# JUSTICE JOURNAL

The *JUSTICE Journal* aims to promote debate on topical issues relating to human rights and the rule of law. It focuses on JUSTICE's core areas of expertise and concern:

- human rights
- criminal justice
- equality
- EU justice and home affairs
- the rule of law
- access to justice
- the constitution

**www.justice.org.uk**

**JUSTICE – advancing access to justice, human rights and the rule of law**

JUSTICE is an independent law reform and human rights organisation. It works largely through policy-orientated research; interventions in court proceedings; education and training; briefings, lobbying and policy advice. It is the British section of the International Commission of Jurists.



JUSTICE, 59 Carter Lane, London EC4V 5AQ
Tel: +44 (0)20 7329 5100
Fax: +44 (0)20 7329 5055
E-mail: admin@justice.org.uk
www.justice.org.uk


ISSN 1743-2472

Designed by Adkins Design
Printed by Hobbs the Printers Ltd, Southampton


The paper used in this publication is procured from forests independently certified to the level of Forest Stewardship Council (FSC) principles and criteria. Chain of custody certification allows the tracing of this paper back to specific forest-management units (see www.fsc.org).

# Contents

# Editorial

## Work goes on

The editorial is the first in the *JUSTICE Journal* not penned by our recently departed director, Roger Smith. The issue was, however, prepared with the benefit of his usual guidance as one of his last tasks as our head of staff. After 11 years of service, we celebrated Roger's work with us with his excellent final annual Tom Sargant lecture (published herein) and we wished him well as he moved on to the next stage of his career He leaves this Journal as ever, as a broad reflection of JUSTICE's work over the past months. As a departure from the usual format, we include two papers from the range of workshops held at the Annual JUSTICE/Sweet & Maxwell Human Rights Conference, on human rights issues in equality and immigration, two practice areas with ever evolving case law relevant to practitioners and policy makers alike. New to the Journal are Clare Hayes and Yasmin Husain, two practitioners who spent short research internships with JUSTICE during the course of this year, reviewing recent developments in respective areas of JUSTICE's historic work: miscarriages of justice and restorative justice.

We await the anticipated arrival of our new director, Andrea Coomber, in early 2013. However, as ever, work goes on at JUSTICE. Despite the commitment of the coalition government to a lighter parliamentary workload and to fewer challenges to civil liberties in legislation, a significant number of bills and draft bills in this legislative session have placed demands on JUSTICE's time, including the Draft Communications Data Bill (also known as 'the snoopers' charter'), the Draft Enhanced Terrorism Prevention and Investigation Measures Bill (introducing Enhanced 'TPIMS', much like control orders by another name) and the controversial Justice and Security Bill.

This latter initiative – also dubbed 'the secret courts' Bill – has been left in the hands of the former Secretary of State for Justice and Lord Chancellor, Ken Clarke MP. Critics have suggested that his well-trodden liberal and legal credentials will be essential to ensure the bill's progress beyond its early stages. His successor may have uttered an unsurprising sigh of relief on being informed that the Minister without Portfolio was keeping this one on his 'to-do' list.

The controversial proposals are in three parts. The first part revisits the role of the Intelligence and Security Committee and other mechanisms for the oversight of the work of the Security and Intelligence Services. The third part of the bill contains largely inconsequential provisions. The second part of the bill is the most contentious. It would introduce into ordinary civil proceedings closed

material procedures (CMP) – such as those used in the Special Immigration Appeals Commission – where one party and his or her legal advisers are excluded from proceedings while a judge considers closed material. Security vetted special advocates act to represent the interests of the excluded party, but they are unable to take effective instructions after they have had access to the secret material considered in closed session. JUSTICE has highlighted the failings of the CMP process over many years, in third party interventions, in its briefings, in its major report, *Secret Evidence* (2007) and in the pages of this Journal. However, the introduction of CMP into the ordinary civil justice system would be a stepchange which, in our view, could fundamentally undermine the common law principles of open, adversarial and equal justice.

These legislative proposals follow the government's failed attempt in *Al-Rawi* to persuade the Supreme Court to accept inherent jurisdiction to order CMP in civil proceedings. In that case, the court concluded that the principles of open justice would require compelling reasons to justify the incorporation of CMP into the ordinary judicial arsenal. It was not persuaded by the government's arguments and concluded that, in any event, a shift of this magnitude was better suited to a decision by Parliament. Lord Kerr succinctly summarised the challenge posed by CMP in practice, thus:

> *To be truly valuable, evidence must be capable of withstanding challenge. I go further. Evidence which has been insulated from challenge may positively mislead.*

The green paper which was published as a trail for the bill was patently a big ask; by ministerial certification any sensitive material would be subject to CMP when in the public interest, in any civil proceedings, including inquests. Concessions made in the bill were trumpeted by the Liberal Democrat front bench as a success for the coalition, including the exclusion of inquests from scope and the limitation of the bill to 'national security' issues. Yet, the bill would see judicial hands bound to order CMP on ministerial application and the production of any evidence of risk of harm to national security. With no judicial discretion to consider the competing public interest in open justice, or any requirement to consider public interest immunity, the bill would represent the nail in the coffin for the carefully crafted *Wiley* balance in public interest immunity.

Both the influential House of Lords Constitution Committee and the Joint Committee on Human Rights (JCHR) criticised the bill and the government's failure to provide compelling evidence for reform. The JCHR was particularly critical of the inability of ministers to provide an indication of the number and type of cases thought to be unlikely to be tried without CMP. The government's case appears to hinge on the argument that cases such as the Guantanamo

Bay litigation are incapable of defence under the PII regime, and that they lead unnecessarily to settlement. This argument crumbles in the knowledge that those cases were settled before a PII exercise was completed, and notably, while the government's case in *Al-Rawi* was pending. The residual argument then becomes that some cases may be struck out as untriable in the event that PII prevents an effective defence. However, this argument is based on scant authority in *Carnduff v Rock*, a sole case where strike out was deemed possible. Notably, the government has never sought the admittedly unattractive option of strike out in any national security case to date, including the Guantanamo Bay cases. After months of scrutiny, and detailed correspondence with government, the JCHR concluded:

> *It is unsatisfactory that the Government at the time of agreeing our Report has still not been able to provide us with the data we had requested on the number of civil damages claims pending in which sensitive national security information is centrally relevant. Pending receipt of a response to our latest attempt to clarify the evidential basis of the Government's case for the provisions in reference to evidence that there exist a significant and growing number of civil cases in which a CMP is 'essential' in the sense that the issues cannot be determined at all without a CMP. In our view this test of necessity is the appropriate test to apply to the evidence, not the lower standard of whether there are cases in which it would be 'preferable' to have CMP as a procedural option.*

In light of the scope of the bill and the seriousness of the issues which may be involved in cases against the government, it faces opposition from all benches with concern expressed not only about its scope and the necessity for reform. Little consideration has been given to how these exceptional procedures will slot comfortably into the ordinary to and fro of civil litigation. It is difficult to imagine how prospects of success will be estimated in cases likely to be liable to CMP, let alone assessments made for the purposes of legal aid claims, Part 36 offers to settle, or on appeals. The Law Society and the Bar Council have both spoken out.

The implications for the credibility of our justice system and our judiciary, who may be undermined by the perception that they are involved in an inherently unfair system of adjudication, are clear. These concerns appear all the more serious when it appears that the bill may offer the government a significant litigation advantage in cases alleging the involvement of UK intelligence and security services in serious human rights abuses. Two of the most high-profile cases likely to be considered in CMP are *Belhadj* and *Al-Saadi*. Both these cases involve allegations by members of the new Libyan government that they and their families were rendered to torture under Gaddafi's regime, with the alleged

involvement and support of the UK. These cases are based upon, in part, intelligence discovered in Libya and delivered to Human Rights Watch in the aftermath of the civil war. The claimants' cases – including evidence against senior officials in the UK – have been trailed heavily in the national press. It takes no great leap of imagination to imagine the intense press speculation that would be involved in second-guessing the case to be considered by the sitting judge behind the veil of CMP. If these cases are as 'saturated' with national security material as the government appears to suggest, then it is highly possible that the claimants could win or lose their case without reason or understanding why. If the case is lost on the basis of a CMP consideration of closed intelligence evidence, speculation will remain rife that the security and intelligence services have somehow been involved in a whitewash. A whitewash which would – as a likely result of CMP – splash squarely onto the long-earned and well-deserved credibility of our judiciary.

JUSTICE considers that the bill is unfair, unnecessary and unjustified, a criticism which is increasingly echoed both in the popular press and from each of the benches of the House of Lords. As it continues its passage, ministers will be pressed to walk away from these disastrous proposals, confirming the important role of the judiciary under PII in striking a fair balance between the competing public interests in open justice and transparency and national security. Without important discretion, the potential for injustice and unfairness will be written into our civil justice system in a way which could damage it irrevocably.

*The Justice and Security Bill is expected to complete its passage through the House of Lords on 28 November 2012. It is expected to start its progress in the House of Commons before the end of the year. More information about JUSTICE's work on the bill can be found on www.justice.org.uk*

***Angela Patrick is director of human rights policy at JUSTICE***

# After the Act: what future for legal aid?

**Roger Smith**

*This paper is the text of the JUSTICE Tom Sargant memorial annual lecture 2012, given at Freshfields Bruckhaus Deringer LLP, London on Tuesday 16 October 2012.*

Last week, Lord McNally told a Legal Aid Practitioners' Group conference that 'it is time to move on from LASPO'. He was referring to the Legal Aid, Sentencing and Prevention of Offenders Act 2012. His reference to LASPO was shorthand for the package of cuts to scope, remuneration and eligibility largely enshrined in, but not limited to, LASPO itself. LASPO's cuts to applicants' scope and eligibility come into force in April next year: cuts to lawyers' remuneration have begun and there is more to follow. Lord McNally is fed up with people still whingeing about cuts that are, as far as ministers are concerned, done and dusted.

This lecture is an extended riposte to Lord McNally. I want to begin with a general point that extends beyond legal aid. The coalition's cuts have, understandably, been presented and understood as about the saving of money. However, for legal aid as elsewhere, cuts of the magnitude projected pose a challenge for government way beyond the financial. They are so deep that they open up fundamental questions of purpose. Take the example of local authorities. Councils in the vanguard of response to the cuts, like Barnet, are priding themselves on the degree to which they outsource their functions. But, beyond a point, shouldn't they just be replaced by commissioning outposts of the central government departments? The same sort of fundamental questions arise about our foreign policy and armed services. Sooner or later, ministers are going to have to lead us through fundamental issues about our democracy, role and very identity.

This speech is spurred by Lord McNally but its text comes from Lord Mackay, by far the best Lord Chancellor of my time. He said in 1991: 'We have gone about as far as we can without radical change.'[1]

My thesis is that the LASPO cuts require radical change, probably beyond that contemplated by Lord Mackay. They slice so hard into the heart of legal aid that we are forced to reconceptualise the objective of policy. They are a repudiation of the bipartisan development of legal aid that has extended through my working lifetime. All major political parties and all governments operated on the premise that the poor were entitled to, and would progressively receive,

legal services available to the rich. The expansion began with the 'green form' universal advice scheme introduced by Lord Hailsham, a Conservative Lord Chancellor, and implemented in the year that I was admitted, 1973; legal aid expanded in the criminal courts in the 1970s through both Heath and Wilson governments; statutory duty solicitor schemes in magistrates' courts and police stations were introduced in 1986 when Mrs Thatcher was in her prime; private practitioners took on public and social welfare law in the 80s and 90s through the reigns of Mrs Thatcher and Tony Blair. Now, this is coming to a sharp stop and into sharper reverse.

There is no rabbit to pull out of a hat which will protect the provision of legal services to the poor at levels that we have had. These cuts provide a massive challenge. The most effective response may be to advance a process not a product. We have no option but to take up Lord Mackay's challenge and open a discussion of the radical change that these cuts demand. That is why I disagree with Lord McNally. We cannot move on in the way that he wants – in part, because the government has not fully appreciated what it has done.

The LASPO cuts essentially reduce legal aid policy to one aim: the delivery of the lowest level of service that will comply with our minimum obligations under the European Convention on Human Rights at the least possible cost. The European Convention is a marvellous document but it amounts to a necessary but not sufficient element of our constitutional framework. Such a reductionist approach is surely unacceptable. Lord McNally, as the legal aid minister, has much more work to do in order to make sense of his package of cuts.

JUSTICE, like many organisations represented in this room, lobbied against both the cuts and the bill. Well, we lost. The bill went through almost unscathed – minor amendments to cuts, a token statement of independence in relation to the Director of Legal Aid Casework, little more. The cost of legal aid is reducing by a quarter over the next three years. And no minister of any party is going to turn the clock back. In the haunting words of Bruce Springsteen: 'These jobs are going, boys and they ain't coming back.'[2]

There are admitted political dangers in accepting the position that I am advocating. I want to recognise them upfront. An alternative way forward would be stubbornly to refuse to participate in any further discussion of policy other than defending what we have managed to keep and demanding the return of what we have lost. We could justify this coherently enough on the basis that government's only concern is financial and so is ours. In such an argument, we give no succour. Any suggestions for a different set of policies, we would just assume, will be open to abuse – savings will be grabbed, balancing expenditure ignored.

On the other hand, such a scorched earth defence surrenders any attempt to alter the terms of the debate and to engage at the level of principle as well as on the pragmatic. We surely need a set of policies that we can advance to any political party that wants to devise a coherent justice strategy. We have to find an approach which is coherent and comprehensible to a wider public than lawyers; meets fundamental constitutional requirements and is deliverable within something like the existing budget. If we cannot find a ringing defence of legal aid expenditure, then the future lies before us – decline by an unending series of salami slices.

Let me spoil the suspense and announce the six steps of my argument which I will then draw out in more detail:

1. The current model of seeing legal aid as stand-alone provision is unsustainable.

2. We need to reconceive the objective of our justice policy as a whole. The objective and ideal should be that we deliver equal justice to all.

3. Equal justice requires an access to justice approach with legal aid reconceived as only one of a set of linked policies and provision – including reform of substantive law, methods of adjudication, the provision of non-legal assistance.

4. Such an access to justice approach builds up from the availability of information and ends with the funding of lawyers – not the other way round.

5. We need to maximise the benefit of the information revolution through which we are currently going and foster innovation.

6. To deliver equal justice, we need one government department and one budget.

## Legal aid

Legal aid is a comparatively small area of government expenditure but still significant enough. As the coalition government came into office, its cost was one third of one per cent of total government expenditure but that amounted to around £2.1bn a year – tempting enough to offer savings worth having. It was not always so big and has grown very fast over the last 20 years. In 1992-3, it reached a net figure of £1bn for the first time. Ten years later it had doubled to £2bn. After a scare about its inexorable rise in the 90s, expenditure has now been contained and flat-lined for the last few years.

The majority of legal aid expenditure is on the provision of defence services to suspects and defendants – around £1.2bn. Civil costs £900m, two-thirds of which goes to family cases. These are all official figures, somewhat blurred at the edges and, for example, include VAT. Three major groups of clients benefit from legal aid in its current form:

- suspects and criminal defendants, overwhelmingly male. Their entitlement will continue;

- those involved in family disputes – the majority of whom are women. In private cases, scope will be reduced to those facing domestic violence;

- clients troubled by the kinds of problems that particularly affect those unable to afford lawyers – what we have called 'social welfare' problems and North Americans, more graphically, 'poverty law' – of which the four largest areas are housing (around 170,000 cases for which payment was claimed in 2008/9), welfare benefits (137,000), debt (132,000) and immigration/asylum (around 90,000).[3] These are the cases where scope will be removed or decimated.

Personal injury claimants were once a large fourth group: they were largely moved onto conditional fees some time ago.

One common characteristic of legal aid civil clients is clear – they are very poor and getting poorer. Means testing now affects criminal defendants. Financial eligibility for civil legal aid has dropped like a stone from the late 1970s. In 1979-80, 77 per cent of all households were eligible. By 1993-4, eligibility dropped for the first time under 50 per cent. In 2007, before the recession impacted, the Ministry of Justice estimated eligibility at 29 per cent of the population. Its current estimate is 36 per cent. By comparison, around 50 per cent of the population receive income from at least one social security benefit.[4] The ministry's impact statement on its cuts programme stated:

> *legal aid recipients are among the most disadvantaged in society, reflecting both the nature of the problems they face as well as the eligibility rules of legal aid.*[5]

The number of people actually assisted by legal aid is impossible to identify because the statistics cover cases not people and, in any event, have become obsessed with information about lawyers and not their clients. A total of just under 3 million 'acts of assistance' are given each year – slightly more in crime than in civil. We might reasonably estimate – given the number of people with multiple problems – that this is the equivalent of assistance to around

2.5 million people. On this basis, the cuts will remove about 20 per cent of recipients, all with incomes at or around minimum means-tested benefit levels, from eligibility.

The determinants and causes of legal aid expenditure have caused long-running disputes between the legal profession and the government. Ministers have consistently blamed lawyers for inflating costs. One of the most eloquent was Jack Straw. Announcing earlier cuts, he said:

> *In the early 1970s there were just over 2,500 practising barristers and about 32,000 solicitors, compared with 15,000 and 115,000 respectively today. This is equal to one lawyer for every 400 people. We are in grave danger of becoming overlawyered and underrepresented.*[6]

He was making a dangerous equation of lawyers and legal aid, excluding any reference to clients. Ken Clarke did the same thing. It shows why we have to look for a justification for legal aid which is more fundamental. Lawyers have an obvious material interest in legal aid, just as doctors do in NHS spending. It does not mean that their clients and patients have fictitious needs.

There are undoubtedly some extraneous factors to the rise of costs. This can be seen most clearly in relation to crime. Tougher policies over the last 20 years have the consequences that you would expect on expenditure. A Ministry of Justice briefing document gives a battery of statistics that demonstrate the issue. The number of offences 'brought to justice' in the six years to 2003 doubled. The number of committals from magistrates for Crown Court sentencing has risen by almost 40 per cent just in the two years from 2008 to 2010.[7]

Politicians often lament that England and Wales spend more than other countries on legal aid but ministry figures show the position is somewhat more complicated than is often portrayed. In 2006, on government figures, legal aid in England and Wales cost £37 per head of population; courts and judges £19; and prosecution costs were £10 per head. That makes a total of £66 per head of the population. By contrast, the Netherlands spends a thrifty £14 per head on legal aid but spends much more than the UK on judges, as you would expect for a civil law country, £32, and £21 on prosecution costs. That gives a total of £67 per head for the total provision of services. So, on these figures, the Dutch who appear to spend less than half of what we do on legal aid, actually spend more on the combined total of judges, courts, legal aid and prosecution. There are countless methodological difficulties in such comparisons. For example, the Ministry of Justice reveals that continental countries appear to pay their judges somewhat less than we do. For example, on its figures, the French appear to be able to get a judge at the highest level for around £70,000 a year and the miserly

Germans for £58,068. The comparable domestic rate was £156,958.[8] If other countries paid UK rates to their judges, then there would be even less difference in the comparable overall cost of the justice systems.

Nevertheless, it is undoubtedly true that we have had one of the best legal aid systems in the world. We can, however, no longer say that it is actually the best. Research in which JUSTICE was involved suggested that of eight European countries studied in depth, Finland actually had the most comprehensive provision in terms of eligibility and scope. An estimated 80 per cent of the Finnish population is eligible for legal aid – more than double ours.[9] There may well be other countries, probably in Scandinavia, that are as good.

It is true that no other country has a legal profession for which legal aid is so integrated into the overall pattern of the delivery of legal services and so important as a source of income. Again, there are methodological difficulties in being precise about figures, but in 2000, the last year in which the Law Society published information, it calculated that gross legal aid payments amounted to just under 15 per cent of turnover of all solicitors. This was probably the equivalent of slightly less net, around 12 per cent when allowance is made for VAT and disbursements. The percentage has probably diminished slightly since then and might now be around 10 per cent – still significant. The Bar has traditionally been more reticent though it did once release figures. We know that legal aid amounted to 27 per cent of its total income in 1989-90.[10] As late as the 1990s, not only was the absolute amount earned by solicitors from legal aid rising, so too was legal aid's proportion of total turnover. There is no reason to think that the Bar would be any different.

The legal profession has known very well what was coming. As early as 1993, the Bar could see the inevitable: it warned that 'it is likely that the Bar will decline in size'.[11] Since then, it is a sobering thought that, on Bar Council figures, the number of practising barristers has actually more than doubled from 7,735 to 15,387. The legal professions might well feel that they have done rather better than they feared. It is pretty clear that the current model of legal aid as the funder of a significant part of both branches of the legal profession is no longer sustainable.

Identification of the role of legal aid in funding the profession is particularly important because the former Lord Chancellor made it the centrepiece of this justification for cuts. He told the 'Today' programme: 'We're not taking legal aid from women and children. We're taking legal aid from lawyers.'[12] This is a little disingenuous. The government's original analysis of the cuts package was that total savings would be between £395m and £440m a year. The cuts were presumably deliberately balanced so that clients took the brunt of two-thirds of

the cuts in reduced scope and practitioners one-third in lowered remuneration – the proportions are too clear to be accidental:

- The largest single slice of savings comes from restricting the scope of the scheme. This will save between £251m and £286m annually. Assuming mean figures for savings between the two estimated extremes, clients take an expected hit of 64 per cent of reduced expenditure.

- Furthermore, clients were expected to contribute a further 3.4 per cent to the cuts through increased contributions and supplementary slices of contribution, the detail of which has been dropped but probably without effect on the size of the cut.

- The largest single source of cut is in relation to private family work which will account for about 60 per cent of the savings from scope reductions. The other major source is areas of social welfare law unprotected by the Human Rights Act.

The ministry itself has quantified the number of potential clients who are losers. They will be about half a million, of whom around 90 per cent will lose entitlement and 10 per cent will face increased contributions. Since the cuts overwhelming affect family and social welfare law, unsurprisingly, the ministry accepts that they will 'have a disproportionate impact on women' (57 per cent to 43 per cent), on black and minority ethnic clients (27 per cent); and that 'we cannot rule out that there may be a disproportionate impact' on those who have a disability (20 per cent). Almost two-thirds of the projected savings on scope will come from family law. A further fifth will come from social welfare law. The imposition of a requirement to go through a 'telephone gateway' to get advice on civil matters instead of receiving direct 'face to face'[13] advice will save another £2m.

Ken Clarke was, of course, right in one sense: the legal profession loses income from both reduced business and reduced payments for work that is retained. Lawyers will receive £150m less in remuneration for work they will still undertake. The overall percentage loss of all work for solicitors is unclear but the ministry estimates that barristers undertaking civil work will lose 42 per cent of their income and those doing criminal work 12 per cent. This will significantly depress both the numbers and incomes of those remaining in the field. Around a third of barristers undertake legally aided criminal work with a slightly higher proportion undertaking legally aided civil work. So, this will have a widespread impact.

