has often been observed, the executive enjoys no sovereignty... However the executive enjoys no power to amend or repeal primary legislation in the absence of delegation by Parliament itself. In the present context, however meritorious the new Government in 2010 may have thought its proposed replacement commission might be, it was not entitled, in my judgment, to pre-empt any primary legislation that Parliament might or might not pass in the future if so invited. The fact is that, as things stood in 2010 and early 2011, Parliament had enacted primary legislation requiring the establishment of the Child Poverty Commission and requiring the Secretary of State to take advice from it before publishing the strategy and laying it before Parliament, something which had to be done within twelve months of the enactment of that Act. That is something which government ministers decided consciously and as a matter of policy not to do. The new Government may have had good reason to adopt a different policy from that of the previous government. However, in my judgment, they were not entitled as a matter of law to ignore, or to fail to comply with, primary legislation as laid down by Parliament itself.”
14. In *R (Nicklinson) v Ministry of Justice and Director of Public Prosecutions* [2012] EWHC 2381 (Admin) the Divisional Court rejected Tony Nicklinson’s invitation to declare that the common

¹ Lord Clarke and Lord Wilson, albeit “without enthusiasm”, endorsed the views of Lord Dyson; Lord Walker preferred not to express an opinion.

law of murder may give rise to the defence of necessity in the case of voluntary active euthanasia. Although the judges clearly empathized with Mr. Nicklinson's predicament, they held that it was for Parliament to legislate in this controversial area: "As to constitutionality, it is one thing for the courts to adapt and develop the principles of the common law incrementally in order to keep up with the requirements of justice in a changing society, but major changes involving matters of controversial social policy are for Parliament. There is ample authority for that proposition. Lord Reid said in *Shaw v DPP* [1962] AC 220, 275: "Where Parliament fears to tread it is not for the courts to rush in."... A decision by the court to alter the common law so as to create a defence to murder in the case of active voluntary euthanasia would be to introduce a major change in an area where there are strongly held conflicting views, where Parliament has rejected attempts to introduce such a change, and where the result would be to create uncertainty rather than certainty. To do so would be to usurp the role of Parliament."

15. Looking rather further back, we may note the SC decision of *AXA General Insurance Ltd v the Lord Advocate* [2011] UKSC 46, a decision of a 7-member SC. The appellants were insurance companies which were in the business of indemnifying employers against liability for negligence. They sought to challenge the lawfulness of an Act of the Scottish Parliament (the Damages (Asbestos-related Conditions) (Scotland) Act 2009), which provides that asbestos-related pleural plaques and certain other asbestos-related conditions constitute personal injury actionable under Scots law.
16. The greater part of the judgments concerned the issue of a violation of Article 1, Protocol 1. The insurers had a 'possession' in the fund of money they might have to pay to satisfy claims, and the issue therefore arose as to whether interference with that possession pursued a legitimate aim and could be shown to be reasonably proportionate to that aim (held, 'yes').
17. But perhaps of greater interest was the claim at common law that the Act was irrational and arbitrary. This raised the issue of the extent to which Acts of the Scottish Parliament (ASPs) were reviewable. Plainly, ASPs are passed by a body to whom powers have been delegated, by the UK Parliament; sovereignty remains with the UK Parliament and the Scottish Parliament may only legislate within its competence. Whether or not it did so was an issue for the courts.
18. But these facts did not assist on what grounds of review applied; this was "uncharted territory". According to Lord Hope, "the rule of law enforced by the courts" was the "ultimate controlling factor on which our constitution is based" and the courts would act to protect this (if, for example, the role of the courts in protecting the interests of the individual was under attack). However, given the democratic nature of the Scottish Parliament and the fact that compatibility between legislation and the ECHR was already required by the Act establishing it, ASPs were not subject to review on the grounds of irrationality, unreasonableness or arbitrariness.
19. Or, according to Lord Reed:

“Since [the Scottish Parliament’s] powers are plenary, they do not require to be exercised for any specific purpose or with regard to any specific considerations. It follows that grounds of review developed in relation to administrative bodies which have been given limited powers for identifiable purposes, and which are designed to prevent such bodies from exceeding their powers or using them for an improper purpose or being influenced by irrelevant considerations, generally have no purchase in such circumstances, and cannot be applied.” (para 147).

20. However, that still left an “exceptional category”, within which the Courts could intervene, if the Scottish Parliament passed an ASP in violation of fundamental ‘constitutional’ principles such as “fundamental rights” or “the rule of law”. The Westminster Parliament could not have intended to establish such a body.
21. It can be seen that the circumstances in which such a challenge could be entertained are left vague and undefined. The SC has, perhaps, put down a ‘marker’, but left any future definition for more extreme circumstances.