The government has made little more than a ritual attempt to justify its actions in anything other than the need for savings. This is what has made them so difficult to oppose. Ken Clarke made a fist at arguing that lawyers were being removed where they were superfluous. He told the BBC:

> *I propose to introduce a more targeted civil and family scheme which will discourage people from resorting to lawyers whenever they face a problem, and instead encourage them to consider more suitable methods of dispute resolution.*[14]

However, there was no supporting research to suggest that people were using lawyers irresponsibly or what would constitute more suitable methods of dispute resolution.

Behind the cuts lies no overarching vision – just a search for cash. Indeed, the cuts were formulated in a way which gave no recognition for previous virtue.

## The effect of the cuts

There must be some considerable doubt as to whether the LASPO cuts will meet the savings predicted and, therefore, we might have to prepare for worse to come. The criminal legal aid budget is sensitive to overall criminal justice policy and to waves of criminality. An increase in imprisonment would be likely to lead to greater defence costs. An increase in domestic violence will scupper the family law savings but is almost unavoidable. Reported domestic violence will rocket as lawyers seize on what is required to make a successful legal aid application and clients have reduced incentive not to pursue allegations of violence by former partners. The cuts to social welfare law are surely too complicated to be sustainable. The LASPO schedule that deals with the scope of civil legal advice stretches over 27 pages. It sets out lists of included and excluded types of case, replacing a simple provision originally in the Legal Aid and Assistance Act 1972 which authorised legal advice to eligible persons on 'any matter of English law'.

The extent to which ministers have recognised the likelihood of a shortfall is unclear. The smart thing would have been to announce cuts of 23 per cent but privately say 16 per cent. However, if this is not the plan (and it probably isn't) then legal aid faces a further spiral downwards on a further series of cuts to scope and eligibility as ministers scramble to provide the Treasury with what they have promised. The President of the London Criminal Courts Solicitors' Association recently reported:

> *The 'product quality' that is being delivered to the consumers of the legal profession's services (our clients) is without doubt being affected. It is foolish not to recognise this.*[15]

This is an obvious problem and we need to take steps to guard against it.

The current state of our legal aid in this jurisdiction looks particularly gloomy if you consider what has happened in other comparable jurisdictions. Back in the 1970s, when I had just qualified, we looked to the US for inspiration. In a little known irony of history, President Nixon appointed a Legal Services Corporation that included in its membership the young Hillary Rodham Clinton. It led the world in looking at legal need and comparing delivery systems. But, later presidents were more opposed to civil legal services than Nixon. In particular, Reagan had opposed all federal funding for civil legal aid while Governor of California. He went for a zero budget to annihilate the LSC and, though he did not get it, he crippled subsequent developments. The annual federal budget for civil legal services in 2012 was $348m or a paltry £215m, albeit that there are some supplementary sources of income for US schemes. The consequences of current low funding in the US sound depressingly familiar. A recent report stated:

> *LSC-funded programs reduced attorneys by 12.5 percent, paralegals by 17.4 percent and administrative staff by 12.7 percent. Programs closed 29 offices in 2012, many of them in rural areas where it can be particularly difficult for individuals to find alternative assistance. As a result, the LSC-funded civil legal aid program served 81,000 fewer low-income Americans.*[16]

Decline in the US has been followed by Australia and Canada as they have slashed their provision and ended with what few of us would consider satisfactory levels of scope, eligibility or quality.

## Equal justice under law

To make any kind of sense of the current level of funding, we need radically to reconceive how we see legal aid. To do this, we need to forget the interests of the legal profession. They are secondary. It is harsh, but out must go any consideration of the value of legal aid in protecting the Bar, young lawyers, High Street solicitors, black and minority ethnic practitioners. If these are in danger – and they are – then it is up to the professions, not government, to remove any unwarranted discrimination and the market to identify the winners and the losers. The preservation of these minorities cannot be any kind of justification for government spending. This, we have to justify in the interests of the ultimate recipients of legal aid, not the intermediary providers.

Legal aid needs a coherent policy objective. And it needs to be something more than an anodyne version of the widely used one of providing 'access to justice'. This phrase has become totally debased. Ken Clarke asserted it as 'the hallmark of a civilised society' even as he implemented his cuts package.[17] Back in 1995, the Lord Chancellor's Department even opened a green paper on legal aid with the following in its first paragraph: 'The aim of the government is to improve access to justice.'[18]

The problem is meaning. The phrase has worthy origins. In a legal aid context, it was advanced by two academics in the 1970s at the European University in Florence, Professors Cappelletti and Garth, as the unifying theme of a dizzying world study. They developed the idea as a way of taking policy beyond the simple funding of more lawyers which they recognised would only go so far. Access to justice was 'an attempt to attack access barriers in a more articulate and comprehensive manner': it 'tries to attack … barriers comprehensively, questioning the full array of institutions, procedures and persons that characterize our judicial systems'. [19]

Cappelletti and Garth's formulation was a major advance. However, access to justice, as originally conceived, described a process or an approach. It certainly does not describe a goal because it avoids the obvious question: 'how much access is enough?' As the Canadian academic, Professor Rod Macdonald plaintively put it, 'Before access to justice there was just justice'.[20] He was making an important point. 'Access' is in danger of becoming a limitation on the attainment of the fundamental goal of justice. The ideal has to be the delivery of justice: not just access to a chance of it.

The basic policy goal has surely to be that anyone in society, rich or poor, is entitled to expect that any dispute is settled on its own intrinsic legal merit and not by the extraneous issue of the different resources of the parties. We can call this equal justice under law. This would be particularly apposite because it is, in fact, the phrase engraved on the architrave of the US Supreme Court building. It is a worthy ideal, though the US is certainly not a good example of its achievement. But it can still be our goal and provide the test by which we judge our effectiveness in meeting it. To quote a voice from within the US Supreme Court, in the case of *Griffin v Illinois* 'there can be no equal justice where the kind of trial a man gets depends on the amount of money he has'.[21]

The emphasis on equal justice avoids the implication that the poor might be satisfied with a little justice while the rich and powerful get a lot: access is important not in itself but because of the outcome that it facilitates. It is not, for example, satisfactory if former husbands are represented in matrimonial disputes while their former wives routinely are not – a predictable result of

one of the major cuts in the current package. If we use the concept of equal justice under the law, then at least we get a standard by which we can judge our performance.

## A holistic access to justice approach

A true access to justice approach will tax ministers to the limit and beyond. This is why Lord McNally cannot be allowed to move on too quickly. It involves the kind of holistic approach to policy which is much praised but little followed. Our task is to maximise what we can get for the total amount of money that we spend on justice, including but not limited to, legal aid. As a very practical matter, this may be impossible under our current governmental arrangements. We need one department and one budget. The Ministry of Justice should pass prisons back to the Home Office where they belong. The Lord Chancellor should be firmly concerned with developing justice policy and managing the interface between the government and the judiciary. He or she should take the kind of personal responsibility for developing legal aid policy which, frankly, we have not seen in any of the Lord Chancellors since Lord Mackay.

There are a number of issues for such a Lord Chancellor to address. These are six outside the field of legal aid as it would be traditionally considered.

The first is the impact of substantive law. Politicians will be reluctant, but they need to simplify the law if it can save costs of prosecution or defence. For example, they should begin to take the Law Commission seriously. The commission has called in recent years for reform of the specialised defences to murder. Politicians have been running scared of these because they don't want to seem soft on crime but, in truth, murder's defences are so different from those to other crimes only because of the impact of a death penalty long since abolished. In *Murder, Manslaughter and Infanticide* in 2006, the commission recommended a major reform of murder into two degrees and manslaughter. Its recommendations were only partially implemented.

To consideration of the substantive law can be added, as a second example, rationalisation of how disputes are adjudicated. From an access to justice point of view, it is the combined cost of legal aid and the rest of the justice system that counts. So, we need also to look at adjudication. We have just completed a major judicialisation of the tribunal structure. But, we may have been mistaken. An ombudsman model might be cheaper and more effective. Witness the success of the financial ombudsman as compared with the courts. The flexibility and positive approach of the ombudsman system opens up interesting possibilities in terms of costs.

My third example is sentencing. As Chris Grayling may be about to find out, the Ministry of Justice budget can no longer afford to back draconian sentencing. Out have already gone Jack Straw's grandiose plans for enormous Titan prisons. In future, all Home and Justice Secretaries have to be honest about the cost of brave new criminal justice legislation of the kind favoured by Tony Blair. We need community punishments to work – for financial reasons as much as anything else.

Fourth, we may need to look at the elimination of discretion in judicial decision making. The Law Commission has just issued a further paper on the financial arrangements following divorce. As the commission explains:

> *under the current law, the meaning of needs is unclear and there is confusion about the extent to which one spouse should be required to meet the other's needs, and for how long.*[22]

Here is an example of how the elimination of discretion and ensuing simplification could lower costs.

Fifth, the criminal justice budget is dominated by very high cost cases which amount to about half of the total budget. They need particular examination to see whether the cost can be reduced. It may be the greater use of strict offences for various types of white collar fraud.

Sixth, where litigation is appropriate, we may want to look at offsetting costs by rigorous implementation of a 'polluter pays' principle against institutional parties. Why should, for example, the government not stand to pay tribunal costs when it loses a social security or immigration case? Market principles are powerful things: let us use them to improve standards – if only at the rate of a nominal £50 per case. We might get spectacular results. At present, the ministry usually does not bother even to turn up to social security hearings because there is no financial advantage in doing so: if it loses, it can always appeal. A financial penalty for loss might concentrate its mind on the merits of the case. The transfer of the budget for social security tribunals to what is now the Ministry of Justice leaves the former sponsoring department with no economic rationale for avoiding appeals and, indeed, every incentive to be slapdash in its decision making. Imposition of costs against the department might be some compensation for the widespread removal of legal advice on social security matters introduced by LASPO. We might want even to revisit the old chestnut of whether the defence and prosecution of many serious fraud trials might be transformed if re-branded as failures of City regulation and funded through funds raised by regulatory fees.

In summary, we need to unleash innovation by way of new ways of looking at solving old problems by placing them within a wider context and keeping a firm eye on two governing principles:

- We have a fixed budget for our whole justice system but we can shift money within headings.

- Our task is to deliver equal justice for rich and poor. We have a wider goal than a reduced budget.

## Legal costs

Any policy for legal aid has to address the question of cost of legal services. Here, the government has only one idea – which it inherited from its Labour predecessor. It wants to restrict the number of providers; eliminate client choice of lawyer; institute compulsory competitive tendering for blocks of cases; and then drive down prices through this version of a market mechanism. There have been plans to do this with solicitors for some years. They will be extended to barristers.

However, we are beginning to appreciate, through cases like G4S and the West Coast main line, that competitive tendering for government services is not quite the panacea that it has been portrayed. The issues of quality and delivery are equally important. It is tempting for ministers to see competitive tendering as an invisible hand that will deliver savings and deliver them from the opprobrium of discriminating judgements. However, there are myriad problems. If government wishes to go down the road of tendering – and myself, I would not – then we must put greater emphasis on quality. Instead of providers competing on price, let government set the price directly and have the practitioners compete on what they will provide for that level of fee. That will kill the dream of unexpected savings from low ball bids but it would allow government to plan and to spend what it decides is necessary and practitioners to compete not for the price that they can give government but the service that they can deliver to clients. It may also mean that we avoid the situation that has occurred in the States where, in the face of rock bottom rates of pay, professional organisations like the American Bar Association seek to specify maximum caseload limits to prevent the exploitation of the lawyers employed to deliver services. So, let providers compete on how much supervision, investigation, client interviews, specialist support they promise to fund and undertake, not how far they can eliminate their competitors by underbidding and then clean up when they have an effective monopoly.

## The internet

Above all, we need to build up our provision on a clean slate – and from the bottom up. We should not begin with the lawyer: we should begin with the person who has a problem. Logically, consideration of how people might get equal justice begins with how they might know what their position is, not how they get a lawyer. We need to look at basic sources of information. We are in the midst of an information revolution. How can we use the internet? Much existing internet advice is, frankly, little more than digital leaflets but there are the beginnings of attempts to use the internet's possibilities – for example, Co-op Legal Services and the work of firms like Epoch in combining document assembly programmes with telephone or video communication. How could the state inspire a good level of interactive information and advice using new technology? Can the public and the private work together in some way on the challenge of providing basic knowledge?

The government proposes a commercially run telephone 'hot line' as the gateway for advice, seemingly staffed by non-professionally trained call centre workers linked to a commercial organisation selling legal services. Why is there no consideration of the provision of something like Legal Direct to replicate NHS Direct? If we cannot afford face to face services why can't we put on the net a diagnostic alternative that provides everyone with a basic service? Perhaps we need a competitive innovation fund to kick-start provision.

Some people will not use the net. We may be moving to the provision of government services in a way which is digital by default. But the digital divide exists and some people will need face to face advice. We should hold to the 1972 ideal of advice for all and we could build upward on net-based advice. Labour rebranded civil legal aid as the community legal service but, frankly, this was never given a coherent meaning. It is even worse now that civil legal aid is a particularly incoherent mix of the rump of family and social welfare law. We need to think whether we could make more sense of things. JUSTICE costs about one third of a million a year. You could get three organisations like JUSTICE for one million – three lawyers, three support staff. For a mere £10m you could get 30. You could start to consider how for a tiny transfer within the budget you could have 29 law centre type operations around the country in areas of the greatest deprivation in terms of use of the internet plus a national centre of excellence. You begin to have an interesting and innovative pilot to run in which you could retain the spirit of the NGO sector and the commitment to a universal advice provision within an overall legal aid scheme.

The internet has all sorts of opportunities and, of course, all sorts of limitations. But there must be massive possibilities. The Dutch are developing on-line

mediation in family matters – could this work here? The government has wound up the highly respected Legal Services Research Centre which kept tabs on international research but it would be worth collaborating with other countries developing net-based systems of advice, mediation and adjudication. The Dutch government funds a project at Tilberg University to encourage innovation in methods of solving legal problems. It has a web presence at www.innovatingjustice.com. It announces:

> *Across the world, courts, legal systems and legal professionals are challenged to deliver more justice. We nurture promising innovations with knowledge, networks and tools.*

This is just the sort of initiative with which the UK government should be establishing links and with which it should be exchanging ideas. A regrettable consequence of the abolition of the Legal Services Commission is that is now probably more unlikely.

The Dutch have focused on-line mediation in divorce. This is the kind of development that the UK needs to follow. People going through divorce will not have an easier time because of the withdrawal of legal aid: they will still need support and they should not be abandoned. The state should acknowledge responsibility for their plight even if its policy is to encourage commercial sources to develop cheap on-line assistance that can be offered to all.

To make any progress, we need some certainty about resources. We need a deal. Legal aid will take its hit but we must know that we can work within the residual amounts allocated to the justice system as a whole. The cut has been a quarter. That is enormous. An expectation that more can be squeezed out is unrealistic. We will avoid a lot of defensive trench warfare to protect what provision we have if governments could explicitly accept that. Government needs to allow us time to absorb this level of retrenchment.

This is undoubtedly dangerous territory. Those of us concerned with the provision of justice need to tread with care. The reorganisation of the justice system required by the cuts has to be negotiated in a way that cannot be abused by governments who just want savings. The justice system has just taken a cut of a quarter: now let us deal with the consequences in a sensible and rational way. We need to articulate an overall coherent policy based on seeing the cost of the justice system as an integrated whole in which we can juggle the number and cost of judges and courts with that of legal aid and information systems. We need to avoid government sweeping up one part of the package and rejecting the counterbalance. As Robert Frost said: 'May no fate willfully misunderstand me, And half grant what I wish.'[23]

## Conclusion

Cuts of the level that we are now experiencing mean that we have to reconceptualise public services. We may be poorer but we must be smarter. And we should remember the fundamental purpose of a society's legal system: in the words of Judge Learned Hand it is 'the tolerable accommodation of the conflicting interests of society'.[24] If we start excluding the poor and disadvantaged from that accommodation in practice, society fragments. Let us end, as I began, with Lord McNally. No. It is not time to move on from LASPO. It is time to deal with its full implications. And that requires the kind of radical change foreseen by Lord Mackay.

***Roger Smith OBE is the former director of JUSTICE***

**Notes**

1 Lord Mackay, Speech, 4 October 1991.
2 Bruce Springsteen, 'My Hometown', from the album 'Born in the USA', 1984.
3 *Legal Aid Review, Map of Legal Aid Spend*, Legal Services Commission/Ministry of Justice, April 2010 pp29-31.
4 *A Survey of the UK Benefit System*, Institute of Fiscal Studies 2010, p3.
5 *Legal Aid Reform in England and Wales: cumulative legal aid reform proposals*, Ministry of Justice, November 2010, para 38.
6 Jack Straw, *Daily Mail* 23 March 2010.
7 See footnote 3. Disclosed as the result of an FOI request and has not been published as such.
8 LSC/Ministry of Justice paper – see footnote 3.
9 *Effective Criminal Defence in Europe*, Cape, Namadze, Smith and Spronken, Intersentia 2010, p560.
10 *Strategies for the Future*, Bar Council Strategy Group, 1990, p18.
11 *The Work of the Young Bar*, Joint Working Party of the Young Barristers Committee and Legal Services Committee of the Bar, 1993, p7.
12 As reported in the *Daily Telegraph*, 5 March 2012.
13 *Cumulative Impact: Equalities Impact Assessment*, Ministry of Justice, 2011.
14 www.bbc.co.uk/news/uk-11741289, 15 November 2010.
15 *The London Advocate*, LCSSA, September 2012, p4.
16 Alan Houseman, Centre for Law and Social Policy http://www.clasp.org/issues?type=civil_legal_assistance
17 *Guardian,* 6 October 2011.
18 *Legal Aid – Targeting Need*, Lord Chancellor's Department HMSO, 1995, Para 1.1.
19 *Access to Justice: Volume II*, M Cappelletti and B Garth, Sitjhoff and Noordhof, 1978, p124.
20 R Macdonald 'Access to justice and law reform', *The Windsor Yearbook of Access to Justice: Tenth Anniversary Volume*, University of Windsor, 1990, p326.
21 *Griffin v Illinois*, 351 U.S. 12 (1956).
22 http://lawcommission.justice.gov.uk/news/1961.htm
23 Robert Frost, 'Birches' from *The Poetry of Robert Frost*, Henry Holt & Co, 1969.
24 Quoted by Philip Hamburger in 'The Great Judge' *Life Magazine*, 4 November 1946.

# Equality: where next?

**Caspar Glyn QC and Robin Allen QC**

The Chinese curse 'May you live in interesting times' is an apposite one for equalities in the next couple of years. We examine the future of equalities from an assessment of current policy, the effect of that policy and the coalition government's proposals and then examine black letter law developments over the last year. The changes are happening now: for instance the day before this paper was written the Commission was discussing Ms Reding's proposals for boards to have a minimum of 40 per cent of women on them.

We consider

a. The coalition government's equality agenda.

b. The role of the Equality and Human Rights Commission.

c. Changes to the age discrimination legislation.

d. Recent cases in relation to

   i. age;

   ii. disability; and

   iii. equal pay.

e. Non-implementation and proposed amendments to the Equality Act 2010.

## The coalition government's equality strategy

The cynic might think that this will be the shortest part of the paper or might think of the Emperor and his clothes, or the lack of them. The Tories have been playing to their gallery; equalities are expensive (the cost to business of £300,000 is adequate justification for the repeal of the third party harassment provisions), frankly should just be labelled as 'red tape' (hence 'The Red Tape Challenge') and are a drain on the recovery; to say nothing of their effect, of course, on the Big Society.

There are the primary prohibitions (dual discrimination) and duties (socio-economic) that will not be brought into force; hardly surprising when Theresa

May described the latter as 'ridiculous' and 'Harman's law'. Perhaps, more importantly, are the lack of prospects of further secondary legislation to give teeth to the public sector equality duty and to equal pay audits.

However, this has not prevented the publication of the coalition's equalities strategy.[1] Intriguingly, the strategy challenges the role of law in promoting equality; subject it says to the law of diminishing returns. It moves on, to suggest a move away from using a 'strand-based' approach, which merely puts people in different categories. The strategy suggests that we are a nation of 62 million individuals. The aim is to devolve power, render inequality transparent, support social action and embed equality.

The strategy then sets out the method by measures such as funding health visitors, early years education, tax cuts for the poorly paid, encouraging voluntary pay reporting to address unequal pay, giving girls more career advice, reforming access to work for the disabled, devolving powers to local communities and bringing together experts to work out a non-legislative way of tackling low levels of body confidence. The language is positive, equalities focused and inspiring. However, it is for the reader to assess at a time of falling government expenditure whether these hopes will achieve the aim. Or are they just a justification for blunting the legal rights and obligations which some would suggest are the real engines of change although they are expensive? What place, for instance, is there for the 'inspire a generation' through the Olympic games in an equality strategy? Or is that part of an inspired plan to change the perception of disability such as may have occurred from the Paralympics?

In May 2012, the Government Equalities Office published its review[2] and, for example, it referred to:

a. its reforms of Sure Start, a £125 million fund for helping to raise the attainment of disadvantaged pupils and starting to procure early intervention foundation including the pupil premium;

b. being on target to have women making up 25 per cent of the membership of boards of the FTSE 100; and

c. flexibility to older workers by allowing them to continue working beyond the default retirement age.

## The Equality Act

The coalition has consulted[3] and intends to repeal Equality Act provisions as to

a. third party harassment (on the justification of cost as set out above) although EU law will require some similar provision;

b. recommendations (although only one has been made in relation to a case involving the Lycée Français in South Kensington); and

c. questionnaires, although these can play a crucial role to identify the decision taker and can lead to settlement. The unintended consequence may be more expensive applications to tribunals for such information.

Further, of course, it is known that the dual discrimination provisions will not be brought into force.

## Equal pay

Equal pay is an ugly sister in human rights law. It is boring, complex and involves lots of figures. Arguably, however, it addresses one of the single most important causes of inequality in Britain: the gender pay gap. We see this as present in two ways; first the continuing underpayment for those sectors where women dominate but also, more fundamental, we will suggest later in this paper, the fact that employers will offer and can offer women less pay for the same work.

S78 EA 2010 is dead. The coalition's response is the 'Think, Act, Report' system. This is voluntary. The proposals will

> *encourage a new voluntary approach to gender equality reporting available to all private and voluntary sector organisations, but particularly those with 150 or more employees*.[4]

Employers will join because of the reputational benefits and because research has shown that companies with diverse boards achieve higher returns.

In June 2012, the government published its response to the modern workplaces consultation proposals on equal pay audits.[5] In July 2012, the IDS published detailed research[6] and the government has indicated[7] that it will consult further but intends to allow tribunals to impose pay audits on employers against whom actual findings have been made where there has been discrimination on grounds of gender in respect of pay, whether contractual or not (ss70/71 blur the old contractual distinction under the Equal Pay Act and Sex Discrimination

Act). The employer can avoid an audit by showing that it has a transparent pay practice or that it would not be useful or where it has carried out an audit in the last three years. Micro businesses with fewer than nine employees are exempt. There is further consultation to come on the details.

Perhaps of most concern to the equalities practitioner is the stated desire of the government to review the effectiveness of the public sector equality duty. It has made a real difference to the jurisprudence on equalities and any watering down or repeal of its provisions will be a step backwards in driving an equalities agenda forwards.