The ECHR and the HRA

Article 2

22. On 20 April 2005, Melanie Rabone hanged herself. At the time, she was on two days’ home leave from Stepping Hill Hospital, Stockport where she was undergoing treatment for a depressive disorder as an informal patient (ie one who was not detained under the Mental Health Act 1983).
23. *Rabone and another v Pennine Care NHS Foundation Trust* [2012] UKSC 2 (8 February 2012) was the case brought by her parents out of these sad facts. It concerned (by the time it reached the Supreme Court) an alleged breach of the “operational duty” (see *Osman*) established under article 2 ECHR (“Everyone’s right to life shall be protected by law”). As Lady Hale observed: “We are here because the ordinary law of tort does not recognise or compensate the anguish suffered by parents who are deprived of the life of their adult child.”
24. In *Powell v United Kingdom* (2000) 30 EHRR CD 362 it was held that if hospital authorities have performed their obligation to adopt appropriate general measures for the protection of the lives of patients in hospitals (for example, by ensuring that competent staff are recruited, high professional standards are maintained and suitable systems of work are put in place), casual acts of negligence by members of staff will not give rise to a breach of article 2.
25. It was held by the Supreme Court that the admittedly “casual” negligence of the trust in its treatment of Melanie should not be assimilated to the *Powell* line of cases and the operational duty arose. It was clear that the existence of a “real and immediate risk” to life was ‘a necessary but not sufficient condition’ for the existence of such a duty under Art 2 (after all, patients facing

heart surgery face such a risk). However, the fact that MR was a psychiatric patient meant that this case should be assimilated to the class of cases where an operational duty arises. Even though MR had not been detained under the MHA, the state had assumed responsibility for her wellbeing and she was a vulnerable person. There was an analogy to be drawn with the case of the child at risk of abuse in *Z v United Kingdom*, where the court placed emphasis on the availability of the statutory power to take the child into care and the statutory duty to protect children. Her apparent freedom was more apparent than real: "Although she was not a detained patient, it is clear that, if she had insisted on leaving the hospital, the authorities could and should have exercised their powers under the MHA to prevent her from doing so."

26. There were further observations about breach, and the nature of the 'real and immediate test'.
27. The Court also accepted that the parents were 'victims' within the meaning of s7 HRA, for the purpose of the breach of the Art. 2 substantive obligation as well as the investigative obligation. It held that the settlement of the negligence claim did not mean that victim status had been renounced:

".....if relatives settle their domestic law claims arising from a death, they will generally cease to be victims in relation to a corresponding Convention claim. The phrase "corresponding Convention claim" is mine. By this I mean that, if (i) the domestic law claim that is settled was made by the same person as seeks to make an article 2 claim and (ii) the head of loss embraced by the settlement broadly covers the same ground as the loss which is the subject of the article 2 claim, then I would expect the ECtHR to say that, by settling the former, the claimant is to be taken to have renounced any claim to the latter."

Asylum and Article 3.

28. The Supreme Court's decision in *RT (Zimbabwe) v Secretary of State for the Home Department* [2012] UKSC 38 is an asylum decision, included (when other asylum decisions have been passed over) because of the general importance of what is said by the Court about the nature of freedom of religious and political thought. I have included it under the heading of Article 3 only because of the link between the concept of 'persecution' (for asylum claims) and 'inhuman or degrading treatment' for Article 3 purposes.
29. The case arose out of the SC decision in *HJ (Iran) v Secretary of State for the Home Department* [2011] 1 AC 596. That was the case which held that gay men were entitled to live openly, in accordance with their sexual identities; and it was no answer to a claim for asylum to say that persecution could be avoided by living 'discreetly'. This logic was then applied by the Supreme Court (and the CA) to the case of returnees to Zimbabwe who would, according to the finding of the Country Guidance case *RN (Zimbabwe)* be required to show support for President Mugabe in order to avoid persecution on return to their country. The argument was as to whether those who held no political beliefs would be persecuted if they were forced to lie in such

circumstances. Lord Dyson gave a resounding “yes” to this question. He looked to the Convention and human rights jurisprudence which establishes that the right to hold a religious belief encompasses the right *not* to hold such a belief – to be an atheist, an agnostic, a sceptic or one of the “unconcerned”. He held that the same applied to political belief, and included the right “not to hold opinions” and not to be forced to enunciate beliefs that were not in fact held. No one should be forced to dissemble in order to avoid persecution, it was held.

Article 5.