## Enforcement

Lawyers can love the law too much. We can trap ourselves by discussions of abstract concepts that will only affect the margins. Perhaps the greatest single impact of the government's equalities agenda will be its changes in the enforcement area. What do rights matter if they are too expensive or too complex to enforce?

The changes are threefold:

a. The funding and role of the Equality and Human Rights Commission;

b. Legal aid and equalities;

c. Tribunal fees.

No doubt the affluent, working, white middle class male will be able to continue to enforce his rights but the disabled, the socially excluded and those not in paid work who have the greatest need of equalities enforcement risk being excluded.

## The Equality and Human Rights Commission

Baroness Onora O'Neill of Bengarve, who was appointed chair of the EHRC, faces a tough challenge as the EHRC faces a period of unprecedented change. To the EHRC alone accrue specific powers to take action directed at enforcement of the Equality Act. A properly funded EHRC is, then, central to a properly working Equality Act and to the future of equalities.

The EHRC's business plan for 2011-12[8] showed that its work had been reduced by about a third. It has to have a leaner focus on fewer, but the higher impact type of, activities. Inevitably there will be less money to fund enforcement and interventions in cases which otherwise would not be taken to appeal.

If this were not enough, the government has finished a consultation[9] as to changes which it intends to make to the EHRC's powers and duties. The coalition sees the new and slimmer organisation as an independent equality regulator and national human rights institution. The proposal is to repeal the s3 general duty (apparently 'it creates an unrealistic expectation about what an equality regulator and national human rights institution can achieve') and amend s8 of the Act so that certain core equality functions are made central to its function.

Accordingly, the EHRC's helpline and its grants programme ended on 31 March 2012. A proposal was made that a new service should be commissioned so as to provide general information and advice for citizens and establish an alternative funding stream to support more effectively the voluntary and community sectors.

Further proposals in respect of the EHRC include a statutory business plan to be laid in front of Parliament so that it can be scrutinised transparently and sanctions can be applied. The consultation paper also made proposals to clarify the commission's relationship to government and strengthen further its governance and systems to provide greater transparency, accountability and value for money. The approach can be described as not the most collaborative for it is proposed that the secretary of state has the explicit power to impose a financial penalty where the EHRC could be shown to have misspent taxpayers' money.

The EHRC has not taken these proposals lying down.[10] It has argued that its 'A' status as a national human rights institution under the United Nations system would be threatened, as the reforms put at risk the EHRC's ability to comply with the Paris principles (such as the principle of adequate funding, and not being subject to financial control so as to affect independence).

The response to the proposals confirmed the repeal of ss3, 10 and 19 Equality Act 2006: this will affect the way in which the EHRC will exercise its powers. Funding for the grant programme has stopped and there is no replacement for it. Instead, funding will be provided by the government to provide 'practical help and support to programmes which support individuals'. Accordingly, the good relations duty disappears and the ending of the grant funding that provided for regional Racial Equality Councils is likely to impact on support for ethnic minority communities. Further, we know that the helpline is to be replaced by a new Equality Advisory and Support Service, which went live at the beginning of the month. The power to provide conciliation services will disappear.

However,

a. the equality duties in s8 will be retained;

b. the human rights duties in s9 will remain;

c. the statutory requirement to lay an annual business plan before Parliament and provide in terms for the secretary of state to impose financial sanctions will not be introduced. The EHRC's concerns were heeded. A new framework document[11] has been agreed which is designed to introduce tighter financial controls and increase its transparency to the public and to Parliament as to the way in which it operates. The sword of Damocles has been averted but a new one has been hung over the EHRC's head by the promise that, should sufficient progress not be made, further reform will follow, which may mean that functions/responsibilities are separated out or allocated elsewhere.

In any event, the EHRC will be a very different body. It will shrink from some 420 staff to no less than 150 but no more than 180. Some of the reductions are attributable to the changes in respect of the helpline and also the ending of the grants programme. However, the reduction in staff is, nevertheless, steep and represents an organisation that simply will not be capable of having the broad reach and effect that it used to have. Enforcement action and support for individual complaints will, of course, fall.

## Legal aid

On 1 May 2012, the Legal Aid Sentencing and Punishment of Offenders Act 2012 received royal assent. The scope changes to legal aid affecting employment are due to be brought into force on 1 April 2013. Part 1 of Schedule 1 places breach of the Equality Act as being in scope for legal aid. Part 2 of the schedule removes any services for personal injury (a frequent effect of discrimination) and then Part 3 generally removes advocacy from the scope of any Equality Act in tribunals but does extend it to cases before the Employment Appeal Tribunal.

The double whammy of cuts to legal aid at the same time as the grants to law centres are being slashed does two things. It makes it less likely that those who are discriminated against will take action and, secondly, even if they do take action, it makes it less likely that they will succeed.

## Employment Tribunal fees

From summer 2013, there will be pay as you go tribunal fees. They are predicated on ACAS being an effective conciliator of disputes. Many practitioners have good reason to doubt that ACAS has sufficient resources to discharge its part

of the plan. In a discrimination claim there will be an issue fee of £250 and a hearing fee (also to be paid by the claimant) to be paid prior to setting down of £950. There will be a fee on counterclaims of £160. There will be no fee for written reasons, as the government decided that one was entitled to be told why one had lost or won. A review of a default judgment will cost £100, an application to dismiss following settlement will cost £60 and an application to review a discrimination claim will cost £350. There is a power to order the unsuccessful party to reimburse fees. Judicial mediation will cost £600 per day. The government will adopt the fee remission system used in the courts system in general and apply it to the tribunal. Appeals will cost £400 to issue and £1,200 to progress to a hearing.

We look forward to Article 4 and, potentially, Article 14 challenges in this area.

## Equality directives

Commentators have noted that the reduced funding may pose the question as to whether the UK is complying with the equality directives. The race and gender directives, after all, require member states to designate a body for the promotion of equal treatment of all persons against discrimination because of their racial or ethnic origin and gender. The obligation extends to providing bodies which provide independent assistance to those who suffer discrimination in pursuing their complaints. Has the government gone so far in its reduced funding that the EHRC can no longer meet its obligations?

Further, the UK must, of course, comply with the principle of effectiveness. This means that it must provide for the introduction of measures necessary to enable victims to pursue their claims by judicial process which are effective in achieving that aim. The rights must be capable of effective reliance before national courts by those who are concerned with them. The principle of effectiveness requires a guarantee of real and effective judicial protection. Each of the directives contains its own effectiveness provisions and a failure to discharge the duties therein gives rise to an action in the domestic courts and a complaint to the European Commission.

Further, of course, member states have a duty to ensure that the rules of procedure laid down by domestic law for the exercise of EU rights should be no less favourable than those governing similar domestic actions.

The perfect storm of withdrawal of legal aid, the reduced funding of law centres, and the introduction of fees will lead, we predict, to arguments over the coming year as to whether the UK is compliant with its treaty obligations and, of course, with Article 6 of Schedule 1 of the Human Rights Act 1998.

We would suggest that there remains some very helpful European jurisprudence for those who wish to overcome the changes to funding and/or fees. In *DEB v Germany* Case C-279/09, the CJEU considered the principle of effectiveness in the context of Article 3(1) of Directive 2003/8/EC, which provides for appropriate legal aid in order to ensure effective access to justice in respect of cross-border disputes. DEB wanted to access German law to challenge its access to gas networks but could not pay the fees to start its case or for a lawyer but did not qualify for legal aid. The CJEU held that

> *The principle of effective judicial protection, as enshrined in Article 47 of the Charter of Fundamental Rights of the European Union, must be interpreted as meaning that it is not impossible for legal persons to rely on that principle and that aid granted pursuant to that principle may cover, inter alia, dispensation from advance payment of the costs of proceedings and/or the assistance of a lawyer***.**

However, the court held that it was for the national court to ascertain whether the conditions undermine the core of that right and whether there is a reasonable relationship of proportionality of the means and the legitimate aim. The court should have regard to

a. The subject matter;

b. Whether there was a reasonable prospect of success;

c. The importance of what is at stake;

d. The complexity of the law and procedure;

e. The applicant's capacity to represent himself;

f. The costs of the proceedings and or the fees;

g. The form of the legal person;

h. Whether the legal person is profit/non-profit;

i. The financial capacity to raise funds.

The protocol to the Charter[12] adopted at the Lisbon Treaty does not give the UK an opt-out as many mistakenly believe. It does preclude courts from finding that laws in the UK are inconsistent with the Charter and that Title IV does not create justiciable rights. This is most clearly seen from the appeal in *R (Saeedi) v*

*Secretary of State for the Home Department,*[13] which went to the Court of Appeal, from whence it was referred to the CJEU. The secretary of state did not seek to support the finding in the Court of Appeal that 'the Charter cannot be directly relied on as against the UK, although it is an indirect influence as an aid to interpretation'. The court accepted in principle that the Charter can be relied upon against the United Kingdom. The purpose of the Charter protocol was not to prevent the Charter from applying to the United Kingdom but to explain its effect. In any event, the *DEB* analysis could be advanced in a discrimination case without recourse necessarily to Article 47 of the Charter as the relevant equality directives provide for their own principles of effectiveness.

In addition, trades unions are likely to have to take on a bigger role in enforcing rights. It will also make the international and regional human rights and other mechanisms yet more important, such as the Convention on Rights of Persons with Disabilities, the Committee on the Elimination of Racial Discrimination and other such treaties as the Convention on Eliminating Discrimination against Women. These organisations allow submissions from NGOs pursuant to their reporting procedures and they may lead to emphasis on inadequate domestic enforcement schemes.

On 12 September 2012, the European Parliament adopted a Directive for minimum standards on the rights, support and protection of victims of crime in the EU. The directive seeks to promote the right to non-discrimination, equality of gender treatment and the rights of persons with disabilities. Victims are given a right to receive treatment tailored to their needs in a non-discriminatory manner. There are some positive duties as to information and assessment of protection needs and to address specific groups, such as those suffering from trafficking, sexual violence, relationship violence or hate crimes.

The EU continues to drive the equality debate, as the Commission is debating the 40 per cent quota of women for all boards, whereas the government proposes a 25 per cent quota only for FTSE 100 companies.

## Age equality

The first and perhaps the most important change to the EA is that from 1 October 2012 age discrimination in relation to the provision of goods, facilities and services will be outlawed. It should be remembered that there is no EU genesis for these provisions and the government was under no external obligation to introduce these changes.

The new changes are being brought in by the Equality Act 2010 (Commencement No 9) Order 2012 No 1569[14] and the Equality Act 2010 (Age Exceptions) Order 2012 No 2466 ('Age Exceptions Order').[15] The Government Equalities Office

published guidance on 3 August 2012 ('Guidance') in order to assist individuals and organisations to understand the implications of the change to the existing law.[16]

The new laws do not give universal rights. They do not apply to Northern Ireland, which is undertaking its own consultation on how it should give similar protections.[17] Only those over 18 years of age are afforded protection.[18] As explained by the Guidance, this means that organisations can continue to operate 'no children' hotels and holidays. However, service providers should proceed with some caution as treating the under-18s more favourably might lead to litigation by older age groups.

Service providers are defined as persons concerned with the provision of services, goods or facilities to the public or a section of the public, regardless of whether or not a payment is provided and regardless of whether or not the relevant persons are exercising a public function.[19] It follows that a wide range of activities will fall within the scope of s29, from the provision of medical treatment by the NHS to the sale of financial products by private banks.

In broad terms, the EA 2010 prohibits service providers from:[20]

a. Direct[21] or indirect[22] discrimination against a person because of age by withholding a service or in respect of the terms on which a service is provided, the termination of the service or subjecting that person to any other detriment;

b. Harassing a person because of age who requires the service or uses the service;[23] and

c. Victimising a person because of age by withholding the service or in respect of the terms on which a service is provided, the termination of the service or subjecting that person to any other detriment.[24]

The scope of indirect discrimination in the context of age discrimination is not altogether obvious. However, the new Guidance offers a useful example, suggesting that indirect age discrimination would arise where an optician restricts eligibility to payment by instalments to those in work, thereby placing pensioners at a disadvantage.[25] A further common scenario will be the provision of special deals or discounts to students. As they are more likely to belong to a younger age group, this might well give rise to potential claims of indirect age discrimination by older groups.

The EA 2010 also renders it unlawful to provide a service either in a different way or in an inferior way because of a person's age.[26] An example provided by the new Guidance is where a salesperson in a computer store serves an older customer less courteously by making jokes or perhaps offensive comments on the assumption that the customer is less knowledgeable about technology because of his or her age.

Importantly, where an employer organises for a third party to provide a service only to the employer's employees, the third party will be a 'service provider' and the employees will be classed as a 'section of the public' so as to engage s29 EA 2010.[27] The employer itself would not be classed as a service provider but any discriminatory activities might fall under Part 5 of the EA 2010 which governs the employment relationship. One common scenario caught within this section would be the provision of IT services or occupational health services by an external organisation.

A private club or association will not fall under s29 EA 2010 but ss100-102 and s107 EA 2010 contain similar provisions in respect of access, membership, termination and guests in cases where the association has at least 25 members.

There is a long list of exceptions to s29 EA 2010 both in the Act itself and the Age Exceptions Order. The areas which are likely to be most relevant to equalities lawyers are financial products, concessions, holidays, age verification, sports, charities, schools and positive action.

However, service providers will still be able to defend allegations of age discrimination falling outside of this list of exceptions, provided that they can justify the discriminatory treatment pursuant to s13 and s19 EA 2012. The scope of this defence remains somewhat unclear even after *Seldon v Clarkson Wright and Jakes*,[28] ('*Seldon*') and *Homer v Chief Constable of West Yorkshire Police*[29] ('*Homer*'). These cases are discussed more generally below.

The case law must be expected to develop over the next months and years. Importantly, it can be anticipated that cost will frequently be cited as the basis for a defence whether because there is a budgetary limitation or because an alternative provision is alleged to be disproportionately expensive.

Although it is easy to quibble about the extent to which this protection will actually change much, the coalition deserves some real praise for bringing these measures into effect. Perhaps they were aware that 2012 is the 'European Year of Active Ageing and Solidarity between Generations'.[30] Moreover, the Madrid International Plan of Action on Ageing (MIPAA)[31] is undergoing a ten-year review, while at the global level the UN Open-ended Working Group on Ageing[32]

has been working to identify gaps in the protection of older people's rights under existing human rights law and the need for an international instrument to fill these gaps.

The area which has fewest exceptions is in relation to health and social care. Romney and Masters in their excellent piece in the *Law Society Gazette* have said that they consider that this is one area where there will be significant litigation.[33] As the government acknowledged during the consultation process, evidence suggests that elderly patients can receive poor treatment. Moreover, in an age of austerity difficult funding decisions will inevitably need to be made which may impact directly or indirectly on older patients.

The NHS has already taken preliminary steps aimed at avoiding discrimination claims; for example, the NHS Commissions Board (NHSCB) Authority published an equality analysis at the beginning of 2012.[34] However, in some areas of the country great work has been undertaken to help health and social care providers to audit their practices and to develop good non-age discriminatory practice. So there are templates that can be used to make age equality in this area a reality.[35]

It seems inevitable that there will have to be more guidance given in this area and that government (at every level) will be challenged to explain rules that have either a direct or indirect age impact.

The area in which there are most exceptions is, perhaps unsurprisingly, financial services. The principle of non-discrimination because of age does not apply to (i) the provision of insurance; or (ii) a related financial service; or (iii) a service relating to membership of a pension scheme; or (iv) benefits under a personal pension scheme if the provision is in furtherance of arrangements made by an employer for the service provider to provide the service to the employer's employees and other persons as a consequence of employment.[36] Similarly, it will not apply to the insurance business in relation to existing insurance policies as of 1 October 2012.[37]

More surprisingly, it will not apply to the provision of those financial services that include a service of a banking, credit, insurance, personal pensions, investment or payment nature. This proved to be one of the major grounds of contention in the consultation process. However, a risk assessment based on the age of a (potential) customer will only be exempted from the EA 2010 in so far as it is carried out by reference to information which is both 'relevant' to the assessment of the risk and from a source which it would be 'reasonable' to rely on.[38]

## Justifying direct and indirect discrimination

The Supreme Court has already had to consider the issue of justification for discrimination in two cases this year. One is of particular importance in the field of age equality and the other, though an age case, is significant for the reminder it gives of the rigour that must be brought to the process of assessing whether there is a justification for an act of prima facie indirect discrimination. The two cases are *Seldon* and *Homer*.

The facts of the case of *Seldon* are now relatively well known. Mr Seldon was a partner in the respondent firm of solicitors. He was compulsorily retired in accordance with the terms of the partnership deed after he reached the age of 65. He brought a claim of unlawful direct age discrimination. The Employment Tribunal found that he had suffered less favourable treatment as a consequence of his age but that that treatment was justified. The tribunal held that the respondent firm had established that the relevant provisions of the partnership deed had three legitimate aims:

(1) Ensuring associates were given the opportunity of partnership after a reasonable period – identified, together with (2) below, in short form, as 'dead men's shoes'.

(2) Facilitating the planning of the partnership and workforce across individual departments by having a realistic long-term expectation as to when vacancies would arise.

(3) Limiting the need to expel partners by way of performance management, thus contributing to the congenial and supportive culture in the firm – identified in short as 'collegiality'.

Mr Seldon appealed to the EAT,[39] which upheld the Employment Tribunal's decision, save in relation to the third aim of 'collegiality'. It held that the respondent firm was not entitled to form the view that the aim justified fixing the age at 65 and remitted the matter to the same tribunal for further consideration.

Mr Seldon then appealed unsuccessfully to the Court of Appeal.[40] In particular, the Court of Appeal held that there is a distinction between justification of national legislation that either renders lawful or unlawful the actions of an employer or a firm and those actions themselves as contemplated by the legislation.

The Employment Equality (Age) Regulations 2006 (the Age Regulations) came into force on 1 October 2006. They were the means by which the United Kingdom transposed into UK law the requirements of Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation (the Framework Employment Equality Directive).

This was implemented in the UK by reg 3(1) of the Age Regulations (and now s19 Equality Act 2010), which provides that direct age discrimination may be justified if it is shown to be a proportionate means of achieving a legitimate aim.

The key point above all else is that the Supreme Court decided that the approach to justification of direct age discrimination is significantly different to justification of indirect discrimination. In particular, direct age discrimination, such as mandatory retirement, may only be justified if the relevant treatment or provision seeks to achieve a legitimate aim of a public interest nature related to employment policy, the labour market and vocational training, the legitimacy of which member states must establish rather than individual employers. Neither cost reduction nor improving competitiveness are legitimate aims for individual employers for this purpose.

The Supreme Court also held that if it is justified to have a general rule, then the existence of that rule will usually justify the treatment which results from it without the need to establish that it is justified to apply the rule to a particular individual. Finally, the judgments addressed the difficult issue of when it is permissible to rely on an ex post facto justification.

The first point has some potentially surprising consequences. Firstly, it means that employers seeking to justify direct age discrimination need to be able to see how their decision aligns with the public interest in areas where decisions might be seen as age discriminatory. This is not, however, quite so difficult as it might seem, since the Supreme Court did show that there was quite a wide range of such relevant public policy interests. The second point shows that employers may rely on rules to provide a justification, though they will not always succeed if they do. The final point shows that it is not at all straightforward to rely on ex post facto justification.

### *Justifying direct and indirect age discrimination is not the same task*

The Supreme Court held that the correct approach to justification of direct age discrimination cannot be identical to that applicable to justification of indirect discrimination. The Age Regulations and s13(2) Equality Act 2010 must be read accordingly.

Direct age discrimination may only be justified if it seeks to achieve a legitimate aim of a public interest nature, such as one related to employment policy, the labour market and vocational training. It is for member states, rather than individual employers, to establish the legitimacy of such social policy objectives. The evolving case law of the Court of Justice had demonstrated that a distinction must be drawn between those types of social policy objectives and purely individual reasons that are specific to the situation of a particular employer, such as cost reduction or improving competitiveness, which would not be legitimate.

The Supreme Court considered that Parliament had chosen to give employers and partnerships the flexibility to choose which objectives to pursue, provided always that (i) those objectives can count as legitimate objectives of a public interest nature within the meaning of the directive; (ii) are consistent with the social policy aims of the state; and (iii) the means used to achieve the objective are proportionate, that is both appropriate to the aim and reasonably necessary to achieve it.

In assessing the approach to justification it was necessary to recall that age is different to other protected characteristics: it is not 'binary' in nature but is a continuum which changes over time and to which we are all subject. This means that younger people will eventually benefit from a provision which favours older employees, such as an incremental pay scale; and older employees will already have benefited from a provision which favours younger people, such as a mandatory retirement age.

Until comparatively recently, differentiating on the basis of age was considered obviously relevant for the purpose of termination of employment. The Supreme Court has held that age may be a relevant consideration for many more purposes than is so with the other protected characteristics.

### *The two kinds of aims identified by the CJEU*

The Supreme Court noted that the CJEU/ECJ had identified two different kinds of legitimate objectives in the context of direct age discrimination. The first may be described as intergenerational fairness, which may mean a variety of things depending on the particular circumstances of the employment concerned. It can mean facilitating access to employment for young people; enabling older people to remain in the workforce; sharing limited opportunities to work in a particular profession fairly between the generations; promoting diversity and the interchange of ideas between younger and older workers.

The second kind of legitimate objective may be described as dignity, which has been put as avoiding the need to dismiss older workers on the grounds of

incapacity or underperformance, thus preserving their dignity and avoiding humiliation and the need for costly and divisive disputes about capacity or underperformance. The Court of Justice has held that the avoidance of unseemly debates about capacity is capable of being a legitimate aim.

### *The approach to justification and ex post facto justification*

The Supreme Court held that once the relevant legitimate aim had been established, it was necessary to establish whether that was, in fact, the aim being pursued by the measure in question. While the aim had to be the actual objective pursued, it was not necessary that the aim had either been articulated or even realised at the time: it could to this limited extent be an ex post facto rationalisation.

It would also be necessary to examine whether the aim identified was legitimate in the particular circumstances of the employment concerned, and the means chosen must have been both appropriate and necessary. Improving the recruitment of young people, in order to achieve a balanced and diverse workforce, was in principle a legitimate aim, but if there was in fact no problem in recruiting the young and the problem was in retaining the older and more experienced workers then it might not be a legitimate aim for the business concerned. Avoiding the need for performance management might be a legitimate aim, but if in fact the business already had sophisticated management measures in place, it might not be legitimate to avoid them for only one section of the workforce.

The means chosen also have to be carefully scrutinised in the context of the particular business concerned in order to see whether they do meet the relevant objective and there are not other, less discriminatory, measures which would do so. It is one thing to say that the aim is to avoid the need for performance management procedures. It is another to say that a mandatory retirement age of 65 is appropriate and necessary to achieving this end.

### *Rules and exceptions*

If it is justified to have a general rule, then the existence of that rule would usually justify the treatment which results from it without the need to establish that it is justified to apply the rule to a particular individual. In the particular context of intergenerational fairness, it was relevant that, at an earlier stage in his life, a partner or employee might well have benefited from a rule which had obliged his seniors to retire at a particular age. Nor could it be entirely irrelevant in the present case that the rule in question had been renegotiated comparatively recently between partners. It was true that the partners did not then appreciate that the forthcoming Age Regulations would apply to them,

but it was some indication that at the time they thought that it was fair to have such a rule.