30. The policing of the Royal Wedding recently (18 July) gave rise to the delivery of a mammoth judgment from the Divisional Court, in *R (Brian Hicks and Ors) v Commissioner of Police of the Metropolis* [2012] EWHC 1947 (Admin). There were four separate claims before the Court (Richards LJ, Openshaw J), each bringing challenges to the lawfulness of various police actions: stop and searches, arrests, or the obtaining of a search warrant, in connection with the marriage. The account of the police’s policies and precautions against violence, and their actions as set out in the judgment, offer a fascinating insight into aspects of that day that I cannot remember being covered on the news at all. Which of us have heard of the ‘zombie fancy dress’ picnic, some of whose participants (it was said) intended to throw maggots as confetti at the royal wedding procession (“Wedding Breakfast, with Fortnum and Mason’s maggot relish!”).
31. I hope I am not doing an injustice to the scale and complexity of these cases, and the care with which they were evidently pursued and defended, if I comment that the most obvious issues of principle raised in connection with the claims were:
 - a. The ambit of Articles 10 and 11 (freedom of assembly), in the context of threatened violence. Paragraphs 122 – 127 of the judgment analyses the Strasbourg authorities and holds that the State’s obligation to allow and indeed enable demonstrations, etc, does not require the State to ignore the risk that demonstrators may themselves provoke violence, as a response to their actions. “The likelihood that protest may lead to violence against the protestors themselves can be an entirely legitimate ground for police intervention *against the protestors* under the domestic law of breach of the peace ... and which .., is capable of operating compatibly with the Convention.” (paragraph 123, emphasis added).
 - b. The meaning of Article 5(1)(c) (“the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence ...”). The issue arose because various Claimants had been arrested, detained until the wedding (or ‘the kiss on the balcony’) was over, but not charged or brought before a court. So the issue was whether the opening words (“effected for the purpose of bringing him before the competent legal authority”) qualified only the phrase which followed immediately after it, or *also* the words “when it is reasonably considered necessary to prevent his committing an offence”. It was held, following the admissibility

decision of *Nicol and Selvanayagam v UK* (App. 32212/96) that the two limbs were distinct ones.

- c. The current status of decisions to retain DNA, fingerprints and photographs following release from detention without charge. The Court noted that in *R(GC) v Commissioner of Police of the Metropolis* [2011] UKSC 21, the SC had held that the indefinite retention of DNA and fingerprints pursuant to s64 PACE and ACPO guidelines was unlawful, being a breach of Article 8. The Supreme Court had granted a declaration only (rather than quashing the decision to retain) so as to allow Parliament time to rectify the situation. This had led to the passage of provisions in the Protection of Freedom Act 2012, but these were not yet in force. The Claimant M argued that enough time had passed for effective rectification. The same considerations applied to photographs: see *R(RMC and FJ) v Commissioner of Police of the Metropolis* [2012] EWHC 1681, where on 22 June 2012 the Divisional Court applied the logic of GC to the retention of photographs. However, the Court followed RMC in continuing to allow further time to the State to introduce solutions; declarations rather than quashing orders were granted.

32. The overall outcome of the case was that the many claims were all dismissed.

Article 6.

- 33. Article 6 was the subject of the important judgment in *R (King and Others) v Secretary of State for Justice* [2012] EWCA Civ 376, handed down by the CA on 27 March 2012. The case concerned a challenge to the procedures used to determine whether or not prisoners (both YOIs and adult offenders) were required to spend periods in segregation. The allegation was that the removal of association amounted to an interference with a ‘civil right’ within the meaning of Article 6, ECHR, and so should attract the procedural protection of that Article. It was said that the procedures for loss of segregation should be assimilated with those governing the award of extra days which (since the ECtHR judgment in *Ezeh and Connors v United Kingdom*) have involved the use of an independent adjudicator, usually a district judge, to determine the sanction.
- 34. Maurice Kay LJ, with whom Lloyd LJ agreed, held that an entitlement to association with fellow prisoners was not to be recognized as a ‘civil right’ within the meaning of Article 6. It was acknowledged that the Prison and YOI rules did contemplate that such association would be enjoyed as a ‘normal’ privilege (subject to the decisions of the Governor in accordance with the Rules). But the ECtHR caselaw did not go so far as to recognize a ‘civil right’ of association within prison, classifying decisions upon such issues as “administrative”. Maurice Kay LJ agreed. He noted [paragraph 44] the impossibility of adopting a procedure which required access to an outside, independent adjudicator when dealing with urgent issues of discipline. When Governors made decisions about segregation or discipline:-

"They do so not just in a binary mode as between themselves and an individual prisoner. They are acting in the interests of the security of the institution as a whole. Sometimes they may have to make a decision which has an immediate restricting effect on the whole or a large part of the institution – for example, the immediate "lockdown" of an entire wing on receipt of apparently credible information about a planned breakout. Such urgent matters are not susceptible to a judicialisation of the decision-making process."