However, there is a distinction between justifying the application of the rule to a particular individual, which in many cases would negate the purpose of having a rule, and justifying the rule in the particular circumstances of the business. All businesses would now have to give careful consideration to what, if any, mandatory retirement rules can be justified.

In *Homer*, the Supreme Court deals with a point that had surprised the Court of Appeal on the indirect age discriminatory effect of policies that work themselves out over time.

*Homer* was heard back to back with *Seldon* and judgment was given at the same time. The facts were simple in one sense. Mr Homer had been working perfectly satisfactorily for the police service doing his job at the highest level when a point was reached at which the police service decided to add a new pay level that could only be accessed by those who had a law degree. Mr Homer was quite willing to do the degree but there was insufficient time to complete the degree before he was compulsorily retired[41] so he complained that he had suffered unlawful and unjustified direct age discrimination.

The Court of Appeal had held that he did not suffer prima facie discrimination However the Supreme Court was quite clear that it was, indeed, prima facie discriminatory.

The Supreme Court held that the law of indirect discrimination is an attempt to level the playing field in circumstances where certain protected characteristics are more likely to be associated with particular disadvantages, by subjecting to scrutiny requirements which look neutral on their face but in reality work to the comparative disadvantage of people with a particular protected characteristic. A requirement which works to the comparative disadvantage of a person approaching compulsory retirement age is indirectly discriminatory on grounds of age.

The Supreme Court added that it was inappropriate to conclude, as the Employment Appeal Tribunal and Court of Appeal had done, that what put the claimant at a disadvantage was not his age but his impending retirement. That argument involved taking the particular disadvantage suffered by members of a particular age group for a reason related to their age and equating it with a similar disadvantage suffered by others for a different reason, unrelated to their age. If that were translated into other contexts it would have alarming consequences for the law of discrimination generally. For example, a requirement that

employees must have a beard puts women at a particular disadvantage because very few of them are able to grow a beard.

The argument accepted in the EAT and Court of Appeal would leave sex out of the account in that analysis and would lead to the conclusion that it was the inability to grow a beard which put women at a particular disadvantage, so that they must be compared with other people who, for whatever reason, are unable to grow a beard.

The current formulation of indirect discrimination set out in the Equality Act 2010, which was intended to do away with the complexities involved in statistical comparisons, was not intended to ignore the fact that certain protected characteristics are more likely to be associated with particular disadvantages. In many respects this was an application of the approach taken by the Court of Appeal some years earlier in *London Underground Ltd v Edwards (No 2)*.[42]

The Supreme Court did, however, send the case back to the Employment Tribunal because it was not clear that the tribunal had dealt with the issue of justification adequately. The ruling of the Supreme Court on this issue is a timely reminder of the rigorousness of the test for justification in ordinary indirect discrimination cases.

The Supreme Court held that the range of aims which can justify indirect discrimination on any ground is wider than the aims which can, in the case of age discrimination, justify direct discrimination. It is not limited to the social policy or other objectives derived from Articles 6(1), 4(1) and 2(5) of the Framework Employment Equality Directive, but can encompass a real need on the part of the employer's business.

Although reg 3 referred only to a 'proportionate means of achieving a legitimate aim', this had to be read in light of the directive that it implemented.

The Supreme Court recalled explicitly that the terms 'appropriate', 'necessary' and 'proportionate' are not to be considered as being equally interchangeable. To be proportionate, a measure has to be both an appropriate means of achieving the relevant legitimate aim and reasonably necessary in order to do so. A measure may be appropriate to achieving the aim but go further than is reasonably necessary in order to do so and, thus, be disproportionate.

## Cost plus justifications

Beyond *Seldon* there have been some developments in the approaches to cost based justifications. No case, sadly, has completely addressed the approach to cost as a basis for the justification for an act of discrimination. Cost can arise

in at least two different ways. It can be argued that it is legitimate to work to a budget. An example is *HM Land Registry v Benson*.[43] In that case, it was argued that maintaining the budget for the sum available to pay to volunteers for redundancy was the legitimate aim. However, in *O'Brien v MOJ,*[44] the CJEU stated that budgetary considerations could not justify discrimination.[45]

It can also be argued that an alternative approach to dealing with an issue is too expensive and, therefore, not reasonably appropriate. An example of this can be seen in the very recent opinion given on 20 September 2012 by Advocate General Kokott, who plainly thought that the cost of alternative measures might be so great that it would not be proportionate to take those measures. The case, *Valeri Hariev Belov*,[46] concerned an allegation of indirect discrimination in the provision of goods, facilities and services by way of electricity meters in a part of a town where there were a large number of Roma citizens. The meters were put at a height which was ordinarily inaccessible because there was too much cost involved in vandal proofing them at a lower level. It remains to be seen what the CJEU will say in its judgment.

In the UK, there is a seam of case law which says that 'costs plus' may justify discrimination. There is, however, a great deal of judicial confusion in UK case law over the degree to which 'costs plus' is necessary and what constitutes the 'plus'. Authorities such as *Cross v British Airways*[47] and *Woodcock v Cumbria PCT*[48] suggest that 'cost' alone cannot be a legitimate aim and, instead, defendants must be able to identify an element additional to cost.

In *Cross*, Burton J isolated two separate strands of European authorities. In the first, a state with a 'notionally bottomless purse' cannot justify a discriminatory social policy on the basis of cost. The other strand is where an employer seeks to justify discrimination against his employees. In *Hill & Stapleton v Revenue Commissioners,*[49] the ECJ said that an employer could not rely 'solely on the ground that avoidance of such discrimination would involve increased costs'. However, the costs plus rule has been doubted by Underhill J in *Land Registry v Benson*.[50]

In *Belov*, the complainant lived in Montana in Bulgaria. In districts with larger numbers of Roma inhabitants, electricity meters were put on pylons 7 metres off the ground. In non-Roma dominated areas, they were fixed on to walls 1.7 metres off the ground. The complaint was that this stigmatised the Roma districts. Advocate General Kokott delivered an opinion so far mostly noted for its extension of horizontal effect but which may be relevant to the jurisprudence of 'costs plus'. In her opinion, the prevention of fraud, the security of the electricity supply and keeping a financially reasonable electricity supply could, under EU law, amount to a legitimate aim. We await with interest the

CJEU's decision and its approach to these legitimate aims. Will the costs plus approach be kept or will, in times of austerity, costs see a prominence in future justification decisions, due to the different environment in which affordability has come to the fore?

This is an area of law that can be expected to develop in the course of the next year. The best advice at the moment is that any argument based on the cost of not discriminating must be very closely scrutinised and analysed. It is certainly not enough to argue that it would cost money not to discriminate, but it is likely to be arguable that one way of dealing with a problem would be exceedingly expensive whereas another is less so.

## Disability

The main weapon in disability employment cases will remain reasonable adjustments predicated on the aim of mainstreaming. Cases in the last year remind the practitioner of the importance of defining with care both the provision, or criterion,[51] and the substantial disadvantage[52] with care and precision. The reasonable adjustment does not have to have a 'good' or indeed a 'real' prospect of removing the disadvantage, so the EAT said in *Leeds Teaching Hospital NHS Trust v Foster,*[53] merely that there would be a prospect of it doing so.

In *Stott v Thomas Cook Tour Operators Ltd/Hook v British Airways plc*,[54] the Court of Appeal ruled that disabled air passengers whose rights under EU and UK disability legislation were breached during the course of a flight were not entitled to compensation for injury to feelings because their situation was governed by the Montreal Convention on International Carriage by Air, which specifically excluded 'non-compensatory damages' from being recoverable. There is an application to the Supreme Court for permission to appeal in relation to this case.

## Equal pay

Resolution as to whether s69(2) EA has done away with the *Newcastle NHS Trust v Armstrong*[55] defence is still outstanding. The defence is that an employer still had an opportunity to show that the differential was not due to a difference in sex, and thereby to avoid the need to show objective justification, even where disparate impact was made out. The Court of Appeal approved the defence in *Gibson v Sheffield City Council*.[56] The employer must show that the explanation is gender neutral and that there is no direct discrimination. The respondent settled the appeal prior to the Supreme Court considering the matter. The intention to do away with this defence can, we suggest, be seen in paragraph 237[57] of the Explanatory Notes and the definition of indirect discrimination as it appears in the Consolidated Directive 2006/54/EC.[58]

The Supreme Court gave judgment in *Birmingham City Council v Abdulla*[59] on 24 October 2012, affirming the Court of Appeal's decision holding that the county court could apply the ordinary common law time limits of six years in equal pay cases where the six-month tribunal time limit had expired. In short, where the primary tribunal limitation period had expired it could never be said that the tribunal was the more convenient forum for the dispute and a claimant did not have to satisfy the common law courts as to any test.

## Conclusion

Legal obligations are being eroded and, perhaps, more importantly, so too are access and mechanisms of enforcement of those obligations and rights. For as long as this government remains in office, the move from a didactic legislative and enforcement mode will be replaced by attempts to address the root causes of inequality but in an era where government spending is being cut as it never has since the Second World War. European rights and obligations and international treaties and bodies represent a fertile ground for lawyers who seek to prevent the impact of reforms and removals on those who suffer most from inequality in society.

***Caspar Glyn QC and Robin Allen QC are barristers at Cloisters in the Temple.***

**Notes**

1 See http://www.homeoffice.gov.uk/publications/equalities/equality-strategy-publications/equality-strategy/equality-strategy?view=Binary
2 See http://www.homeoffice.gov.uk/publications/equalities/equality-strategy-publications/progress-report?view=Binary
3 See http://www.redtapechallenge.cabinetoffice.gov.uk/2012/05/equalities-rtc-announcement/
4 See http://www.homeoffice.gov.uk/publications/equalities/womens-equality/gender-equality-reporting/think-act-report-framework?view=Binary
5 See http://www.homeoffice.gov.uk/publications/equalities/womens-equality/modern-workplaces-consultation/government-response?view=Binary
6 See http://www.homeoffice.gov.uk/publications/equalities/womens-equality/modern-workplaces-consultation/equal-pay-audit-report?view=Binary
7 See footnote 5.
8 See http://www.equalityhumanrights.com/uploaded_files/aboutus/business_plan_2011-12.pdf
9 See http://www.homeoffice.gov.uk/publications/equalities/government-equality/EHRC-consultation-response?view=Binary
10 See http://www.equalityhumanrights.com/uploaded_files/aboutus/ehre_geo_response.pdf
11 See http://www.equalityhumanrights.com/uploaded_files/ehrc_framework_agreement.pdf
12 There is a very useful app from the European Union Agency for Fundamental Rights at fra.europa.eu/charterapp
13 [2010] EWCA Civ 990.
14 http://www.legislation.gov.uk/uksi/2012/1569/contents/made
15 http://www.legislation.gov.uk/ukdsi/2012/9780111525692/contents
16 See the following useful links for further guidance 'Equality Act 2010: Banning age discrimination in services, public functions and associations: Government response to the

consultation on exceptions' http://www.parliament.uk/deposits/depositedpapers/2011/DEP2011-0368.pdf; The Equality Act 2010 (Commencement No 9) Order 2012 http://www.legislation.gov.uk/uksi/2012/1569/contents/made; Government Equalities Office guidance, 'An overview for service providers and customers' http://www.homeoffice.gov.uk/publications/equalities/equality-act-publications/equality-act-guidance/age-discrimination-ban?view=Binary; Government Equalities Office guidance, 'A guide for private clubs and other associations'http://www.homeoffice.gov.uk/publications/equalities/equality-act-publications/equality-act-guidance/age-discrimination-guide-clubs?view=Binary; Government Equalities Office guidance, 'A guide for small businesses' http://www.homeoffice.gov.uk/publications/equalities/equality-act-publications/equality-act-guidance/age-discrimination-guide-sme?view=Binary; Government Equalities Office guidance, 'A guide for holiday providers, hotels and those letting holiday properties' http://www.homeoffice.gov.uk/publications/equalities/equality-act-publications/equality-act-guidance/holiday-discrimination-age?view=Binary

17 See http://www.equalityni.org/archive/pdf/StrengtheningProtectionAllAgesFullReport.pdf

18 S28(1)(b) EA 2010.

19 Ss29(1) and 31(1)-(3) EA 2010.

20 Ss29(2)-(5) EA 2010.

21 S13 EA 2010.

22 S19 EA 2010.

23 S26 EA 2010.

24 S27 EA 2010.

25 Government Equalities Office, 'An overview for service providers and customers', para 6.

26 S31(7) EA 2010.

27 S31(5) EA 2010.

28 [2012] UKSC 16 [2012] IRLR 590, [2012] Eq LR 579.

29 [2012] UKSC 15 [2012] IRLR 601, [2012] Eq LR 594.

30 See http://europa.eu/ey2012/

31 See http://social.un.org/index/Ageing/Resources/MadridInternationalPlanofActiononAgeing.aspx

32 See http://social.un.org/ageing-working-group/

33 http://www.lawgazette.co.uk/in-practice/practice-points/beginner-s-guide-ban-age-discrimination-goods-and-services

34 See http://www.commissioningboard.nhs.uk/2012/01/26/equality-analysis-of-nhs-commissioning-board-authority-functions/

35 See *Age equality in health and social care*, the report of Sir Ian Carruthers OBE, Chief Executive NHS South and Jan Ormondroyd, Chief Executive West Bristol City Council which can be found at http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_107278

36 S31, Part 1, s20 EA 2010.

37 S31, Part 1, s23 EA 2010.

38 Age Exceptions Order.

39 [2009] IRLR 267.

40 [2010] EqLR 89.

41 The case was brought at the time when there was a right to ask for a continuation of employment but no obligation for an employer to accede to this request. Although the employer made much of its standard commitment to agree to such requests in most cases, this did not impress the Supreme Court which noted that there was simply no such right.

42 [1999] ICR 494 CA.

43 [2012] EqLR 300.

44 [2012] ICR 955.

45 See also Joined Cases C-4/02 and C-5/02 *Schönheit and Becker* [2003] ECR I-12575, para 85, and Case C-486/08 *Zentralbetriebsrat der Landeskrankenhäuser Tirols* [2010] ECR I-3527, para 46.

46 Case C-394/11.

47 [2005] ICR 627.

48 [2012] IRLR 491 (CA).
49 [1988] IRLR 466.
50 [2012] IRLR 373.
51 *Newcastle upon Tyne Hospitals NHS Foundation Trust v Bagley* [2012] EqLR 634.
52 *Chief Constable of West Midlands Police v Gardner* [2012] EqLR 20.
53 [2011] EqLR 1075.
54 [2012] EqLR 351.
55 [2006] IRLR 124.
56 [2010] IRLR 331.
57 If there is evidence that the factor which explains the difference in terms is not directly discriminatory but would have an adverse impact on people of her sex (that is, without more, it would be indirectly discriminatory) the employer must show that it is a proportionate means of meeting a legitimate aim or the sex equality clause will apply.
58 …where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary.
59 Currently reported below at [2011] EWCA Civ 1412; [2012] 2 All ER 591; [2012] CP Rep 9; [2012] ICR 20; [2012] IRLR 116; [2012] Eq LR 81 and in the Supreme Court at http://www.supremecourt.gov.uk/decided-cases/docs/UKSC_2012_0008_Judgment.pdf

# Immigration law – private and family life: Article 8 ECHR[1]

**Duran Seddon**

## Part I: the implications of the new Immigration Rules

***The new Rules: general and intent and purpose***

The main changes are those contained in HC 194 (laid on 13 June 2012 and debated in Parliament), largely taking effect on 9 July 2012.[2] Further changes, mainly to accommodate the decision in *R (on the application of Alvi) v SSHD* [2012] 1 WLR 2208, [2012] UKSC 33,[3] were made by: Cm 8423 (laid on 19 July 2012) coming into effect on 20 July 2012 and HC 565 (laid on 5 September 2012) coming into effect on 6 September 2012 and 1 October 2012.

The new Rules are accompanied by a substantial amount of guidance contained in the Immigration Directorate Instructions (IDIs) and in 'Modernised Guidance', available on the UKBA website.

The explanatory memorandum to HC194 states, inter alia, as follows:

> *2.1 The purpose of these changes is:*
>
> *…*
>
> *- To provide a clear basis for considering immigration family and private life cases in compliance with Article 8 of the [ECHR]… In particular, the new Immigration Rules reflect the qualified nature of Article 8, setting requirements which correctly balance the individual right to respect for private or family life with the public interest in safeguarding the economic well-being of the UK by controlling immigration and in protecting the public from foreign criminals*
>
> *…*
>
> *6.1 The new Immigration Rules provide a clear basis for considering family and private life in cases in compliance with Article 8 …*[4]
>
> *…*
>
> *Approach to ECHR Article 8*
>
> *The new Immigration Rules will reform the approach taken as a matter of public policy towards ECHR Article 8 – the right to respect for family and private life – in immigration cases. The Immigration Rules will fully reflect the factors which can weigh for or against an Article 8 claim. The*

> *rules will set proportionate requirements that reflect the Government's and Parliament's view of how individuals' Article 8 rights should be qualified in the public interest to safeguard the economic well-being of the UK by controlling immigration and to protect the public from foreign criminals. This will mean that failure to meet the requirements of the rules will normally mean failure to establish an Article 8 claim to enter or remain in the UK, and no grant of leave on that basis. Outside exceptional cases, it will be proportionate under Article 8 for an applicant who fails to meet the requirements of the rules to be removed from the UK.*

By way of explanation in advance of HC 194, the Home Office also produced 'Statement of Intent: Family Migration'. Important extracts are as follows.

> *Introduction and overview of changes*
>
> *…*
>
> *7. First, we shall end the situation where those claiming the right to enter or remain in the UK on the basis of ECHR Article 8 – the right to respect for private and family life – do so essentially without regard to the Immigration Rules.*
>
> *…*
>
> *10… The Immigration Rules will for the first time reflect the views of the Government and Parliament as to how Article 8 should, as a matter of public policy, be qualified in the public interest in order to safeguard the economic well-being of the UK by controlling immigration and to protect the public from foreign criminals.*
>
> *11… The Courts will continue to determine individual cases according to the law but, in doing so, they will be reviewing decisions taken under Immigration Rules which expressly reflect Article 8. If an applicant fails to meet the requirements of the new Immigration Rules, it should only be in genuinely exceptional circumstances that refusing them leave and removing them from the UK would breach Article 8.*
>
> *12. In future, whether an applicant makes an application under the family Immigration Rules, or Article 8 is considered under an asylum application, or Article 8 is raised in the appeals or enforcement process, the applicant will be expected to meet the requirements of the Immigration Rules in order to be granted leave on Article 8 grounds.*
>
> *…*
>
> *Article 8 of the European Convention on Human Rights*
>
> *…*

*33. The requirements of the new Immigration Rules will themselves reflect the Government's and Parliament's view of how, as a matter of public policy, the balance should be struck between the right to respect for private and family life and the public interest in safeguarding the economic well-being of the UK by controlling immigration and in public safety by protecting the public from foreign criminals.*

*34. Exceptionally for changes to the Immigration Rules, Parliament will be invited to debate and approve the Government's approach to Article 8 and the weight the new Immigration Rules attach to the public interest under Article 8(2), in order to provide the Courts with the clearest possible statement of public policy on these issues. This is consistent with some non-binding comments made by the Courts in recent Article 8 case law, and with the House of Lords' observation in Huang in 2007 that immigration lacks a clear framework representing 'the competing interests' of individual rights and the wider public interest in Article 8, because the immigration rules 'are not the product of active debate in Parliament'.*

*35. The Courts will continue to determine individual cases according to the law but, in doing so, they will be reviewing decisions taken under Immigration Rules which properly reflect the qualified nature of Article 8 and the Government's and Parliament's view of how, as a matter of public policy, that qualification should operate in practice. If an applicant fails to meet the requirements of the new rules, it should only be in genuinely exceptional circumstances that refusing them leave and removing them from the UK would be a breach of Article 8.*

*…*

*37… The Courts have accepted this invitation to determine proportionality on a case-by-case basis and do not – indeed cannot – give due weight systematically to the Government's and Parliament's view of where the balance should be struck, because they do not know what that view is.*

*38. The new Immigration Rules are intended to fill this public policy vacuum by setting out the Secretary of State's position on proportionality and to meet the democratic deficit by seeking Parliament's agreement to her policy. The rules will state how the balance should be struck between the public interest and individual rights, taking into account relevant case law, and thereby provide for a consistent and fair decision-making process. Therefore, if the rules are proportionate, a decision taken in accordance with the Rules will, other than in exceptional cases, be compatible with Article 8.*

*39. This does not mean that the Secretary of State and Parliament have the only say on what is proportionate. The Courts have a very clear role*

> *in determining the proportionality of the requirements in the Immigration Rules. It is for the State to demonstrate that measures that interfere with private and family life are proportionate. But a system of rules setting out what is or is not proportionate, outside of exceptional circumstances, is compatible with individual rights, as has been accepted by the Courts in other spheres, e.g. housing law. Where the rules have explicitly taken into account proportionality, the role of the Courts should shift from reviewing the proportionality of individual administrative decisions to reviewing the proportionality of the rules.*
>
> *40. The starting point of such a review will be that Parliament has decided how the balance should be struck. Although Parliament's view is subject to review by the Courts, it should be accorded the deference due to a democratic legislature. If proportionality has already been demonstrated at a general level, it need not, and should not, be re-determined in every individual case.*

The amended Rules themselves, in the introduction to 'Appendix FM family members', make the same point as follows.

> *Purpose*
>
> *GEN.1.1. This route is for those seeking to enter or remain in the UK on the basis of their family life with a person who is a British Citizen, is settled in the UK, or is in the UK with limited leave as a refugee or person granted humanitarian protection. It sets out the requirements to be met and, in considering applications under this route, it reflects how, under Article 8 of the Human Rights Convention, the balance will be struck between the right to respect for private and family life and the legitimate aims of protecting national security, public safety and the economic well-being of the UK; the prevention of disorder and crime; the protection of health or morals; and the protection of the rights and freedoms of others. It also takes into account the need to safeguard and promote the welfare of children in the UK.*

In the debate in Parliament on the Rules on 19 June 2012, the motion before the House was:

> *That this House supports the Government in recognising that the right to respect for family or private life in Article 8 of the European Convention on Human Rights is a qualified right and agrees that the conditions for migrants to enter or remain in the UK on the basis of their family or private life should be those contained in the Immigration Rules.*

### *Approach to Article 8 cases in the light of the new Rules*

The clear purpose of the new Rules, in the light of the above explanations and statement of intent, is to return to the approach to proportionality in Article 8 cases *pre* the decision of the House of Lords in *Huang v SSHD, Kashmiri v SSHD* [2007] 2 AC, [2007] UKHL 11, ie, to the position reflected in the decision of the Court of Appeal in *Huang* ([2005] 3 WLR 488, [2005] EWCA Civ 105). That is, the position where the courts acknowledge that the Rules, as a matter of generality, have struck a prior balance between the interests of immigration control and those of the individual whose Article 8 rights are engaged such that, only 'truly exceptional' cases can succeed where such cases do not meet the Rules. Accordingly, although the question of whether, ultimately, there is a violation is for the tribunal, the intention of the Home Office in laying the new Rules is that the question that the tribunal will ask itself on hearing an appeal is whether the case is a truly 'exceptional' one. Practitioners will remember the very high threshold test set by Laws LJ in relation to such 'exceptionality' in the Court of Appeal in *Huang*.

In cases pre-dating that of the Court of Appeal in *Huang*, the courts had adopted an approach that, for practical purposes, resulted in a similar outcome to that decision, but the conceptual analysis was different. So, in *Edore v SSHD* [2003] 1 WLR 2979 (§20) and in *M (Croatia) v SSHD* [2004] INLR 327, [2004] UKIAT 24 (starred decision at §29), it was held that the role of the tribunal/court was limited to reviewing whether the SSHD's decision as to proportionality was one that was reasonably open to her.

The House of Lords in *Huang* rejected both the approach in *Edore/M (Croatia)* and the approach of the Court of Appeal in *Huang*. Thus, the House of Lords in *Huang* held that: (1) the decision as to whether there was a violation of Article 8 was one for the tribunal and that there was no Wednesbury-style threshold that needed to be passed before the tribunal could intervene; and (2) there was no legal test of 'exceptionality' before a decision could be found to be in violation of Article 8. Accordingly, the approach of the courts since *Huang* has been to adopt a 'hands on', fact sensitive, structured approach to determining whether a decision is compatible with Article 8 ECHR; see, for example the judgment in *EB (Kosovo) v SSHD* [2009] 1 AC 1159, [2008] UKHL 41 at §12:[5]

> *Thus the appellate immigration authority must make its own judgment and that judgment will be strongly influenced by the particular facts and circumstances of the particular case. The authority will, of course, take note of factors which have, or have not, weighed with the Strasbourg court. It will, for example, recognise that it will rarely be proportionate to uphold an order for removal of a spouse if there is a close and genuine bond with the other spouse and that spouse cannot reasonably be expected to follow the*

> *removed spouse to the country of removal, or if the effect of the order is to sever a genuine and subsisting relationship between parent and child. But cases will not ordinarily raise such stark choices, and there is in general no alternative to making a careful and informed evaluation of the facts of the particular case. The search for a hard-edged or bright-line rule to be applied to the generality of cases is incompatible with the difficult evaluative exercise which article 8 requires.*

The question is, do the new Rules, together with their stated aim and the fact that they were debated in Parliament, achieve this objective? The statement of intent (above) makes it clear that the Home Office's intention in ensuring a debate on the Rules is to bring the approach to immigration cases in line with those in housing on the basis that, in *Huang*, the former were distinguished from the housing context by the fact that the Immigration Rules are not, including by way of democratic debate, intended to strike the balance at the heart of Article 8. At the time of *Huang*, the main decision of the House of Lords in the housing context was *Kay v Lambeth LBC* [2006] 2 AC 465. Since that time, the position in housing has moved on – there have been a number of decisions in Strasbourg and the decisions of the Supreme Court in *Manchester City Council v Pinnock* [2010] UKSC 45, [2011] 2 AC 104 and *Hounslow LBC v Powell* [2010] UKSC 8, [2011] 1 AC 186[6] overrule *Kay*. Thus, the approach of the courts in housing cases, while it remains more restricted and not as structured as the approach in immigration cases coming before the tribunal, is not as restrictive as was the case under *Kay*. It is not the purpose of this paper to examine the precise approach in housing *but rather* to consider what issues may arise in determining whether, on the approach of the House of Lords in *Huang*, the debate in Parliament on the Rules is sufficient to introduce an exceptionality threshold into the proportionality exercise carried out by the tribunal (for that reason, the references below are to *Kay* because that was the leading decision of the House of Lords at the time in *Huang* and informed the distinction made by the House between immigration and housing cases).

The following points arise.

(1) In both *Huang* and in the statement of intent (above), the SSHD has sought to rely on an analogy to be drawn with housing (possession actions), where the courts had held that a prior balance had been struck, thus diminishing the role for the court (*Huang* at §17 referring to *Kay*). But in *Kay*, the landowner had an unqualified right to possession either on the basis that the right of the occupier had expired, or because notice determining the interest had been given and there was a deliberate lack of statutory protection for the occupier. Thus, occupiers sought to rely on Article 8 for 'free-standing' claims with no purchase in the domestic law.

The claims of the occupiers also conflicted with the rights of landowners to possession (*Kay* at §§34, 36, 110, 187, 203, 207).

Contrast the immigration scheme:

- there is a wide discretion *outside* the Rules to grant leave as a supplement to the statutory regime (see for example, *R v SSHD ex p Ahmed and Patel* [1998] INLR 546 at 573F-577G; and also *Alvi* above);

- the very 'premise' of the statutory scheme, following the introduction of the HRA 1998 and the corresponding express right of appeal on human rights grounds under s65 Asylum and Immigration Act 1999 (now contained in the 2002 legislation),[7] is that an applicant who cannot succeed under the Rules, may succeed under the ECHR (see *Huang* at §17) (see also now, *AM (Ethiopia) v ECO* [2009] Imm AR at §38: the Immigration Rules contain no overarching implicit purpose).

(2) The House of Lords in *Huang* held that the analogy with housing law was not persuasive: domestic housing policy had been the continuing subject of discussion and debate in Parliament over many years with the competing interests of landlords and tenants fully represented. The outcome could truly be said to be the result of democratic compromise. The House held that that could not be said of the Immigration Rules, which were not the subject of active debate and where non-nationals are not represented (*Huang*, §17). Interpreting the approach in *Huang*, in *R (Aguilar Quila) v SSHD* [2011] UKSC 45, [2011] INLR 698, it was observed (at §46):

> *[Lord Bingham] added … that notwithstanding the limited right of Parliament to call upon the [SSHD] to reconsider proposed changes in the Immigration Rules provided by s3(2) of the Immigration Act 1971, it would go too far to say that any changes ultimately made had the imprimatur of democratic approval such as would be relevant in particular to answer question (d) set out in para [45] above ['(d) do they strike a fair balance between the rights of the individual and the interests of the community']*

Will the Parliamentary debate that took place on 19 June 2012 change that position? Relevant are the following matters:

- the debate on the Rules was called at very short notice (with only about a week to consider the newly proposed Rules); the debate itself was relatively short and with little time to consider the very detailed content (that is very distinct from the normal Parliamentary process over a piece

of contentious legislation which typically involves a lengthy period of consultation; a number of readings in two Houses and a detailed committee stage);

- compare also *Kay* per Lord Bingham at §§33-35: *over the centuries*, the general property law of England and Wales had developed so as to reconcile the rights and interests of owners and landlords on the one hand and residential occupiers/tenants/licensees on the other and, over the last century, this law became overlaid by a 'mass of very detailed, very specific housing legislation' regulating the range of competing interests.

(3) Although not reflected in the judgment in *Huang*, one of the arguments deployed by Mrs Huang and Mr Kashmiri had been that the housing context was also different because it was concerned with the state attempting to mediate between distinct groups or interests in society: the property interests of landowners (including Article 1, First Protocol rights) and the Article 8 rights of occupiers (and indeed the interests of other prospective residential occupiers seeking tenancies).[8] Their case was that the public interest side of the scales will inevitably carry greater weight when it is bolstered by the specific rights of other individuals. There is also some jurisprudence to suggest that greater deference will be due to the legislature where the law is concerned with the competing rights of different sectional interests; see: *Irwin Toy Ltd v Quebec* [1989] 1 SCR 927 at 993-4; *Stoffman v Vancouver General Hospital* [1990] 3 SCR 483 at 251.

One potential means of reconciling the UK's obligations under Article 8 with Rules that might, at first blush, give rise to decisions not in compliance with Article 8, might have been to suggest that the Rules require to be interpreted as compliant with Article 8 obligations.[9] But that approach has been rejected by the Court of Appeal: *Syed v SSHD, Patel v SSHD* [2012] INLR 344, [2011] EWCA Civ 1059 at §§3, 35-7; *AM (Ethiopia) v Entry Clearance Officer* [2009] Imm AR 2, [2008] EWCA Civ 1082 at §§38-9[10]; *MW (Liberia) v SSHD* [2008] 1 WLR 1068, [2007] EWCA Civ 1376. *Syed* also rejects the suggestion that *SSHD v Pankina* [2011] QB 376 is inconsistent with *AM (Ethiopia)* [2010] EWCA Civ 719, or that *Pankina* requires the Rules to be construed so as to be compliant with Article 8 (§35). Thus, according to *Syed* and *AM (Ethiopia)*, the Rules are to be construed and applied according to their natural and ordinary meaning and the wording of the Rules is not to be modulated so as to be HRA/ECHR compliant. If an applicant does not satisfy the Rules but has a human rights claim to the effect that he or she should not be removed, the approach laid down was that that can be accommodated outside the Rules.

In conclusion, it is by no means settled or straightforward that the tribunal and courts will simply accept that their new role, following the July 2012 Rules, is limited to determining whether a wholly exceptional case has been made out for allowing a case under Article 8 where the Rules cannot be met. The courts will have to decide the question (and, indeed, decide whether *Huang* itself already decides) whether the innate structure of immigration decision making, with the SSHD's residual powers aside from the Rules, lead to a different settlement than in the housing context. The courts will also have to consider whether the nature of the Parliamentary exercise undertaken in the summer of 2012 is now sufficient to enable a direct analogy to be drawn with housing cases. The courts may also have to address whether, given the SSHD's materials accompanying the new Rules and given also the declaration relating to Article 8 contained in the new Rules themselves, whether the approach in *Syed* and *Patel* (above) continues to be sustainable, or whether the Rules must now be given colour according to the terms of and jurisprudence underpinning Article 8.

An unreported (thus non-binding) decision of the Upper Tribunal (UT), *MF v SSHD*, DA/00916/2010, 31 October 2012, promulgated after this paper was prepared, contains the UT's first survey of the landscape following the new Rules. It concerned the deportation of a 'foreign criminal' as defined by s32(1) UK Borders Act 2007. By way of precursor, the UT comments (§2):

> *We suspect that the issue of the status and meaning of the new Rules will preoccupy Tribunal and higher court judges for some time to come and doubtless, as case law about the new Rules develops, a fuller understanding will be reached than that offered here.*

Among the observations made by the UT in *MF* are the following.

(1) The Home Office materials (statement of intent, statement of compatibility, IDIs and Modernised Guidance) reflect a tension between two positions regarding the implications of the new Rules for assessment of Article 8 claims: (a) on the one hand, they appear to adopt the position that, for decision makers, the Article 8 assessment must or can be done wholly within the new Rules, but; (b) on the other hand, in stating that the failure to meet the new Rules will 'normally' mean failure to establish an Article 8 claim 'other than in exceptional cases', they appear to embrace the position that the new Rules are not conclusive as to assessment of an Article 8 claim (at §§17, 20).

(2) While it might be thought that, by virtue of their setting out specific requirements that have to be met in order for claims brought under the new family life or the private life heads to succeed, the legal effect of these

new Rules is to provide a complete code for assessing Article 8 claims, the UT did not consider that that could be the case since (§§23-24):

(a) the new Rules only cover Article 8 claims brought under specific parts of the rules – one example given is a visitor seeking to enter for private medical treatment;

(b) even within the routes they establish, the new provisions do not seek to accommodate all possible types of Article 8 claims based on private and family life;

(c) by strictly demarcating the 'family life' and 'private life' heads of claim, it is not clear how the decision maker is to consider, in any individual case, the cumulative impact of these;

(d) some of the new Rules themselves continue to require the decision maker to act in accordance with legal norms outside the Rules (the example given is paragraph 397 of the Rules).

(3) Primary decision makers and immigration judges remain bound by s6 HRA. Under the new Rules, decision makers are still bound to act 'in compliance with' Article 8 and indeed all provisions of the ECHR (and in cases concerning the deportation of foreign criminals, see also s33(2) of the 2007 Act); and also bound by s2 HRA to have regard to the Strasbourg jurisprudence (§§25, 32).

(4) For the reason given immediately above, the approach before the tribunal remains a two-stage method of assessment, ie, (a) Rules; and (b) Article 8 ECHR (§§32-34, 41, 48).

(5) The new Rules enhance judicial understanding of the public interest previously only available as mediated through submissions to the courts on the SSHD's behalf (§§42-45, 48).

(6) Although thought to furnish a near-complete code for dealing with Article 8 claims, the new Rules still in fact, in many cases, leave 'considerable scope for individual assessment'. In specifying that for certain categories there is an exceptional circumstances test, the new Rules still contemplate that, when applying this test, decision makers will have to conduct a fact-sensitive exercise as to proportionality (§28).

### *What about the 'near miss' arguments?*

An approach frequently resorted to by applicants as a means whereby to measure the strength of the SSHD's case in justifying an interference with Article 8 on public policy grounds is to consider how close the applicant has come, in an individual case, to meeting the Rules. If the applicant 'nearly' satisfies the Rule, so the argument has been, the state's interest in requiring the applicant to leave, or in not admitting them, cannot be strong.

In the recent decision of the Court of Appeal in *Miah & Others v SSHD* [2012] 3 WLR 492, [2012] EWCA Civ 261, this approach was deprecated. In *Miah*, Stanley Burnton LJ, overruling *Pankina* and *MB (Pakistan) v SSHD* [2010] UKUT 282 and upholding *Mongoto v SSHD* [2005] EWCA Civ 751 and *R (Rudi) v SSHD* [2007] EWCA Civ 1326, held that there can be no 'near miss' analysis when it comes to applying the proportionality test in Article 8 cases (see at §§21-7). The court held:

> *25 … A rule is a rule. The considerations to which Lord Bingham referred in Huang's case [2007] 2 AC 167 require rules to be treated as such. Moreover, once an apparently bright-line rule is regarded as subject to a near-miss penumbra, and a decision is made in favour of a near-miss applicant on that basis, another applicant will appear claiming to be a near miss to that near miss. There would be a steep slope away from predictable rules, the efficacy and utility of which would be undermined.*
>
> *26. For these reasons, I would dismiss the appeal in relation to the 'near-miss' argument. In my judgment, there is no 'near-miss' principle applicable to the Immigration Rules. The [SSHD], and on appeal the Tribunal, must assess the strength of an Article 8 claim, but the requirements of immigration control is not weakened by the degree of non-compliance with the Immigration Rules.*

The conclusion to the effect that no account is to be taken of the *extent* to which the UK's immigration policy is prejudiced as reflected by the extent to which the requirements of the Rules are not met, seems an odd one. Does it make no difference if two rather than one discrete requirements of the Rules are not met? If an applicant is unlikely to become a charge upon public funds (or may do but only to a minimal extent) such as to provide an answer to one of the public policy requirements under Article 8(2) (see, for example, *UE (Nigeria)* [2010] EWCA Civ 975, [2011] INLR 97), albeit the strict requirements of the Rules relating to maintenance have not been met, it is hard to see that that can never be relevant to the proportionality balancing exercise. As was underlined in *Sher Afzal v SSHD* [2012] EWHC 1487 (Admin), it is now the decision in *Miah* which binds, the court having considered contrary views expressed in cases such

as *Pankina* and *MB (Article 8 – Near Miss) Pakistan* [2010] UKUT 282 (IAC). One, nevertheless, suspects that the decision of the Court of Appeal in *Miah* will not be the final word on this question.

### *The new Rules: broad content*

It is not possible, within the confines of this paper, to set out the entirety of the new Rules. The following constitutes an overview only.[11]

In general terms, the Rules:

- Introduce a new route for those seeking leave to remain in the UK on the basis of Article 8 family life. This will apply at all stages: whether an application for LTR under the Rules is made, in an asylum claim where Article 8 is raised, or when Article 8 is raised on appeal or at the enforcement stage. Those raising Article 8 will be expected to meet the requirements of the Rules. The government considers that it will only be in exceptional circumstances where a refusal of leave would breach Article 8.

- Introduce a new Rule on those seeking leave to remain on the grounds of private life to replace the former 14-year rule, paragraph 276B HC395. The provisions require in general terms that the applicant,

    - has lived in the UK for a continuous period of 20 years (excluding any period of imprisonment); or

    - is under 18 and has lived in the UK for a continuous period of 7 years; or

    - is aged between 18-25 and has spent at least half of his or her life in the UK (excluding any period of imprisonment); or

    - is over 18, has lived in the UK for less than 20 years (again excluding any period of imprisonment) but has no ties including social, cultural or family with the country to which he or she would be required to return.

Leave is granted for 30 months with ILR after 120 months. Some applicants will need to establish that they have been in the country for 30 years before they are entitled to settlement.

- Introduce a new set of standards in connection with those facing deportation following a conviction for a criminal offence (see further below).

- Introduce a new ten-year threshold for acquiring settlement (granted in 4 x 30-month periods) for those granted leave to remain as family members on Article 8 grounds.

- Make changes to the Rules for those persons present and settled in the UK wishing to sponsor migrant spouse/partner (civil/unmarried or same sex) or fiancée/proposed civil partner or children, in particular, by introducing a new earnings threshold of £18,600 for sponsoring the settlement in the UK of a spouse or partner, or fiancé(e) or proposed civil partner of non-European Economic Area (EEA) nationality, with a higher threshold for any children also sponsored; £22,400 for one child and an additional £2,400 for each further child, to more accurately demonstrate that applicants can be maintained and accommodated without recourse to public funds and publishing, in casework guidance, a list of factors associated with genuine and non-genuine relationships, to help UK Border Agency caseworkers to focus on these issues.

- Remove the ability of immediate settlement on arrival for non-EEA spouses or civil/unmarried/same sex partners who have lived together for 4+ years overseas.

- Introduce a new five-year threshold (granted in 2 x 30-month periods) for acquiring settlement for spouses/civil partners and children, said to 'test the genuineness of the relationship', thereby extending the probationary period.

- Amend paragraph 317 (adult dependent relatives) to require applicants to demonstrate that as a result of their age, illness or disability, they require long-term personal care that can only be provided in the UK by their relative without recourse to public funds. Such applications can only be made overseas.

- From October 2013, applicants for settlement will need to pass both a Knowledge of Life in the UK test and demonstrate proficiency in English at level B1 or above, unless exempt from doing so. Prior to this date, however, they will only be required to pass the Knowledge of Life in the UK test or English for Speakers of Other Languages (ESOL) test. This test will also be extended to applicants seeking settlement after five years' residence in a PBS (Points Based System) category.

- Significantly, restrict appeal rights by abolishing a full right of appeal for family visit entry clearance visas.

- The Immigration Appeals (Family Visitor) Regulations 2012[12] SI 1532/2012 came into force on 9 July 2012. These Regulations define those who are entitled to bring an appeal against a decision of an Entry Clearance Officer (ECO). They now define those entitled to do so as

  - spouse, civil partner, father, mother, son, daughter, grandfather, grandmother, grandson, granddaughter, brother or sister;

  - father-in-law, mother-in-law, brother-in-law or sister-in-law;

  - son-in-law or daughter-in-law; or

  - stepfather, stepmother, stepson, stepdaughter, stepbrother or stepsister.

That excludes appeals brought by uncles, aunts, nephews, nieces, or first cousins, which were previously permitted.

- In addition, visitors to the UK coming to see those *without* settled or refugee/humanitarian protection will no longer have a full right of appeal.

- The Crime and Courts Bill, published on 11 May 2012, has been presented to Parliament and is expected to receive royal assent in 2014. It contains provisions which will remove the ability of all family members to appeal against a decision of the ECO refusing them entry clearance as visitors. After that date, applicants refused entry clearance for family visits will only be able to appeal on the grounds of a breach of human rights and racial discrimination grounds. Their only alternate remedy thereafter will be by way of judicial review.

- Such persons will, nevertheless, be able to *make* visit visa applications.

As to overstaying, as the guidance states, for Appendix FM categories and, from 1 October 2012, all other categories, if they have overstayed their leave by more than 28 days any application for further leave will be refused. This change in the Rules affects applicants applying for further leave under:

- the points-based system;

- all working and student routes;
- visiting routes;
- long residency routes;
- discharged HM Forces; or
- UK ancestry routes.

As to deportation:

- Former paragraph 364 has been withdrawn and replaced with new paragraphs 396-399A concerning deportation. These new provisions purport to give effect to Article 8 ECHR. Paragraph 396 reaffirms the principle that where a person is liable to deportation, the presumption will be that the public interest requires deportation and that it is in the public interest to deport where the SSHD uses her powers under s32 UK Borders Act 2007.

- Paragraph 397 preserves the position that deportation contrary to the Convention relating to the Status of Refugees (CSR) 1951 or ECHR 1951 would be unlawful. It further asserts that it will only be in exceptional circumstances that the public interest in deportation, outside a ECHR or CSR ground, will be outweighed.

- Paragraph 398 sets out how the SSHD will consider Article 8 cases. It is based on the length of the sentence that they receive. The statement of intent asserts that this is to 'provide clarity in practice as to how Article 8 issues should be determined in immigration applications, taking account of the very clear public interest in deporting serious criminals' (para 65*ff*). Under the UK Borders Act 2007, Parliament set the threshold for automatic deportation at a single custodial sentence of 12 months or more. 'The new Immigration Rules set out the Government's practice in respect of that exemption from automatic deportation as it applies to Article 8.' Paragraph 398 envisages three situations:

  (a) the deportation of the person from the UK is conducive to the public good because he or she has been convicted of an offence for which he or she has been sentenced to a period of imprisonment of at least four years;

(b) the deportation of the person from the UK is conducive to the public good because he or she has been convicted of an offence for which he or she has been sentenced to a period of imprisonment of less than four years but at least 12 months; or

(c) the deportation of the person from the UK is conducive to the public good because, in the view of the secretary of state, his or her offending has caused serious harm or he or she is a persistent offender who shows a particular disregard for the law.

- Where the sentence falls within these provisions, then the SSHD will consider whether paragraphs 399 or 399A apply and if not, 'it will only be in exceptional circumstances that the public interest in deportation will be outweighed by other factors'.

- Paragraphs 399 and 399A apply *only* to (b) or (c) (and not to (a) – ie, where a sentence of more than four years' imprisonment has been passed) and states:

(Relationship with a child: paragraph 399(a))

*(a) the person has a genuine and subsisting parental relationship with a child under the age of 18 years who is in the UK, and*

*(i) the child is a British Citizen; or*
*(ii) the child has lived in the UK continuously for at least the 7 years immediately preceding the date of the immigration decision; and in either case*
*(a) it would not be reasonable to expect the child to leave the UK; and*
*(b) there is no other family member who is able to care for the child in the UK; or*

(Relationship with a partner in the UK: paragraph 399(b))

*(b) the person has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen, settled in the UK, or in the UK with refugee leave or humanitarian protection, and*

*(i) the person has lived in the UK with valid leave continuously for at least the 15 years immediately preceding the date of the immigration decision (discounting any period of imprisonment); and (ii) there are insurmountable obstacles to family life with that partner continuing outside the UK.*

(Long residence: paragraph 399A)

*(a) the person has lived continuously in the UK for at least 20 years immediately preceding the date of the immigration decision (discounting any period of imprisonment) and he has no ties (including social, cultural or family) with the country to which he would have to go if required to leave the UK; or (b) the person is aged under 25 years, he has spent at least half of his life living continuously in the UK immediately preceding the date of the immigration decision (discounting any period of imprisonment) and he has no ties (including social, cultural or family) with the country to which he would have to go if required to leave the UK.*

The statement of intent asserts that 'the Government believes that a custodial sentence of four years or more represents such a serious level of offending that it will almost always be proportionate to outweigh any family issues, even taking into account that the best interests of a child are a primary consideration'. 'Exceptional circumstances' is nowhere defined.