35. Maurice Kay LJ also rejected an alternative formulation of the argument, which was that since the removal of association – at least over a protracted period of time, as was the case in 2 of the 3 cases before the Court – engaged Article 8, that alone meant that Article 6 governed the resolution of the dispute. *RB (Algeria) v Home Secretary* [2010] 2 AC 110 established that "the criterion for the European courts in deciding whether Article 6 is engaged is the nature of the proceedings and not the articles of the Convention which are alleged to be violated".

36. Elias LJ dissented on the issue of whether or not Article 6 was engaged, holding that it was.

37. However, the appeals were dismissed by all Lord Justices, on the basis that even if (contrary to the majority conclusion) Article 6 was engaged, its requirements were satisfied by "the internal procedures surrounding segregation decisions and their review, leading to the availability of judicial review." They reviewed the concept of "full jurisdiction", established in *Bryan v United Kingdom* and developed in cases such as *Alconbury*, noting that:

"Much depends upon the subject matter of the decision and the quality of the initial decision-making process. If there is a 'classic exercise of administrative discretion', even though determinative of civil rights and obligations, and there are a number of safeguards to ensure that the procedure is in fact both fair and impartial, the judicial review may be adequate to supply the necessary to access to a court, even if there is no jurisdiction to examine the factual merits of the case.": *R (Wright v Secretary of State for Health* [2009] 2 WLR 267, at paragraph 23, per Baroness Hale"

38. The same factors relating to the nature of the initial decision-making by prison governors were prayed in aid to support the conclusion that "this is an area calling for "professional knowledge or experience and the exercise of administrative discretion pursuant to wider policy aims". Overall, the process satisfied the requirements of Article 6. The challenges were dismissed.

Article 8 ECHR.

39. *R(T) v Chief Constable of Greater Manchester Police and Ors* [2012] EWHC 147 was a decision of Kenneth Parker J upon the legality of the CRB scheme for enhanced criminal records certificates (ECRCs). T's ECRC was issued under to the Police Act 1997 and contained details of the warning which T had been given when he was only 11 years old. T submitted that the requirement of the

Act that warnings be disclosed on ECRCs breached his right to respect for private life under Article 8, and sought a declaration of incompatibility.

40. It was accepted by the Defendants that disclosure might interfere with the right to a private life under Article 8, following the SC case of *R(L) v Commissioner of Police for the Metropolis* [2009] UKSC 3. Although information about convictions, etc, is in a sense ‘public’, the fact is that the information is stored when it would otherwise long have faded from others’ memories. “As it recedes into the past, it becomes a part of the person’s private life which must be respected.” Furthermore, it was possible for an ECRC to contain information that had never been public (cautions, allegations that were never prosecuted). In the *R(L)* case, the SC held that disclosure of such ‘information’ should be subject to a two-stage test; it needed to be potentially relevant to the decision for which the certificate had been obtained (e.g., an employment decision) and disclosure must be necessary and proportionate. However, Kenneth Parker J found, the SC had held that this two-stage process applied only to such forms of ‘information’ and not to the disclosure of criminal convictions and cautions. As a result, he found that he was constrained by binding authority to reject the challenge. It was a conclusion that he reached with reluctance; had there not been SC authority, he would have held that the absence of a ‘filtration’ system to remove (for example) the non-violent, non-sexual offence of a child who under some legal systems would be regarded as below the age of criminal responsibility, and who had subsequently committed no further crimes, was disproportionate.
41. However, in relation to a linked challenge to Orders made under the Rehabilitation of Offenders Act, he reached the conclusion that Article 8 did not import a positive duty on the part of the state to intervene in the right that (eg) employers would otherwise have, to ask questions and insist on truthful answers: this would be a ‘novel positive obligation’.
42. Permission was granted to appeal to the CA.
43. *The General Dental Council v Savery and Others* [2011] EWHC 3011 was a decision of Sales J concerning the GDC’s rights to obtain and then to circulate, to those concerned with disciplinary proceedings, the dental records of patients who had not consented to such disclosure. It was held that (a) the GDC had a statutory power to require the disclosure of such records, under s33B of the Dentists Act 1984, from any person other than the dentist under investigation; this did not require a court order; (b) it was lawful, and not in breach of either the DPA or Article 8, ECHR for the records then to be used for disciplinary proceedings. Such use was “in the interests of public safety”, for the “protection of health and morals” and “for the protection of the rights and freedoms of others”. Although the GDC should seek to alert patients to the use which it was proposed to make of their records, it was not necessary to make an application to court to obtain judicial approval, even in the absence of patient consent. In essence, it was to be left to patients to make representations, and to bring their objections to court if the representations were not effective.