As to 'suitability' (General grounds of refusal), following the rubric of PBS applications, those seeking entry clearance are subject to refusal on specified general grounds (S-EC1.1-1.7), mirroring the provisions of Part 9 HC 395 including where the SSHD has personally directed their exclusion on the basis that it is conducive to the public good, where the applicant is subject to a deportation order or sentenced to a period of imprisonment of over 12 months, but also include a failure to attend an interview, provide specified data or undergo a medical examination if required. In addition, where false information, representation or documents have been disclosed, or a failure to disclose material facts, that will result in refusal (S-EC 2.1-.2.). Equally, where an NHS body has notified the SSHD of a failure to pay charges over £1,000 in accordance with the NHS regulations, applications will be refused (S-EC 2.3). A failure to provide a maintenance or accommodation undertaking under paragraph 35 HC 395 may also result in a refusal (S-EC 2.4).

### *Issues arising as to the compatibility of the content of the new Rules with Article 8*

Despite the government's assertions as regards the content of the new Rules, some of the new Rules are suspect (to say the least) as regards their compatibility with, or attempts to reflect, the requirements of Article 8 ECHR. Some examples follow.

(1) *'Insurmountable' obstacles*.[13] If an applicant for leave to remain as a partner, or a parent of a child in the UK, does not meet the main requirements under the Rules, he or she might still be granted leave under 'Section EX:

Exception'. As to partners, one exception applies where the applicant 'has a genuine and subsisting relationship with a partner who is a British Citizen, settled in the UK, refugee, or in the UK with refugee leave or humanitarian protection, and there are insurmountable obstacles to family life with that partner continuing outside the UK'. Although the 'insurmountable obstacles' test was that used in the first HRA Court of Appeal judgment involving Article 8 (*R (Mahmood) v SSHD* [2001] 1 WLR 840), that test has since repeatedly been put to bed by the courts in favour, simply, of the question of whether it is reasonable to relocate; see *Huang* (above), *EB (Kosovo)* (above); *VW (Uganda) v SSHD* [2009] EWCA Civ 5 (at §§19, 24);[14] *JO (Uganda) & JT (Ivory Coast) v SSHD* [2010] EWCA Civ 10 at §§24-25; *LM (Democratic Republic of Congo) v SSHD* [2008] EWCA Civ 325; *YD (Togo) v SSHD* [2010] EWCA Civ 214.

(2) In respect of children, EX.1 does not address the 'best interests' of the children as required by *ZH (Tanzania) v SSHD* [2011] 2 AC 166, [2011] UKSC 4 (as to which, see further below). The criteria that are imposed for these children by the Rule (seven-year residence and unreasonableness of relocation for the child) do not begin to engage with the extensive nature of the considerations that are required to be identified and assessed in dealing with the question of where the child's best interests lie; see the factors set out below by reference to *MK (best interests of child) India* [2012] INLR 292, [2011] UKUT 00475 (IAC)).

(3) *'Suitability' requirements*. The 'suitability' requirements of the Rules (above) include a mandatory requirement based on the fact of a conviction and sentence for more than 12 months (see S-EC1.1.17). This sits uncomfortably with what the ECtHR has said about the range of factors that need to be taken into account in such cases when proportionality is considered, see *Boultif v Switzerland* [2001] 33 EHRR 1179.[15] In *Uner v Netherlands* [2006] ECHR 873, (2007) 45 EHRR 14, the Grand Chamber of the ECtHR added to those factors (§§57-58): (a) the best interests and well-being of the children, in particular the seriousness of the difficulties which any children of the applicant are likely to encounter in the country to which the applicant is to be expelled; and (b) the solidity of social, cultural and family ties with the host country and with the country of destination.[16]

(4) *Private life based on residence*. The replacement of the 14-year rule by a prescriptive set of criteria (set out above), is similarly unresponsive to the particular factors that might make good a claim under Article 8, even where the particular qualifying periods of time that are required to have been spent in the UK are not met.

(5) *Dependent relatives*. The long-standing criteria contained in the dependent relative Rule (paragraph 317) are replaced by Rules with exceptionally stringent criteria, requiring that the applicant must 'as a result of age, illness or disability require long-term personal care to perform everyday tasks' which cannot be provided, albeit via financial help provided by the sponsor, in their country of origin (see EC-DR). This elevates the threshold well beyond the original paragraph 317 criteria ('wholly or mainly financially dependent' on sponsor in the UK/'without close relatives to turn to' in the country of origin) and beyond the circumstances in which elderly parents have, over the years, succeeded in making out Article 8 claims based on dependency where the paragraph 317 criteria have not been met.

(6) *General*: there are instances in which the Rules do not defer to certain criteria and considerations that are contained in the established case law. The 'best interests' of the child have already been referred to above. Other examples are: (a) the relevance of delayed in-country decision making by the SSHD which may affect the extent of ties to the UK, the applicant's expectations about the future and the weight that can be placed upon the public policy side of the balancing scales (see *EB (Kosovo)*, above); (b) the circumstances in which Article 8 might permit the state to insist on compliance with procedural requirements, such as the obtaining of entry clearance and the requirement to make an application from overseas, rather than in-country (see *Chikwamba* [2008] UKHL 40, [2008] WLR 1420); and (c) the circumstances in the Article 8 balance may be affected by an applicant's status as of significant value to the community (see *UE (Nigeria)* above).

## Part II: General developments in the case law

This section contains a general survey of case law developments affecting Article 8 immigration over the last year or so.

### *Engagement of and conceptual approach to Article 8*

In *R (Quila) v SSHD* [2011] UKSC 45, [2011] INLR 698 SC, 12 October 2011, the issue before the court concerned changes to paragraph 277 of the Rules (effective from November 2008) requiring that, where a foreign spouse is seeking to join a settled husband/wife in the UK, both parties must be at least 21 years of age, rather than 18. Family life normally comprises cohabitation and the Supreme Court held that the amended rule, subjecting couples to a choice either to separate or to disrupt the UK settled spouse's plans to remain living/working in the UK to live abroad for up to three years, amounted to a 'colossal' interference with Article 8 (§32). The purpose of the amendment was to deter forced

marriages. The burden was on the SSHD to demonstrate that the interference was proportionate.

The court held that the SSHD had failed to do that, inter alia, because: there was no robust evidence of any substantial deterrent effect; the number of unforced marriages disrupted exceeded the forced marriages deterred; the rule was a blanket one; accordingly, the SSHD could not show that the measure was no more than necessary to achieve the objective, or that a 'fair balance' had been struck. On any view, it was sledge hammer and the SSHD had not even properly identified the size of the nut (Lord Wilson, §57).

Strikingly, aside from the particular facts and the assessment of proportionality (above), the court *declined* to follow the landmark Strasbourg Article 8/ immigration decision in *Abdulaziz & Others*, Applcn No 9214/80 (1985) 7 EHRR 471. In *Abdulaziz*, three husbands with no rights to enter/remain in the UK sought reunion here with their wives. The majority of the ECtHR, analysing the case as one concerning a 'positive obligation' to admit them so as to facilitate reunion, held that Article 8 was *not engaged at all*, citing as factors: the suggested obligation on the state was a positive one, ie, to take active steps to admit the husbands (and the notion of 'respect' was not clear cut in the context of such positive obligations); immigration control involved an area in which states had a wide margin of appreciation; the rights of the husbands to enter/remain were precarious when the marriages were contracted; and the extent of the state's obligations depended on the circumstances – the women had not shown that they could not establish family life in their own, or their husbands' home, countries (*Abdulaziz* at §§66-8).

The Supreme Court (per Lord Wilson and Baroness Hale giving the reasoned judgments at §§43, 69-72), drawing upon intervening Strasbourg jurisprudence,[17] held that *Abdulaziz* should no longer be followed. The court held: that the distinction between positive and negative obligations was elusive and should not affect the outcome (see also *Osman v Denmark*, Applcn 38058/09, 14 June 2011, below); the area of engagement of Article 8 'is, or should be, wider now'; and the issue was much better analysed in terms of justification for an *interference* under Article 8(2). Thus, the approach will now be similar in all types of cases (Baroness Hale, §71) *and* note also that the Court in *Quila* cited the test for engagement of Article 8 as that set by Lord Bingham in *R (Razgar) v SSHD* [2004] UKHL 27, [2004] 2 AC 368 at §17 by reference to *AG (Eritrea) v SSHD* [2007] EWCA Civ 801, [2007] INLR 407 at §28, ie, that the threshold requirement for engagement is '*not a specially high one*'.

This development puts paid to the suggestion that in cases that might previously have been analysed in terms of positive obligation, they will be analysed in any

other form than the traditional approach of interference/justification, rather than not getting off the ground at all. Baroness Hale identified two types of 'reunion' cases previously analysed in terms of positive obligation/respect: (1) child 'left behind' cases, ie, where the family has migrated but one or more minor has remained in the country of origin; and (2) cases where a couple marry when one is lawfully settled in a host state but in which the other has only a precarious status and no rights of permanent residence there (or is physically seeking admission from overseas). All are now to be analysed in the same way.

See also, though, the later decision of the Court of Appeal in *Muse & Others v Entry Clearance Officer* [2012] Imm AR 476, [2012] EWCA Civ 10 at §§20-24, which continues to adopt the language of positive obligation in respect of an application for reunion. The court in *Muse,* nevertheless, confirmed that the application of the factor of whether it was reasonable to expect the (UK) settled relative to relocate overseas was to be applied whether the case was one of reunion or expulsion (ie, whether it concerned positive or negative obligations). The court noted that such cases depended on their own facts regardless of whether the case concerned reunion or expulsion.[18]

### *Deference to SSHD in deciding questions of proportionality*

Lord Brown (in the minority in *Quila*) asserted that, in the subject area under discussion (policy/forced marriages), which was essentially a matter for government, the courts should 'accord government a very substantial area of discretionary judgment' (§91).

This contrasts with the approach of Lord Wilson, also *in Quila* at §46, citing *R (SB) v Governors of Denbigh High School* [2006] UKHL 15, [2007] 1 AC 100 at §30 (intensity of review greater than previously appropriate and greater even than the heightened scrutiny test … domestic court must now make a value judgment, ie, an evaluation, by reference to the circumstances prevailing at the relevant time … proportionality must be judged objectively by the court) and *Huang* at §16 (wrong to afford 'deference', albeit appropriate weight can be given to the extent that the SSHD may have had access to special sources of knowledge and advice).

### *Burden/standard of proof*

In, *ECO v Shabana Naz* [2012] UKUT 00040 (IAC), the UT confirmed that the standard of proof where an applicant is attempting to establish facts to show an interference with family life is the balance of probabilities. As is well known, the burden shifts to the SSHD in order to establish that the interference is justified. As to that exercise, see *Quila* (above) per Lord Wilson at §44: '… in an evaluation which transcends matters of fact it is not in my view apt to describe the requisite standard of proof as being, for example, on the balance of probabilities'.

### *'In accordance with the law' under Article 8(2) ECHR*

As a matter of generality, a decision to refuse an extension of stay or remove a person may be so contrary to a requirement contained in an established policy or practice as to be not in accordance with the law. In such cases, where Article 8 is engaged, the analysis does not need to move on to justification for Article 8 purposes and the decision must be re-made in accordance with the law: *SC (Article 8 – in accordance with the law) Zimbabwe* [2012] UKUT 00056 (IAC).

### *Does the case fall within the scope of 'family life' or 'private life'? Is the distinction important?*

In *AA v UK,* Applcn No 8000/08, [2012] INLR 1, the facts were that the applicant was a Nigerian who came to the UK aged 13 in September 2000. He was convicted at the age of 15 of his part in a gang rape and sentenced to four years' detention at a YOI. While he was in detention, he was granted ILR (apparently in error), but shortly afterwards was served with a decision to make a deportation order against him. He appealed, unsuccessfully. His response to rehabilitation, while in the YOI, was positive, and he was consistently assessed as posing a low risk of reoffending. Upon his release (in 2004), he completed 'A' levels; he went on to complete a degree and a masters and to obtain employment with a local authority; he did not reoffend. Meanwhile, his appeal proceedings lasted almost three years, resulting ultimately in a decision dismissing his appeal and a refusal of permission in the Court of Appeal. By the time his matter came before the ECtHR, he had been at liberty for approximately seven years, and had moved back in permanently with his mother and sisters. The ECtHR unanimously held that there 'would be a violation of article 8 of the Convention in the event of the applicant's deportation'.

The ECtHR recalled case law in which family life had been found as between adult son/daughter (*Bouchelikia v France*, Applcn No 23078/93 (1998) 25 EHRR 686, §41; *Boujlifa v France*, Applcn No 25404/94 (2000) 30 EHRR 419, §36). But it noted also two recent cases (against the UK) in which the ECtHR had *rejected* the suggestion that the relevant adult son/daughter retained 'family' life ties in the absence of evidence of additional elements of dependency: *Onur v UK*, Applcn No 27319/07 (Unreported), 17 February 2009, §§43-5; *Khan v UK*, Applcn No 47486/06, [2010] INLR 567 §32. However, the ECtHR in *AA* noted that *Onur* and *Khan* were both cases in which the applicants had a child or children of their own following durable relationships (§48). The ECtHR went on to declare[19] that: 'An examination of the court's case-law would tend to suggest that the applicant, a young adult of 24 years old, who resides with his mother and has not yet founded a family of his own, can be regarded as having a "family life" ' (§49).

Compare the domestic decision in *Kuguthas v SSHD* [2003] INLR 70, [2003] EWCA Civ 31 (CA) concerning ties between adult sons/daughters and their parents in which the Court of Appeal held that, generally, it will require more than the normal emotional ties, eg, some form of dependency (financial or emotional) if they are to amount to 'family life'.

The outcome seems to be, therefore, that, to the extent that one needs to show an additional element of dependency for adult son/daughter and parent relationship, that will generally be made out where the adult son or daughter has no family of his or her own and is still living with parents. It is not clear whether there is an upper age limit of the adult son/daughter for this analysis to apply, or, if there is, what that age might be. Practitioners will note, though, that in the *Bouchelika* case (above) the applicant son was 28.

As to the question of family life as between adult siblings who are living together, in the recent case of *Ghising (family life – adults – Gurkha policy)* [2012] UKUT 00160, the tribunal conducted a detailed review of the ECtHR jurisprudence and concluded that there was no general proposition that Article 8 is never engaged when the family life it is sought to establish is between adult siblings living together: each case had to be analysed on its facts.

But does the distinction between family/private life now matter at all? In *AA*, the court did *not* reach a final conclusion on the question of whether the circumstances fell within private or family life, stating instead that it was not necessary to do so since Article 8 also protected private life and, thus, the totality of the social ties between settled migrants and the community in which they are living. The court expressly asserted that, while it had previously referred to the need to decide in the circumstances of the particular case before it whether it is appropriate to focus on 'family life' rather than 'private life', in practice 'the factors to be examined in order to assess the proportionality exercise are the same regardless of whether family or private life is engaged' (see at §49).

Of interest also is the fact that the court in *AA* reaffirmed that the relevant date for considering Article 8 rights was the date of hearing in cases in which the applicant had not yet been expelled (at §67). Here the court explained that 'any other approach would render the protection of the Convention theoretical and illusory by allowing Contracting States to expel applicants months, even years, after a final order has been made notwithstanding that such expulsion would be disproportionate having regard to subsequent developments'. Indeed (at §68) 'in a case where deportation is intended to satisfy the aim of preventing disorder or crime, the period of time which has passed since the offence was committed and the applicant's conduct throughout that period are particularly significant'.

### *Article 8 and the 'best interests' of the child*

As is well known, in the leading case of *ZH (Tanzania) v SSHD* [2011] 2 AC 166 [2011] UKSC 4 (1 February 2011), the Supreme Court held that international law[20] placed a binding obligation on public bodies, including the SSHD, to discharge their functions having regard to the need to safeguard and promote the welfare of children and that extended to immigration decisions. See further the obligation in s55 BCIA 2009, to make arrangements to assure that functions relating to asylum, immigration and nationality 'are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom'.

In all decisions directly or indirectly affecting a child's upbringing, a primary consideration was the child's best interests. A child's British nationality was not decisive but it was, nevertheless, of particular importance in assessing a child's best interests and was relevant in deciding whether it would be reasonable to expect the child to live in another country. In the instant case, the removal of the mother (with whom the children lived – having separated from their British father) was disproportionate having regard to: the benefits of British citizenship; the fact that the children were British (derived from their British father) and, thus, had an unqualified right to live in the UK where they had always lived; the children were being educated in the UK and had social links with the community; the children could not be blamed for ZH's appalling immigration history and the fact of the precarious nature of her status when they were conceived.

Subsequent domestic cases of note, in date order, on the 'best interests' over the past year or so, are as follows below.

*Re E (Children)* [2012] 1 AC 144, [2011] UKHL 27 (10 June 2011) (concerned issue arising under the Hague Convention in circumstances where the mother had removed the children from Norway to the UK and resisted their return on grounds of psychological abuse by the father). The Supreme Court held that the Hague Convention was designed with the best interests of children generally and of the individual child as the primary consideration. Article 8 had to be interpreted and applied in light of the Hague Convention and the UN Convention on the Rights of the Child; all were designed with the best interests of the child as a primary consideration. Commenting on decisions of the ECtHR under Article 8, the Supreme Court identified the general approach to a child's interests (taken from the observations of the Grand Chamber in *Neulinger and Shuruk v Switzerland,* Applcn 41615/07; 06/07/2010):[21]

> *The child's interest comprise […] two limbs: maintaining family ties and ensuring his development within a sound environment, not such as would harm his health and development.*

*AJ (India), SP (India), EJ (Nigeria)* [2012] Imm AR 10, [2011] EWCA Civ 1191, [2011] All ER (D) 222 (Oct 2011) (27 July 2011): compliance with the s55 duty is a matter of substance rather than form; if the decision maker's mind is directed to the situation of the child under the Rules, Article 8 of the Convention or s55, it is difficult to contend that there has been no consideration of the statutory duty in substance. The primacy of the interests of the child fell to be considered in the context of the particular family circumstances as well as the need to maintain immigration control (§§28-31, 43).

*R (Tinizaray) v SSHD* [2011] EWHC 1850 (Admin) (25 October 2011): taking account of Baroness Hale and the statutory guidance, the decisions in the instant case were set aside because: (a) the information available to the decision maker was 'woefully inadequate' and could have been obtained by appropriate requests made to the applicant's solicitors, the child's school and through other third party agencies; (b) no weight had been attached to the fact that the child was 'as close as it is possible to be to being a British citizen'; and (c) assumptions had been made about the child's ability to fit into the school system of the country of proposed removal (Ecuador) without there being any sufficient underlying factual information available (see at §27).

*Omotunde* [2011] UKUT 00247 (IAC), [2011] INLR 684 (25 November 2011). The father had engaged in fraudulent claims for tax credits; was the main carer for his five-year-old son (registered as a British citizen); his deportation would have the effect of the son either losing his home, school, regular contact with his mother and friends and the benefit of being brought up in the country of his birth as a British citizen with all the benefits associated; alternatively the child would lose his primary carer, his father. Either requiring the child to live in Nigeria, or depriving him of his primary carer, would undermine the child's rights of residence. It was in the child's best interests and his rights as a British citizen and citizen of the EU to be brought up in the UK with the support of his father. Deportation was, thus, not proportionate having regard to those interests (§§28-9, 32, 38-9). The best interests of the child can, however, yield to the rights of others where a contrary course is 'convincingly demonstrated by the relevant public authority, which bears the burden' (§§17-19).

A child's British nationality is an important aspect of his or her best interests, but may also afford the child a right to reside in his or her own country in both national and EU law. *Zambrano v Office National de l'emploi* (C-34/09) required national courts to engage with the question of whether removal of a particular

parent would 'deprive the child of genuine enjoyment of the substance of the rights attaching to the status of European Union Citizen'. *Zambrano* did not have to deal with the question of a strong public interest reason to expel. The tribunal concluded that any right of residence of the parent is not absolute based on this, but is subject to the community principle of proportionality. There is no substantial difference between the human rights-based assessment of proportionality of an interference considered in *ZH (Tanzania)* and the approach required by community law (§§30-2).

*MK (best interests of child) India* [2012] INLR 292, [2011] UKUT 00475 (IAC), 2 December 2011. 'Best interests' are to be examined first and as a distinct stage of the Article 8 enquiry, ie, the decision maker should make a decision as to what is in the best interests, before passing on to see whether those interests can be overridden by countervailing considerations. An important part of discovering best interests is to ascertain children's views (see Article 12 of the UN Convention on the Rights of the Child) but the notion is not a purely subjective one – the decision maker has to come to an objective view as to what it is reasonable to expect of a child.

*MK* is useful for its detailed examination of the factors to be taken into consideration in order to arrive at an overall assessment of the 'well-being' of a child, which involves a broad range of considerations: age; level of maturity; the presence/absence of parents; the child's environment and experiences; the need for security/continuity of care; the opportunity to form long-term attachments; the level of integration into the UK; length of absence from overseas; the arrangements for looking after the child overseas; the intrinsic importance of citizenship of the host country; the degree of possible social and linguistic disruption of childhood; loss of educational opportunities.

*T (s55 BCIA 2009 – entry clearance) Jamaica* [2012] INLR 359, [2011] UKUT 00483 (6 December 2011) concerned a child (T) in Jamaica seeking entry clearance. Since she was not in the UK, the s55 duty did not apply. In the SSHD's statutory guidance *Every Child Matters, Change for Children*, issued in November 2009, the UK government took the position that 'UK Border Agency staff working overseas must adhere to the spirit of the duty and make enquiries when they have reason to suspect that a child may be in need of protection or safeguarding or present welfare needs that require attention'. Reference to the 'spirit' of the duty was too vague to give rise to a separate common law duty to take a particular course when assessing the case.

However, there was also a duty under the Rules to consider the child's situation and to assess whether there were any 'compelling reasons' why the child should not be excluded and a duty on the ECO under Article 8 ECHR to act compatibly

with the child's rights as so protected – in any such assessment the child's best interests were a primary consideration. These rights could be directly enforced by the tribunal. It was difficult to imagine a situation where the s55 duty was material to an immigration decision and indicated a certain outcome, but Article 8 did not.