44. The case of *Broadway Care Centre Limited v Caerphilly County Borough Council* [2012] EWHC 37 (Admin) raised the issue of whether judicial review can be used to challenge the termination of a contract. A care home proprietor applied for permission to seek judicial review of the defendant local authority's decision to terminate its contract to provide care for elderly dementia sufferers. It acted on the basis that neglect of residents entitled it to terminate its contracts immediately. Most of the home's residents were funded by the local authority.
45. The local authority replied, first, that it was not exercising public law functions but private ones. The Claimant argued that the decision to terminate the contract was amenable to judicial review, under s145 Health and Social Care Act 2008:
- “s145(1) A person (“P”) who provides accommodation, together with nursing or personal care, in a care home for an individual under arrangements made with P under the relevant statutory provisions [as here] is to be taken for the purposes of sub section (3)(b) of Section 6 of the Human Rights Act 1998 to be exercising a function of a public nature in doing so”.
46. But it was held by HHJ Seys-Llewellyn that s145 was aimed at the accountability of the care home to public law claim by a resident. It was a provision making it unlawful for a care home to act in a way incompatible with a Convention right, since it was a person certain of whose functions were functions of a public nature. But it did not impact on the nature of the care homes' dealings with the LA. This is plainly a difficult area, but it seems there are anomalies: compare *London & Quadrant Housing Trust v Weaver* [2009] EWCA Civ 587, where a registered social landlord seeking possession under a tenancy was said to be exercising function of a public nature, susceptible to judicial review.
47. Second, it was held that the home did not have standing to protect, or to rely on, residents' Article 8 rights. Whilst it might exceptionally, in unusual circumstances, have standing for 'domestic' public law claims in respect of its residents' public law rights, it was not a "victim" in relation to any breaches of the Article 8 rights possessed by the home's residents. An attempt by the home to rely on Article 1, Protocol 1 directly also failed. It remained open to B to continue to make use of the home, if it remained commercially viable. Further, unlike in *Jain v Trent SHA* [2009] UKHL 4, [2009] 1 A.C. 853, the local authority was not the regulatory authority and had not prohibited use as a care home. It would be novel if the simple termination of a contract was regarded as a matter engaging Protocol 1 art.1.

Community Care and Care Homes – a digression

48. *DM v Doncaster* [2011] EWHC 3652 (Admin) established that a local authority was entitled to charge for accommodation whilst the service user was detained there under the Mental Capacity Act 2005.

49. *R (KM) v Cambridgeshire Council Council* [2012] UKSC 23 is the dog that didn't bark. The Supreme Court listed this case before seven SC judges, for a reconsideration of *R v Gloucestershire County Council ex parte Barry* [1997] AC 584. That was the case in which it was established that a Council could take its own resources into account when determining what level of "presenting need" it would provide services for, when meeting obligations under s2 of the Chronically Sick and Disabled Persons Act 1970. However, in the event it transpired that Cambridge Council had not taken its resources into account when making its provision decisions for the applicant (his needs were accepted to be "critical", and resources had only been relevant to Cambridge's decision to meet "critical" and "substantial" needs, but not "moderate" or "low" needs). So the Court did not reconsider *Barry*. However, there was a useful discussion of its ratio; and also of the Council's duty to explain (give reasons) for its funding offer, and to explain when it disagrees with the assumptions or desires put forward by the service user. It endorsed the words of Maurice Kay LJ in *R. (Savva) v Kensington and Chelsea RLBC*, where he had spoken of the need to "list the required services and assumed timings ... together with the assumed hourly cost". That duty exists even if the needs are to be met by way of direct payments.

50. *R (on the application of Mavalon Care Ltd) v Pembrokeshire CC* [2011] EWHC 3371 (Admin) (6 December 2011) continued the line of cases about the setting of care home fees, and the relevance of the Laing & Buisson 'toolkit', widely adopted as the model for so doing. However, more recent cases that I am aware of are, first, *R. (on the application of Bevan & Clarke LLP) v Neath Port CBC* [2012] EWHC 236 (17 February 2012), in which the Court considered a challenge to the setting of fees. It held that, first, such a decision was amenable to judicial review as it had a 'public dimension'. The scope of the judicial review extended, in principle, to all the conventional public law grounds subject to two qualifications: (i) the court should be cautious about interfering in a process where the local authority was engaged in a contractual negotiation with providers who might wish to improve their contractual negotiating position by recourse to public law principles; and (ii) where competitive tendering for contracts with public authorities was concerned, there was a different remedial structure.

51. That case was followed by *R (South West Care Homes Ltd) v Devon County Council* [2012] EWHC 1867 (8 May 2012). Devon CC had, for the second year running, decided not to award a fees increase. The first ground was an allegation that there had been a failure to have due regard to the actual cost of care, as required by statutory guidance. It was agreed that this did not require a particular result; it was a duty to take this factor into account. The allegation was rejected on the facts. It was common ground that there was no obligation to adopt the 'toolkit'. The second ground alleged that the Defendants had failed to assess the risk that their decision would lead to a reduction in the quality of care, contrary to the Article 8 rights of the residents; but this engaged the same problems of standing / status as have been discussed in the context of *Broadway*. The claimants succeeded in their claim that there had been a failure to consult properly. The duty was established by a past practice of consultation, but there had been no invitation to engage whilst the proposals were at a formative stage. However, the claimants were refused a quashing order because of the passage of time, and the impact of relief on third parties.

Article 10, ECHR

52. The decision in *Sugar v BBC* [2012] UKSC 4 was predominantly concerned with the issue of when the BBC is a 'public authority' for the purposes of FOIA. But the Supreme Court also considered the extent to which Article 10 created a right of access to information, as opposed to merely prohibiting the State from restricting a person from receiving information which others are willing to impart to him (see *Leander v Sweden, Roche v UK*). The appellant relied on a trilogy of ECtHR cases which had apparently moved towards recognition of such a principle. However, Lord Brown disagreed:-

"Of course, every public authority has in one sense "the censorial power of an information monopoly" in respect of its own internal documents. But that consideration alone cannot give rise to a *prima facie* interference with article 10 rights whenever the disclosure of such documents is refused. Such a view would conflict squarely with the Roche approach."

53. For those with an interest in information law: the issue is likely to be revisited. Lord Brown's approach has since led the Court of Appeal to reverse the Information Rights Tribunal's decision in *Kennedy v ICO*, which concerned whether the exemption in s32 of FOIA should be 'read down' to be consistent with Article 10. The CA said Article 10 could not have that effect; but it granted permission to appeal to the Supreme Court, which is therefore likely to revisit the ground covered by Lord Brown, in greater detail.

Article 1, Protocol 1.

54. A major case in this difficult area is *R (New London College Ltd) v Secretary of State for the Home Department* [2012] EWCA Civ 51 (CA). This was a case concerning the revocation of a sponsor licence awarded to a FE college, which enabled the college to enroll students from overseas. The leading judgment was delivered by Lord Justice Richards.

55. The first issue was whether the system of sponsor licensing, under which the suspension and withdrawal decisions were taken, was unlawful, in that it was argued that the relevant requirements should have been included in rules laid before Parliament pursuant to section 3(2) of the 1971 Act and could not lawfully be contained in policy guidance outside the rules. The Court held that since the withdrawal of a licence had only an indirect effect on the grant of leave to enter or remain, s3(2) was not engaged. This was the *Pankina* issue, now potentially to be (re)considered in the light of the *Alvi* judgment.

56. A suggestion that Article 6 required that decisions be taken by a court-like body was rejected by Richards LJ: “I am not persuaded by those submissions. It must be recalled that sponsor licences do no more than confer a right to issue a CAS which will be recognised by UKBA for immigration purposes. In this context the administrative decision-making process provided for in the guidance, coupled with the availability of judicial review on conventional grounds, is in my view adequate to ensure a fair determination within the meaning of article 6.”
57. On the issue of Article 1, Protocol 1, the judge noted that “It is well established that the concept of “possessions” in A1P1 has an autonomous Convention meaning, independent of classifications in domestic law. Unfortunately it is quite difficult to determine how that concept applies in a licensing context such as that with which we are concerned in this case.” (paragraph 82). He continued by discussing the difference between *loss of goodwill* and a mere *loss of future income*. He noted that in *Denimark Limited v United Kingdom* (2000) 30 EHRR CD 144 “The Court recalls its case-law that goodwill may be an element in the valuation of a professional practice, but that future income itself is only a ‘possession’ once it has been earned, or an enforceable claim to it exists”
58. The Court went on to find, first, that a sponsor licence is plainly not itself a possession within A1P1. “A sponsor licence is not marketable or even transferable, nor is it obtained at a market price. The sale of a business having the benefit of a licence would not in substance be a transfer of the licence. The new owner would have to satisfy UKBA that the conditions for grant of a licence were met under the new ownership.“. The judgment continued:-

“95 The principal factor leading Wyn Williams J to find that the suspension and withdrawal of a sponsor licence nevertheless engaged A1P1 was the apparent parallel with the withdrawal of the liquor licence in **Tre Traktörer**. There is obvious attraction in that line of reasoning, given the undoubtedly effect on the business in each case. The judge did not grapple, however, with the question whether the adverse effect in the present case amounts to an effect on goodwill, in the sense used in the authorities, or only to a loss of future income (albeit a loss with serious economic consequences for the business). I agree with Mr Palmer that he needed to do so. The distinction is far from clear but one has to decide which side of the line the case falls, since the relevant possession is the goodwill of the business, and the suspension or withdrawal of a licence will not amount to an interference with the right to peaceful enjoyment of possessions within A1P1 unless it has an adverse effect on that goodwill.