*Sanade & Others (British Children – Zambrano – Dereci)* [2012] Imm AR 597, [2012] UKUT 00048 (7 February 2012) (IAC). The three conjoined cases concerned the father of a young child, who was a British citizen, who sought to resist deportation based on criminal offending. Two of the fathers were being deported as 'foreign criminals' within the meaning of the 'automatic' deportation provisions in s32 UK Border Act 2007; the other father's deportation notice was issued before the provision of the 2007 Act. The fathers appealed to the UT on the basis that the First Tier Tribunal had failed to examine the interests of the British national children as the primary consideration. The guidance issued by the UT includes the following: preventing crime by deporting individuals in cases of particular seriousness would be a legitimate aim that could outweigh the best interests of the children – but the fact that the children were British was a strong pointer to the fact that their future lay in the UK (§§59-67); where one parent was also British, the critical issue was whether the child was dependent on the parent being removed and whether removal of that parent would deprive the child of the effective exercise of residence in the UK (§§86-91). In cases where there is a combination of exceptionally poor immigration history with very serious offending, the child's best interests may be outweighed by a public interest in deportation.[22]

*Deron Peart v SSHD* [2012] EWCA Civ 568 (1 May 2012): the Court of Appeal underlined the importance of making careful findings in relation to a child's relationship with the parent facing removal, not just as of the present but also as to 'how the relationship might develop in the future if the appellant [i.e. the father] were allowed to remain [in the UK]' (at §15).

See further the following recent Strasbourg cases on 'best interests' of the child:

- *Osman v Denmark*, Applcn 38058/09, 14 June 2011: violation of Article 8 found where the child was admitted at the age of seven to Denmark with her parents and was subsequently sent overseas by the parents who objected to aspects of her conduct. The parents remained residing in Denmark and the Danish rules on reunion had been amended in the interim to increase the maximum age of the child for reunion so as to exclude this applicant.

- *Nunez v Norway, Applcn* 55597/09, 28 June 2011: violation of Article 8 found in respect of a Dominican woman with a very poor immigration history indeed, who had previously been deported for criminal offending and who had entered again using a false passport/identity and committed further offences. She had two children, in 2002 and 2003, with another Dominican national who had residence rights in Norway. The ECtHR considered that, in terms of the impact upon Ms Nunez herself, expulsion was justified. It went on, however, to examine 'whether particular regard to the children's best interest would nonetheless upset the fair balance under Article 8' (§78). The ECtHR found that the children were entitled to remain in Norway to live with their father. The court found a violation of Article 8 *notwithstanding* the fact that, unlike previous similar cases where a violation had been found, Ms Nunez had at no time been entitled to a residence permit.

- But contrast with *Nunez* the different outcome arrived at by a different division of the ECtHR, on the basis of very similar facts in *Antwi and ors v Norway* Appcln 26940/10, 14 February 2012.

### *Expulsion of 'young' offenders and compatibility with Article 8*

The landmark decision of the Grand Chamber in *Maslov v Austria,* Applcn 1638/2003 (23 June 2008) [2009] INLR 47 is of enduring importance. The Grand Chamber had emphasised that age and age related factors are relevant to the potential deportee particularly where: (a) he or she entered the UK as a minor; and/or (b) if he or she committed criminal offences as a minor/juvenile.

Where a person to be expelled is a young adult who has not yet formed a family of his or her own, the relevant factors to be taken into consideration are: the nature and seriousness of the offence/s; length of applicant's stay in the host country; time elapsed since commission of the offences; solidity of social/ cultural and family ties with the host country and the country of destination (§70). The court thus observed:

> *75. In short, the Court considers that for a settled migrant who has lawfully spent all or the major part of his or her childhood and youth in the host country very serious reasons are required to justify expulsion. This is all the more so where the person concerned committed the offences underlying the expulsion measure as a juvenile.*

In *MJ (Angola) v SSHD* [2010] EWCA Civ 557, [2011] INLR 62, [2010] 1 WLR 2699 (20 May 2010), the Court of Appeal considered the application of the *Maslov* criteria to a man who had entered the UK at 12 (and had, therefore, spent less than half of his childhood in the UK). Further, his most recent offences were

committed when he was an adult, but the court noted that most of his offending had been committed when he was still under the age of 21. The court held that the requirement for 'very serious reasons' nonetheless applied (§40):

> *… the determination of this issue [of private life] was flawed. The appellant had lawfully entered the UK when he was 12 years of age. He spent his adolescence and the whole of his adult life here. Much of his offending was committed when he was under the age of 21. In these circumstances, very serious reasons were required to justify his deportation.*

The court, it will be noticed, treated the cut-off point as 21 rather than 18 and applied *Maslov* at §75, albeit the applicant had only spent a third of his childhood in the UK (ie, not all or the major part, as in *Maslov*). Although the court considered that the tribunal had looked with 'obvious care' and in 'considerable detail' at all the relevant factors, that they had not applied the *Maslov* test that 'very serious reasons were required to justify the decision to report' was sufficient to flaw the decision (see at §§38, 40, 42-3).

In *Osman v Denmark,* Applcn 38058/09, 14 June 2011, the court held that 'very serious reasons' were required to prohibit the re-entry of a 17-year-old who had spent 'the formative years of her childhood and youth in Denmark' and whose close family was in Denmark, but whose residence had been broken by a stay of over two years in Kenya: it, therefore, applied the *Maslov* principle to a person whose residence in the host country had been broken.

A further important recent case is that of *Balogun v UK,* Applcn 60286/09, 10 April 2012 [2012] Imm AR 779. B had been brought to the UK at age three; he was made the subject of a residence order in favour of his aunt, at age eight and was placed in foster care shortly afterwards. He was granted ILR in 2003, when he was 17. When he was 20, he was convicted of possession of Class A drugs with intent to supply and sentenced to three years' imprisonment. He had previous convictions for possession of Class A, B and C drugs, and for handling stolen drugs. The SSHD decided to deport him; he appealed unsuccessfully, then applied to Strasbourg. He had a history of mental illness (including a period as an in-patient following an unsuccessful suicide attempt). The ECtHR held that his removal would not breach his Article 8 rights. It was accepted that B enjoyed a private life in the UK. The ECtHR found (§§49-50) that B's offences merited far more serious characterisation than the 40 gang-related offences of *Maslov*, and that he could 'pursue and strengthen his tie' to his mother if returned to Nigeria. Note the 'misgivings' expressed by Judge de Gaetano in giving a concurring opinion in *Balogun*:

> *… the instant case is not easily reconcilable with, and not convincingly distinguishable from, cases like Nunez v Norway … and AA v United Kingdom … the various criteria set out in Üner… and Maslov… all exert a different gravitational pull such that it is often difficult to decide on which side the scales should tip. Factor in also the 'best interests of the child'… and the case can spiral out of orbit.*

In *ED (Ghana) v SSHD* [2012] Imm AR 487, [2012] EWCA Civ 39, the Court of Appeal held that the *Maslov* guidelines (see *Maslov* at §75 set out above) will not be applicable to a case in which the applicant has not been present in the UK *lawfully* – so much was held to be clear from *JO (Uganda) and JT (Ivory Coast)* [2010] 1 WLR 1607, [2010] EWCA Civ 10 at §§28, 31. The Court of Appeal found the same to be true in the particular circumstances in *ED,* despite the very particular facts of that case, namely in which the applicant had been abandoned in the UK, not understanding that he was not permitted to be here and had been cared for by the local authority for much of his childhood (see at §§24-36).

### *Automatic deportation and Article 8*

In *RU (Bangladesh)* [2011] EWCA Civ 651,[23] the Court of Appeal looked at the special considerations that apply under the 'automatic deportation' regime contained in the UK Border Act 2007 and at the approach where the applicant relies upon Article 8 ECHR. *Rocky Gurung* [2012] EWCA Civ 62 (at §§11-12) looks particularly at the weight to be given to the public interest in an 'automatic' deportation appeal. In *Bah (EO) (Turkey – liability to deport)* [2012] UKUT 00196 (IAC) (1 June 2012), the tribunal sets out the approach to decision making in s32 UK Borders Act 2007 appeals where Article 8 is raised and expands upon the approach identified in *EO (deportation appeals: scope and process) Turkey* [2007] UKAIT 62.

### *Extradition and Article 8*

In *H (H) v Deputy Prosecutor of the Italian Republic, Genoa; H (P) v Same; F-K v Polish Judicial Authority* [2012] 3 WLR 90, [2012] UKSC 25,[24] two litigants resisted extradition based upon Article 8, given the existence of their dependent children and evidence of the loss that would be suffered by them if their parents were extradited to stand trial respectively in Italy and Poland. The Supreme Court held that, although extradition was more analogous to the criminal process than the deportation process, the court still had to examine the way in which extradition would interfere with family life – the issue was always whether the interference with private and family life of the extraditee and members of his family was outweighed by the public interest in extradition.

The public interest in extradition to the effect that the UK should honour its international treaty obligations that those accused of crime should be brought

to trial and those convicted should serve their sentences, carried 'great weight'. The weight, though, varied according to the particular circumstances of the case. The impact on private and family life would have to be exceptionally severe to outweigh the public interest, but it was *not* appropriate to treat extradition cases as falling within a special category which diminished the need to examine the way in which the extradition process would interfere with the individual's right to respect for his family life. As in other cases, the child's 'best interests' were a primary consideration.

The joined cases *of JP v District Court at Usti nad Labem, Czech Republic* and *JE-H & IE-H v Government of Australia* [2012] EWHC 2603 (Admin) (26 September 2012) were appeals to the High Court from decisions of a magistrate in extradition proceedings that had been delayed pending the outcome of *HH* above. After *HH*, the Administrative Court turned to deal with the outstanding cases. In the stronger of the two cases on the facts, which was the first case, the court had 'no doubt' but that the interests of the children would be severely disadvantaged by their primary carer (the mother) being extradited to the Czech Republic with no opportunity of seeing her during her period of imprisonment. Even though no court in England and Wales would have considered that the offences passed the custody threshold, the strong interest in extradition was sufficient to outweigh the best interests of the children, given that their welfare could be adequately safeguarded by their being looked after by their father and grandfather, even though they had not been the primary carers hitherto (see at §§16-17, 23-25).

### *Expectations and Article 8*

*Philipson (ILR – Not PBS: evidence) India* [2012] Imm AR 3, [2012] UKUT 39: a care assistant had arrived in the UK with a five-year work permit. She came with her husband and two children. At the point when she sought indefinite leave, the Rules had been changed (by reference to the Tier 2 PBS Codes of Practice) to require a particular rate of pay for the job. The claimant's rate of pay, although it had been increased over the years, was less than that required.

In an important part of the UT's decision regarding Article 8 and the applicant's established private life in the UK, the President emphasised the fact that the applicant had been encouraged to come to the UK to take on a demanding low paid job as a care assistant on the understanding and belief that she would be allowed to remain indefinitely if she continued to meet the work permit conditions. Her rights were not indefeasible in this context but one would normally expect to see transitional provisions put in place if the criteria were to change. It was hard to identify a legitimate aim that was proportionate to the interference in this context (at §§20-22).

### *General grounds of refusal/travel bans*

*Mumu* [2012] UKUT 000143 (IAC) (April 2012): in a case where an applicant faces long-term exclusion from the UK as the result of false representations made in an entry clearance application, the weight to be given to the SSHD's interests in conducting the proportionality balance under Article 8(2) is not automatically diminished by the fact: (1) that a person may, in a later application, be able to take advantage of the exceptions in the Rules to the travel bans; or (2) there is a danger that the applicant may be refused in the future by reference to paragraph 320(11) (ie, particularly serious previous conduct designed to frustrate the intentions of the Rules).

### *Overlap with parallel family court proceedings*

There are two recent decisions of the Upper Tribunal, in both of which the panel was chaired by McFarlane LJ and in which the President of the UT gave the judgment of the panel.

In *Vanessa Nimako-Boateng & IA v SSHD* [2012] UKUT 00216 (IAC) (heard 22 May 2012), the UT held that a residence order, or a prohibited steps order made by a judge of the family court under s8 Children Act 1998, did not bind the SSHD. However, decisions of family courts in respect of the welfare and best interests of children are important sources of information for judges considering immigration appeals. The tribunal explained (at §§31-3):

> *Both the Home Office and the immigration judiciary are concerned with an assessment of the best interests of the child affected by an administrative decision to remove either the child or a parent or other person providing care or support to the child … However, whereas in family law proceedings the welfare of the child is the paramount consideration, in immigration proceedings it is a 'primary' rather than 'the paramount' consideration and can be outweighed by other compelling rights-based factors. These include those set out in article 8(2) ECHR …*
>
> *Further, the family court is best placed to evaluate the best interests of the child in proceedings brought before it. Both the decision itself and the reasons for the outcome are material to the consideration of the Article 8 balance to be conducted by the immigration judiciary and may be a decisive consideration. Reasoned decisions of such courts are not to be ignored in immigration appeals. Indeed the problem facing immigration judges is that, although they must attach weight to the best interests of the child, in many cases they will often not be able to assess what those interests are without the assistance of a decision of the family court. The family court has, amongst other things, procedural advantages in investigating what*

> *the child's best interests are, independent of the interests of the parent, as well as the necessary expertise in evaluating them.*
>
> *An informed decision of the family judge on the merits and, in some cases at least, the material underlying that decision, is likely to be of value to the immigration judge.*

In *RS (immigration and family court proceedings) India* [2012] UKUT 00218 (IAC) (heard 23 May 2012), the UT held that where a claimant appeals against a decision to deport/remove and there are outstanding family proceedings relating to a child of the claimant, the judge of the Immigration and Asylum Chamber should first consider (§43):

(1) Is the outcome of the contemplated family proceedings likely to be material to the immigration decision?

(2) Are there compelling public interest reasons to exclude the claimant from the UK irrespective of the outcome of the family proceedings or the best interests of the child?

(3) In the case of contact proceedings initiated by an appellant in an immigration appeal, is there any reason to believe that the family proceedings have been instituted to delay or frustrate removal and not to promote the child's welfare?

The UT further held that, in assessing the above questions, the immigration judge will want to consider (§43(iv)): (a) the claimant's previous interest in and contact with the child; (b) the timing of the contact proceedings and the commitment with which they have been progressed; (c) when a decision is likely to be reached; (d) what materials (if any) are available or can be made available to identify pointers to where the child's welfare lies.

Having considered these matters the judge will then have to decide (§44):

(1) Does the claimant at least have an Article 8 right to remain until the conclusion of the family proceedings?

(2) If so, should the appeal be allowed to a limited extent and a discretionary leave be directed (as per *MS (Ivory Coast)* [2007] EWCA Civ 133)?

(3) Alternatively, is it more appropriate for a short period of an adjournment to be granted to enable the core decision to be made in the family proceedings?

(4) Is it likely that the family court would be assisted by a view on the present state of knowledge of whether the appellant would be allowed to remain in the event that the outcome of the family proceedings is the maintenance of family contact between him or her and a child resident here?

The tribunal in *RS* further noted that, in addressing the above questions, there would need to be (§47):

> *… informed communication*[25] *between the judge deciding the immigration question and the judge deciding the family question. It is important that a system be established so that both jurisdictions can be alerted to proceedings in the other and appropriate relevant information can be exchanged, without undermining principles of importance to both jurisdictions.*

In the case of *Mohan v SSHD* [2012] EWCA Civ 1363 (23 October 2012), the Court of Appeal cited with approval the guidance given in both of the above decisions of the Upper Tribunal, ie, *Nimako-Boateng* and *RS* (see at §§16-21). On the instant facts in *Mohan*, the Court of Appeal concluded that it was not a case in which the public interest in deportation was 'overwhelming' such that there was no need to delay the immigration proceedings in order to await the judgment of the family court and that '[t]he judgment of the family court, with all the tools at its disposal (including the assistance of CAFCASS[26] and the opportunity to assess all the adults …), could and should inform the decision making of the Tribunal on the issue of proportionality of deportation, in relation to the best interests [of the child in that case]'. Accordingly, the appeal was allowed and the matter remitted to the Upper Tribunal to approach its task in the manner laid out in *RS* (§§31-32). That very recently decided case concludes this, inevitably selective, review of the Article 8 case law over the past year.

***Duran Seddon is a barrister at Garden Court Chambers.***

**Notes**

1 This paper is a substantially revised version of the paper that was given at the JUSTICE/SWEET & MAXWELL human rights law conference in October 2012. It has been revised by the addition of additional (and updated) case law and some further examples and explanation. The final section, dealing with developments relating to Article10 ECHR/immigration rights and, in particular, the case of *R (Naik) v SSHD* [2011] EWCA Civ 1546, has been dropped in the interests of space.

2 New provisions dealing with overstayers came into force on 1 October 2012.

3 Delivered on 18 July 2012 and holding that any requirement which, if not satisfied by the migrant, will lead to an application for leave to enter or remain being refused is a rule within the meaning of s3(2) Immigration Act 1971; such a 'rule' must be laid before Parliament for scrutiny by way of the procedure under s3(2).

4 A 'statement of ECHR compatibility' was also published on the Home Office website.
5 For an earlier case exemplifying this approach, see *Senthuran v SSHD* [2004] EWCA Civ 950.
6 See also post *Kay*, *Doherty v Birmingham City Council* [2008] UKHL 57, [2009] 1 AC 367.
7 S84(1)(c)(g) Nationality, Immigration and Asylum Act 2002.
8 And see in *Kay* at §§33, 36; 180-4; 205.
9 *SSHD v Pankina* [2011] QB 376 had made it clear that the Rules are not 'subordinate' legislation. Accordingly, they are not subject to the interpretive duty in s3 1998 Act. At the same time, because they are not made under primary legislation, they cannot block a grant of leave outside the Rules on HRA grounds on the basis that the Rules were made under primary legislation within the meaning of s6(2) HRA, see at §42-43.
10 The issue was left open in the House of Lords: *Mahad v ECO* [2010] 1 WLR 48, [2009] UKSC 16.
11 With thanks to Navtej Singh Ahluwalia and Sonali Naik, both of Garden Court Chambers and David Chirico, Pump Court Chambers from whose work the notes making up this summary have been taken.
12 http://www.legislation.gov.uk/uksi/2012/1532/regulation/3/made
13 And see *MH v SSHD*, Unreported UT above at §37.
14 In *VW*, it was held that: 'the inquiry into proportionality is not a search for such an obstacle and does not end with its elimination. It is a balanced judgment of what can reasonably be expected in the light of all the material facts'.
15 The factors are: nature and seriousness of the offence; length of the applicant's stay in the country from which he or she is to be expelled; time elapsed since the offence was committed and the applicant's conduct during that period; the nationalities of the various persons concerned; applicant's family situation, such as the length of the marriage, and other factors expressing the effectiveness of a couple's family life; whether the spouse knew about the offence at the time when he or she entered into a family relationship; whether there are children of the marriage, and if so, their ages; and the seriousness of the difficulties which the spouse is likely to encounter in the country to which the applicant is to be expelled. And see *MH v SSHD*, Unreported UT above at §§38-41.
16 See further *Maslov v Austria* [2009] INLR 47 GC (below).
17 *Boultif v Switzerland* (Applcn No 54273/00) (2001) 33 EHR 50; *Tuquabo-Tekle & Others v Netherlands*, Applcn No 60665/00, [2006] 1 FLR 798; *Rodrigues da Silva and Hoogkamer v The Netherlands*, Applcn No 50435/99 (2006) 44 EHRR 729, *Y v Russia*, Applcn No 20113/07 (2008) 51 EHRR 531; *Omoregie & Others v Norway*, Applcn No 265/07 [2008] ECHR 761.
18 Note also, though, that the court in *Muse* qualified what it said about the similar approach to reunion/ expulsion cases by stating (at §23): 'The trauma of breaking up a family and thereby rupturing family ties may be significantly greater than the effect of not facilitating the reunion of a family whose members have become accustomed to living apart following a decision of the family to live elsewhere'.
19 Citing also *Bousarra v France* (Applcn) No 25672/07, 23 September 2010.
20 UN Declaration on the Rights of the Child 195; the Convention on the Rights of the Child 1989 (UNCRC); the Convention on the Elimination of All Forms of Discrimination against Women 1979; to General Comments 17 and 19 of the Human Rights Committee in relation to the International Covenant on Civil and Political Rights 1966; and to the European Union's Charter of Fundamental Rights; see also the obligation in s55 Borders, Citizenship and Immigration Act 2009, to make arrangements to assure that functions relating to asylum, immigration and nationality 'are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom'.
21 'The child's interest comprises two limbs. On the one hand, it dictates that the child's ties with its family must be maintained, except in cases where the family has proved particularly unfit. It follows that family ties may only be severed in very exceptional circumstances and that everything must be done to preserve personal relations and, if and when appropriate, to "rebuild" the family […]. On the other hand, it is clearly also in the child's interest to ensure its development in a sound environment, and a parent cannot be entitled under Article 8 to have such measures taken as would harm the child's health and development…'

22 See also: *AD Lee* [2011] EWCA Civ 384, where there was contradictory evidence about the best interests of the children, and where the Court of Appeal emphasized that the question of where the balance lay had been one for the immigration judge as primary fact-finder.
23 Citing also *OH (Serbia)* [2008] EWCA Civ 694 and *AP (Trinidad & Tobago)* [2011] EWCA Civ 551.
24 See also, *Norris v Government of the United States of America* (No 2) [2010] 2 AC 487, [2010] UKSC 9.
25 In the subsequent decision of the Court of Appeal in *Mohan v SSHD* [2012] EWCA Civ 1363 (below), this phrase appears to have been transcribed as 'informal communication'.
26 Ie, the Children and Family Court Advisory and Support Service.

# Miscarriages of justice – back to basics?

**Yasmin Husain**

*This paper considers the effectiveness of the criminal and civil justice systems in righting and redressing the wrongs caused by miscarriages of justice. The author, Yasmin Husain, was seconded as a trainee to JUSTICE between May and August 2012. In producing this paper, she conducted interviews with Susie Labinjoh (Partner at Hodge Jones & Allen Solicitors), Stephen Cragg (a barrister at Doughty Street Chambers), Lord Eric Avebury (Liberal Democrat Spokesperson for home affairs: civil liberties between 2005 and 2010) and Michael Mansfield (QC at Tooks Chambers) as well as consulting other written material to which she refers.*

It has been 15 years since JUSTICE campaigned on miscarriage of justice cases. Tom Sargant, JUSTICE's founding secretary, worked alongside the BBC's *Rough Justice* and Channel Four's *Trial and Error* programmes to secure the release of a number of prisoners who had been wrongfully imprisoned. JUSTICE played a significant role in changing the legal establishment's view of the inadequacies of the system. These were highlighted in evidence to the 1993 Royal Commission on Criminal Justice, which led to the establishment of the Criminal Cases Review Commission in 1997. At its peak, JUSTICE itself took on around 200 cases annually, using pro bono lawyers to pursue the necessary casework.

## Introduction

The principles of natural justice or 'due process' include access to free legal advice and representation at all stages; a clear and precise exposition of all the charges; ready access to independent and impartial judicial scrutiny; proportionate access to all evidence and information; a fair trial before an independent and impartial tribunal on tested and reliable evidence; and, above all, according to a presumption of innocence which can only be displaced by the state discharging its obligation to prove guilt 'beyond reasonable doubt' (the onus and standard of proof). This is intended to be a system for, in criminal matters, safely convicting the guilty and not the innocent.