96 Kenneth Parker J in **Nicholds** was of the view that “goodwill” in this context means the capitalised value of the business as a going concern. Mr Gill did not seek to challenge the correctness of that view. Whilst there is evidence in this case of the economic disruption caused by the suspension of the college's licence, and liable to be caused by the withdrawal of the licence, the evidence does not

deal with the goodwill of the business in the sense identified in Nicholds. Thus there is no concrete evidential basis on which to found a conclusion that the goodwill of the business has been or would be adversely affected by suspension or withdrawal of the licence. Nor, as it seems to me, can such an effect be inferred from the information available to us.”

Article 2, Protocol 1

59. *R (Hurley and Moore) v Secretary of State for Business, Innovation and Skills* [2012] EWHC 201 (Admin) was a decision of Elias LJ and King J (17 February 2012) and concerned a challenge to the government’s decision to raise tuition fees for universities to £9,000 per annum. The decision was said to be contrary to Article 2 of Protocol 1 of the ECHR, either by itself or when read with Article 14, ECHR. The second limb of challenge was that it was contrary to the public sector equality duties imposed by the Sex Discrimination Act, the Race Relations Act and the Disability Discrimination Act.
60. A2P1 secures “the right to an education”; it is well established that, whilst this does not oblige a State to provide higher education institutes (still less not to charge for them), there must be “an effective right of access” to institutions which do exist. Elias LJ accepted (paragraph 40) that ECtHR jurisprudence suggested that the levying of fees should be treated as a “restriction” on the right to education. But the argument by the Claimants that this restriction was not a proportionate means of achieving a legitimate end was rejected; given that it was permissible to charge fees for higher education, it could not be said that such charges (absent discrimination) deprived the right of its effectiveness, at least when loans were made available.
61. The argument under Article 14, that the new funding arrangements would indirectly discriminate against those from lower socio-economic groups, took the Court into an assessment of the potential effects of a key government policy. The argument depended on the Claimants demonstrating that the new funding arrangements would indirectly discriminate against those from lower socio-economic groups. That was an inference that the Court was not prepared to draw from the evidence. The evidence was not all one way; “at this stage it is all too uncertain ... In time the facts may prove [the Claimants] right, but I am not sure about that.” In any event, the policies pursued a legitimate end and had been subject to detailed review, consultation and Parliamentary scrutiny; the Court could not find the decisions were “unjustified”.
62. The Claimants had some success on the issue of whether the SoS’s public section equality duties had been properly carried out (and the decision contains a useful summary of the law on the nature of the duties: paragraphs 66 – 78). However, although compliance had not been complete, it would not be appropriate to award relief, given that the failures were only indirectly relevant to the decision under challenge.

63. Such equality impact assessments continue to be a fertile source of litigation: see *R(Essex CC) v Secretary of State for Education* [2012] EWHC 1460 (Admin) (17 May 2012). The case related to the decision of the Education Minister not to allow uncommitted funding for childcare, quality and access projects, in the form of the building of schools and nurseries, to be ‘carried forward’ into the next financial year. A consultation claim failed (there had been no past practice of consultation) and so too did an irrationality challenge. But Mitting J held that the secretary of state had not fulfilled his race and disability equality duties under the Race Relations Act 1976 s.71(1) and the Disability Discrimination Act 1995 s.49A(1) (the Equality Act 2010 had not come into force) where he had failed to consider the potential impact of his decisions. This was despite the ‘distance’ between the SoS and the actual spending of the money. The SoS was ordered to reconsider the decision to give effect to the Equality Act 2010.

Consultation

64. The case of *R (Brompton and Harefield NHS Foundation Trust) v Joint Committee Of Primary Care Trusts & Anr* [2012] EWCA Civ 472 went to the Court of Appeal this year, with a judgment handed down in April. It was a case where there was a statutory duty to consult. Paragraphs 8 – 14 of the judgment of the Court (delivered by Lady Justice Arden) contain a useful summary of the law relating to the requirements of a “fair” consultation. The greater part of the Court’s judgment is concerned with a detailed account and analysis of the facts, to which those legal principles were applied, to overturn the judgment below. But note paragraphs 97 – 93, which set out the Court’s concerns about legal challenges to consultation processes. All the arguments of the Claimant:

“..... are all subject to the same threshold objection: the act challenged was a consultation process, not the final decision of a public body. One of the functions of a consultation process is to winnow out errors in the decisionmaker’s provisional thinking. The JCPCT owes a public law duty to reconsider matters in the light of responses. True consultation is not a matter of simply “counting heads”: it is not a matter of how many people object to proposals but how soundly based their objections are.

...

In short, it is inherent in the consultation process that it is capable of being selfcorrecting. This has to be borne clearly in mind. For the various reasons already indicated, the courts should therefore avoid the danger of stepping in too quickly and impeding the natural evolution of the consultation process through the grant of public law remedies and perhaps being led into areas for the professional judgment of the decision-maker. It should, in general, do so only if there is some irretrievable flaw in the consultation process.”

65. The Court of Appeal reversed the finding of the judge below, on the issue of a legitimate expectation about how research evidence would be used in the exercise; the representation relied upon, as to its use, was not sufficiently clear and unequivocal (see paragraph 104); and,

even if that was wrong, the position was not "irretrievable". Further information could have been submitted (paragraph 108). The Court also rejected the allegation that an appearance of bias arose from the fact that two members of the Steering Group (whose role it was to advise the decision-making Panel, the Defendants) were consultants at the two hospitals which, ultimately, were put forward as the preferred centres for paediatric cardiac surgery in London.

And a topical note the Olympics

66. On 10 July 2012, Haddon-Cave J robustly dismissed a challenge to the decision to deploy missiles (a Ground Based Air Defence system) and military personnel on the roof of a residential tower block in Leytonstone for the duration of the Olympics: *Harlow Community Support Limited v Secretary of State for Defence* [2012] EWHC 1921 (Admin). He summarized the duty to consult thus:-

"A duty to consult does not arise in all circumstances. there are four main circumstances where consultation will be, or may be required. First, where there is a statutory duty to consult. Second, where there has been a promise to consult. Third, where there has been an established practice of consultation. Fourth, where, in exceptional cases, a failure to consult would lead to conspicuous unfairness. Absent these factors there will be no obligation to consult. .. The general law will be slow to require a public body to engage in consultation if there is no obligation or promise to consult."

67. On the facts of the case, there was no obligation to consult.
68. The case under Article 8 was also dismissed, following an analysis of what disruption or inconvenience would in truth be suffered by the residents, should the system be sited on the roof. Essentially, the judge accepted the MOD's case that the residents would not become a potential target for terrorist attack; they would be likely to be safer as a result of military presence in the area.

Procedure: Costs.

69. No update on judicial review would be complete without mention of cases concerning the recovery of costs. So I draw your attention to the following cases:-
70. *R(M) v Mayor and Burgesses of the London Borough of Croydon* [2012] EWCA Civ 595 (CA, 8 May 2102), which has re-defined the law on the recovery of costs following a settlement of a JR. For many years the leading case has been *R(Boxall) v Waltham Forest LBC*, which tended to suggest that, when a judicial review case was settled before a substantive hearing, the "default" position would be no order as to costs unless it was readily apparent to the judge ("plain and obvious") that the Claimant would have been successful on a full hearing. That approach has been diluted in a gradual process, starting with *R(Scott) v Hackney LBC* [2009] EWCA Civ 217, through *R(Bahta) v Secretary of State for the Home Department* [2011] EWCA Civ 895, and culminating in the re-

writing of the rules by the Master of the Rolls in the *M v LB Croydon* case. The MR assimilated judicial review cases to ‘normal’ civil litigation. If a defendant concedes a case after the issue of proceedings, and the claimant has complied with the pre-action protocol, then that claimant will generally be considered the successful party who will normally be entitled to his or her costs. Neither the fact that this result is achieved by a consent order, nor policy reasons such as encouraging public authorities to settle cases, are good reasons for depriving the successful claimant of his costs.

71. This case was further considered by the CA in *AL (Albania) v Secretary of State for the Home Department* [2012] EWCA Civ 710 (30 May 2012), which concerned statutory appeals from (in particular) the Upper Tribunal (Asylum and Immigration Chamber). The Court was concerned with those appeals in which the appellant asylum seeker is successful, either gaining remission back to the Upper Tribunal, or a grant of some status by the Secretary of State. Such appeals are not preceded by the issue of a pre-action protocol letter, and the SSHD had long been accustomed to resisting costs orders when appeals were conceded for (it would be said) “pragmatic” reasons. However, the Court of Appeal pointed out that if an appeal was allowed, that could only happen because the Consent Order assumed an error of law – otherwise the Court of Appeal would not have the power to make a quashing order or grant other relief. So the starting point was that the appellant was a “successful party” who would normally be entitled to his or her costs. Unless there are special features, such as a “clear conduct issue” on the part of the appellant, he or she will be entitled to their costs. There was no “special indulgence” for asylum and immigration cases – or, it might be added, any other appeals from other specialist tribunals.

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