The rights enshrined in the International Covenant on Civil and Political Rights (ICCPR) and the Seventh Protocol of the European Convention on Human Rights state that where there has been a miscarriage of justice, the person who has suffered punishment as a result of such a conviction shall be compensated according to law. The system of compensation is intended to reflect the 'spirit

and purpose' of these international obligations and ensure that respect is given to individual rights.

However, the rules are made a mockery when they are broken. This paper will highlight the causes of miscarriages of justice and evaluate how effective the criminal and civil justice systems have been in redressing wrongful convictions identified as still ongoing today.

## Abuse of power in the police and crown prosecution services

Commentators view the police and prosecution services as under pressure from both government and the public in tackling rising crime. As a result, there is a perception that miscarriages of justice are due to the failings of both of these agencies.

As the Legal Action Group argued in its evidence to the Royal Commission, 'The seeds of almost all miscarriages of justice are sown within a few days, and sometimes hours of the suspect's arrest.'[1] This suggests that wrongful convictions result from biased investigations. The danger can be particularly acute when police officers arrest a suspect; believe they have resolved the question of guilt or innocence; and can sometimes ignore vital evidence that might contradict their belief in the suspect's guilt.

Police corruption and abuse have been a cause of miscarriages of justice in the past. *The Birmingham Six* case is a well-known example of how the police were able to abuse their powers using unlawful methods to arrest and charge Hugh Callaghan, Patrick Joseph Hill, Gerard Hunter, Richard McIlkenny, William Power and John Walker. This was in spite of the fact that they were unsure the suspects had committed any crimes at all.

Michael Mansfield[2] has written that, after the six suspects were arrested for suspicion of planting and exploding bombs in two Birmingham pubs that killed 21 and injured 182, they claimed to have been, beaten, punched and kicked around the face, head and all parts of their body by Birmingham CID. They also claimed that the CID officers subjected them to verbal abuse and death threats. The men could hear screams from the room next door and were told that their wives and children would be harmed unless they co-operated. William Power was so scared that, against his will, he signed a six-page statement confessing to planting the bombs. Hugh Walker, was 'booted' in the spine, he had cigarettes stubbed out on a blister on his right foot and was kicked in the genitals. His head was covered in a blanket and a CID officer threatened to and, subsequently, pretended to pull the trigger of a hand gun. In the end, Walker was so disorientated that he lost consciousness and was in no state to make

a confession. However, the abuse, threats and beatings continued and all but Paddy Hill confessed to the bombings. When the Court of Appeal overturned their convictions in 1991, the judges learned that some of the confession evidence had been written by the police.[3] In addition, 22 other convictions were overturned due to the misconduct of the West Midlands Serious Crime Squad that had produced coerced confessions.[4]

Interrogations and confessions appear to have been employed as key investigative tools used by police officers in cases in the 1970s and 1980s. From time to time, police officers abused these techniques by fabricating and coercing confession evidence.[5] The charges against the *Guildford Four* were dismissed when a rough set of typewritten notes with handwritten addenda were discovered, proving that the police had fabricated confession evidence.

Allegations of miscarriage of justice accelerated the introduction of legislation to deal with abuse. The Police and Criminal Evidence Act 1984 (PACE) provided a legislative framework for the powers of police officers in England and Wales to combat crime, as well as providing codes of practice for the exercise of those powers. The aim of the legislation was to establish a balance between the powers of the police and the rights of members of the public.

PACE provided rules for police officers on the length of questioning and required that interviews should be recorded and all suspects be informed of the right to have legal representation as well as providing detailed rules on detention reviews and medical assessments.[6] PACE provided safeguards to ensure that suspects would not be mistreated and sought to eliminate the causes of miscarriages of justice. However, PACE has not entirely eliminated police corruption and abuse of power. There still remain cases which breach PACE codes.

The Crown Prosecution Service (CPS) was created in 1986, with the explicit role of independently reviewing the police decision to make a charge and to take over all prosecutions initiated by the police. Previously, police officers in England and Wales had been responsible for both investigating and initiating criminal charges. The CPS was granted the power to discontinue inappropriate cases. In spite of its detailed charging standards, the CPS has been criticised for failing to scrutinise the police decision to prosecute. The failure stems from the dependence of the CPS on the police. The CPS cannot initiate prosecutions and is, therefore, dependent on the police for the evidence needed to do its job, including its quality, sufficiency and reliability. The CPS cannot supervise the investigation, direct the police to undertake further investigations or question witnesses.[7] This failure of the CPS effectively to review charging decisions made by the police is a weakness which can, and has, led to miscarriages of justice.

## The fallibility of forensic evidence

One of the most significant and complex causes of miscarriages of justice has been forensic evidence.

The case of *Sally Clark* is, arguably, amongst the most infamous cases in modern criminal history.[8] Sally Clark was convicted of the murder of her two sons, eight-week-old Harry and 11-week-old Christopher. Three judges in the Court of Appeal ruled that the convictions were unsafe as medical evidence that might have cleared Ms Clark was kept secret during her trial. The Criminal Cases Review Commission (CCRC) referred the case back to the Court of Appeal after it emerged that there was clear evidence in the form of newly disclosed results of microbiology tests showing that Ms Clark's sons had died of natural causes. In the Court of Appeal on 29 January 2003, the court found that the trial of Sally Clark had not been fair, as the jury had been deprived of the opportunity of hearing and considering medical evidence that may have influenced their decision. The convictions were held to be unsafe and were subsequently quashed.[9] These tests had been known to prosecution pathologist, Alan Williams, but not to other medical witnesses, police or lawyers, since 1998. Sally Clark's husband, a solicitor, found the new evidence by accident; it had been hidden away in a huge pile of papers that had been finally extracted from Macclesfield Hospital in 2001. A request for the papers had been made almost two years earlier.[10]

This case caused fears of a reversal of the presumption of innocence where mothers are accused of killing their babies. There were several similar cases to that of Sally Clark at the turn of the millennium, including those of *Sheila Bowler*, convicted of murdering her aunt, Florence Jackson, and *Kevin Callan*, who served three years for the murder of his four-year old step-daughter, Amanda Allman.[11] Both are examples where, upon appeal, the convictions were found to be unsafe and quashed after the introduction of new forensic evidence. Cases such as Sally Clark's continue to question the reliability of convictions based solely on 'expert' forensic evidence.

## To disclose or not to disclose?

The suppression of disclosure evidence has been identified as being at the heart of a series of miscarriage of justice cases dating back to the 1970s. This is in spite of the duty of prosecutors to disclose all evidence that they intend to offer to prove their case.

Several cases exposed the suppression of exculpatory evidence by the police. In the case of the *Birmingham Six,*[12] exculpatory forensic evidence suggested

that the defendants had not handled the nitroglycerine as they were alleged to have done in manufacturing the bombs. In the case of the *Guildford Four*, police interview notes that undermined the authenticity of the defendants' confessions were found to have been suppressed. In the case of *R v Kiszko,*[13] forensic evidence had been suppressed that would have established that the defendant was infertile and semen found at the rape scene was not that of the defendant.

Tightening the laws on disclosure has proved difficult. The police and prosecution services have a history of being caught disclosing only what they believe to be relevant to their own case and not all of the information they hold.

Michael Mansfield has spoken about the case of *Judith Ward*[14] who was charged with and convicted of conspiracy to cause explosions in three bombings which occurred in 1973 and 1974. She was found guilty and spent 18 years in prison. In 1991, after her case was considered by the CCRC, there was a successful referral to the Court of Appeal. The evidence illustrated many failings. These included failure by the West Midlands Police to hand over 1,700 witness statements, some of which were entirely supportive of the defence case. In addition, Judith Ward's mental illness; her many changes to her confession; and the prosecution's selection of statements from often contradictory confessions were not disclosed. The Court of Appeal criticised a member of the Department of Public Prosecutions (DPP) staff and a barrister for their role in the non-disclosure in this case. The non-disclosure of scientific evidence was identified as the key cause in the wrongful conviction of Judith Ward.

As a result of the Judith Ward case, the prosecution was required to provide the defence with all evidence, unless the trial judge specifically ruled that it could be held back on grounds of public interest. Thus, the defence could inspect any material it felt was necessary. The police and prosecutors reacted to this change and complained about spending vast amounts of time and money supplying the defence with material, much of it irrelevant. In response, the government passed the Criminal Procedure and Investigations Act 1996, which created detailed requirements for police recording, retention and disclosure in the prosecution of any information that might be relevant to the investigation. The result was a formalised, statutory method for giving the defence access to evidence pertinent to the case.[15]

However, in practice, what this means is that disclosure is left to a police disclosure officer, who is typically not legally trained, to list any unused non-sensitive material and anything that might undermine the prosecution's case to be disclosed to the defence. The defence must supply a defence statement and the prosecuting authority is to supply any unused data that helps the defence

case. This process still leads to miscarriages of justice as the rules depend entirely on the judgement, assiduousness and honesty of the police officer who assembles the information and on the impartiality of the CPS lawyer who assesses whether the material may assist the defence. Michael Mansfield has argued that the outcome has been that major trials have collapsed at huge expense to the state and that the risks of non-disclosure continue to be a matter of concern.[16]

The case of *Steven Miller*[17] illustrates that abuse of police and prosecution powers as well as non-disclosure are still very much key causes of miscarriages of justice. The case was a high-profile civil action against former police officers. The case collapsed in 2011 after the court was told that some files had been destroyed. This led the judge to believe that a fair trial was no longer possible. It later emerged that some of the documents which were believed to have been destroyed had been recovered by the Independent Police Complaints Commission. The Director of Public Prosecutions, Keir Starmer, has opened a new independent enquiry into what happened in this case, asking inspectors to look at the Crown Prosecution Service's system for handling large amounts of evidence. Steven Miller has said that he feels he has been 'fighting for his life' ever since his wrongful conviction.

Michael Mansfield, in interview, stated that:

> *The causes of miscarriages of justice which were highlighted in the 80s and 90s have not disappeared. The causes used to be police corruption, disclosure and forensic evidence and today we are seeing these causes resurface but for different reasons. There is an unhappy repetition and a moral and legal blindness. This shows that those responsible have not learned any lessons from the past and we have come back round to the systematic failure in the system.*[18]

In spite of the fact that rules and laws were enforced following the high-profile cases of wrongful convictions in the 1970s and 1980s, the system is still allowing wrongful convictions to occur.

## The right to a fair trial

One of the problems for victims of wrongful convictions is accessing funding in order to obtain legal representation for their Court of Appeal application. Susie Labinjoh[19] pointed out that access to good quality legal advice and funding has been a big problem for many victims. She has said that:

> *Many victims of miscarriages of justice are acquitted by the Court of Appeal after a long-term campaign which has attracted significant media attention. For these victims of miscarriages of justice decent legal advice*

> *and funding will not be an issue but what about the victims who are inarticulate or not media savvy and do not have a wide network of support to assist with the legal and campaigning costs?*

A 2009 study found that two out of three applicants to the CCRC did not have a lawyer and that applicants with lawyers were almost twice as likely to succeed.[20] An unrepresented applicant is significantly disadvantaged when challenging a CCRC decision not to refer a case to the Court of Appeal. The study concluded that 'there can be little doubt that such high quality legal representation merits the public funding which is provided'.

Legal aid cuts to the criminal defence sector have caused significant setbacks in the provision of high quality legal advice and representation. Further to this, the cuts in the public sector have had an impact on the quality of investigation, research, disclosure and scientific examination. We recently witnessed the closure of the government-owned Forensic Science Service (FSS), which will have an impact on those seeking forensic science services in the investigation of a potential miscarriage of justice case. Their only option will be to tap into the private sector. Recent austerity measures will and already have had a significant impact on the right to legal advice and representation and the right to adequate resources, particularly to ensure that defendants have a fair hearing. It will be even harder for defendants to overturn a wrongful conviction.

## How effective is the role of the Criminal Cases Review Commission (CCRC) in righting miscarriages of justice?

The CCRC will refer a case to the Court of Appeal where there is any new argument, or evidence, not previously raised and where there exists a 'real possibility' that in the event of a referral, the Court of Appeal would find the conviction to be unsafe. This is known as the 'real possibility test'.

JUSTICE has been involved in scrutinising the CCRC's role. Laurie Elks, a former commissioner of the CCRC, authored a book published by JUSTICE, reviewing the outcomes of cases referred to the Court of Appeal by the CCRC between 1997 and 2007. The report identified that in 1997 only 11 referrals were made and this increased to 39 referrals in 2007.[21] The CCRC has received 14,778 applications up until May 2012 and there have been 503 referrals in total. Of these, 324 cases have resulted in convictions being quashed by the Court of Appeal.[22]

Michael Naughton of the Innocence Network in Bristol has been an outspoken critic of the effectiveness of the CCRC. He has published a collection of papers contributed by practitioners, campaigners and academics seeking to show that

the CCRC is bound up in legal technicalities and often fails the innocent victims of miscarriages of justice. He calls for an overhaul of the CCRC and its referral powers.

There does appear to have been a shift in the approach of the CCRC and the way that it views cases. In its 2011/12 annual report, the CCRC stated that it had performed well in the year in spite of further reductions in budget and staffing and that in the sixth consecutive year of cuts to the commission, it had managed to refer 22 cases to the Court of Appeal without any material increase in queues or waiting times.[23] The CCRC highlights its success, particularly in the case of *Sam Hallam*.[24] Sam Hallam was convicted of the murder of Essayas Kassahun in 2005 and served a seven-year sentence. The annual report describes an in-depth detailed investigation that uncovered fresh evidence. A review was conducted with the assistance of Thames Valley Police, which revealed serious deficiencies in the original police investigation. This, in turn, led to the referral of the case to the Court of Appeal. Sam Hallam's case was quashed by the Court of Appeal in May 2012. The commission identifies Mr Hallam's case as one that matched the public conception of a classic miscarriage of justice in the sense that Mr Hallam denied the offence and pleaded not guilty and was wrongfully convicted.

The CCRC has recently identified a series of cases where refugees or asylum seekers have been prosecuted for, and pleaded guilty to, offences relating to their entry into the UK, such as having a false passport or not having a passport. International law states that such prosecutions should not be brought where people are fleeing persecution and UK law provides defences designed to protect people in this position. The CCRC has recently referred several cases where convictions have been obtained and prison sentences imposed in these circumstances and where defendants appear not to have been adequately advised of potential defences available to them. The CCRC has reported that it is an extraordinary fact that such victims are treated so unfairly by our justice system.[25]

One function of the CCRC may be to help policy makers and professionals understand the causes of miscarriages of justice and how to prevent them. When interviewed, Lord Avebury,[26] said that he had been asked to assist with cases related to ss32-33 Criminal Justice and Public Order Act 1994 (CJPOA), under which the judge in a case is not obliged to give the jury directions about uncorroborated evidence in relation to sexual offence cases. Lord Avebury is investigating the case of a potential wrongful conviction. It concerns allegations of sexual assault on the defendant's step-daughter. There is now new expert evidence that the step-daughter was suffering from severe mental health problems at the time she gave evidence in the criminal trial. The appeal case

relies upon this new expert evidence. However, the jury was allowed to hear uncorroborated evidence in the first trial and the defendant was convicted based upon that evidence. Lord Avebury is of the view that the rule concerning uncorroborated evidence is causing grave problems for defendants in obtaining a successful application to the Court of Appeal. He stated that what is needed is an analysis of the CCRC's data in order to analyse how many cases related to ss32-33 CJPOA are referred to the Court of Appeal by the CCRC to identify whether the current law on uncorroborated evidence needs to be reformed.

The CCRC has recognised that sexual offences trials can lead to miscarriages of justice and it has made referrals in such cases.[27] These have included cases where uncorroborated evidence is a factor. A defendant may be convicted by the jury on the testimony of the complainant. An unprepossessing defendant may be particularly likely to be disbelieved by the jury. However, the case Lord Avebury is investigating still awaits consideration by the CCRC. Lord Avebury, in his correspondence with the CCRC has requested statistics on how many cases have been referred to the Court of Appeal where uncorroborated evidence has played a part in a defendant's conviction. The CCRC has offered to allow research to be conducted in this area and JUSTICE may become involved in this.

## Relationship with the Court of Appeal

The CCRC can only refer cases on grounds within the Criminal Appeals Act 1995. As a result, the CCRC is subordinate to the Court of Appeal.[28] The consequence of this relationship is that any new evidence or argument raised by the CCRC's investigations is ultimately received and evaluated by the Court of Appeal. It was and still is a matter within the discretion of the Court of Appeal whether or not it is 'necessary or expedient in the interests of justice'[29] to receive new evidence.

On the question of the effectiveness of the Court of Appeal in quashing convictions, Dr Hannah Quirk, Lecturer in Criminal Law and Justice, University of Manchester, speaking at a JusticeGap debate,[30] said that more convictions are quashed than ever would have happened in the 1980s. She has worked at the CCRC and the Innocence Networks in New Orleans. In her view, it is far better to have an appeal heard in the UK than in the United States because prosecuting authorities take more notice of bodies like the CCRC rather than voluntary and under resourced organisations.

However, in spite of the fact that the Court of Appeal is successfully quashing convictions, the critics in this area, level their concerns at the approach taken in fresh evidence cases and jury infallibility.

When interviewed for this paper, Michael Mansfield[31] confirmed that

> *there is a problem on appeal with defendants having to prove their innocence because the Court frequently, and wrongly in my view, adopts an approach in fresh evidence cases where they retry instead of review. This was a criticism voiced strongly by Lord Devlin who emphasised the paramountcy of the jury as arbiters of fact.*

Those working on the Innocence projects argue that reform of the CCRC needs to be considered as part of a wider debate about the fundamental problems with the Court of Appeal's approach. They argue that the Court of Appeal needs to consider potential miscarriages of justice rather than rigid rules and it needs to abandon ideas of jury infallibility and the unfair requirement for 'new evidence' or argument as in many cases it appears that the evidence needed was there all along.[32]

## Calls for reform

Laurie Elks has concluded that it may, indeed, be time to carry out a review of the CCRC's remit and that it would be possible to widen its power of referral to include exceptional cases where it suspects that a miscarriage of justice has occurred even when it is not persuaded that the 'real possibility' test has been satisfied. This would then, perhaps, compel the Court of Appeal to apply a more holistic approach to the safety of such convictions.[33] He acknowledges that there is a legitimate concern about the CCRC's subordinate relationship with the Court of Appeal and that a critical review should not be ruled out.

## Approaches to the right to compensation?

Those whose freedoms have been violated must be provided an effective remedy by the state. This right is enshrined in the International Covenant on Civil and Political Rights (ICCPR).[34] Once a wrongly convicted person has had his or her conviction quashed, part of his or her remedy has been provided for by the state, in restoring his or her liberty. However, the state is also under a duty to provide compensation for the loss of liberty suffered by those wrongly convicted, as enshrined in Article 14(6) ICCPR. The rights under the ICCPR are what compelled the government to introduce statutory legislation to provide redress to victims of miscarriages.

Prior to the Criminal Justice Act 1988, a person who had been pardoned or whose conviction was quashed had no legal right to compensation, despite the fact that a gross miscarriage of justice might have occurred. In certain instances, however, the Home Secretary would offer an ex gratia payment from public funds. The payment was offered in recognition of the hardship caused. The

decision was at the discretion of the Home Secretary, who sought advice from an independent assessor.[35]

The scheme was abolished in April 2006, when the then Home Secretary, Charles Clarke, scrapped the scheme as part of New Labour's 'rebalancing' of the criminal justice system.[36] Susie Labinjoh described the ex gratia scheme as: 'A scheme for victims of miscarriages of justice who fell through the net of the statutory scheme'. Her firm was amongst several law firms that brought a judicial review against the government's decision to abolish the scheme. This was unsuccessful. The result of the abolition of the ex gratia scheme had a significant impact on victims of wrongful convictions. When interviewed, Susie Labinjoh recalled the case of *Colin Stagg* who spent 13 months on remand before he was acquitted. Colin was wrongly accused of the murder of Rachel Nickell. Under the ex gratia scheme he was awarded £700,000. Under the statutory scheme he would have received no compensation at all. There are many cases similar to that of Colin Stagg which fall outside the statutory compensation scheme and are left with no other route to obtaining compensation.

## Statutory rights and the 'meaning of miscarriage of justice'

However, the reliance upon the Home Secretary's discretion in determining the right to compensation for wrongful conviction was criticised[37]and many, including JUSTICE, argued that compensation should be made a legally enforceable right. The UK was seen to be failing its international obligations under Article 14(6) ICCPR.[38] It was believed that the implementation of a statutory compensation scheme would finally enshrine the UK's international obligations.

The right to statutory compensation is enacted by s133 Criminal Justice Act 1988, which states that:

> *when a person has been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows beyond reasonable doubt that there has been a miscarriage of justice, the Secretary of State shall pay compensation for the miscarriage of justice to the person who has suffered punishment as a result of such conviction or, if he is dead, to his personal representatives, unless the non-disclosure of the unknown fact was wholly or partly attributable to the person convicted.*[39]

In order to qualify for compensation under this section, a 'new or newly discovered fact' must have come to light which shows 'beyond reasonable doubt' that the defendant was the victim of a 'miscarriage of justice'. It is

important to note that the section only applies to appeals against convictions that are brought out of time. This further restricts the number of cases which meet the eligibility criteria for obtaining compensation.

Susie Labinjoh,[40] when interviewed for this paper, stated that

> *Prior to 19 April 2006, the majority of victims of miscarriages of justice who did not meet the eligibility criteria for the statutory scheme were eligible under the ex gratia scheme.*

The two schemes were, therefore, working well alongside one another. However, when the ex gratia scheme was abolished it became much more difficult to gain compensation for the victims of miscarriages of justice under s133 of the statutory scheme.

The test for eligibility was further restricted following the House of Lords' ruling in *Mullen*.[41] This case concerned the question of whether the abuse of process in getting the defendant extradited from Zimbabwe to stand trial in the UK rendered his conviction so unsafe as to qualify him for compensation for a miscarriage of justice. The meaning of 'miscarriage of justice' under s133 was considered by the Lords. In this case, Lord Steyn concluded that the phrase only covered the conviction of someone who was later shown to be innocent. However, Lord Bingham doubted whether this narrow construction was correct. He made references to cases where a conviction is quashed because something has gone seriously wrong in the investigation of the offence or the conduct of the trial, resulting in the conviction of someone who should not have been convicted.

Stephen Cragg[42] commented:

> *In my view following the case of Mullen,[43] the Secretary of State was applying the Lord Bingham test in S133 cases after 2004 and we were seeing a more liberal interpretation being applied to the term miscarriages of justice.*

The Lord Bingham test is more liberal because it includes cases where there has been a 'judicial error' linked to the wrongful conviction. However, the courts have adopted the Lord Steyn test in s133 cases. Stephen Cragg[44] states that only a few cases were going through on the Lord Steyn test as it proved almost impossible for victims to prove that they were innocent of a crime. Therefore, subsequent cases following *Mullen*[45] have attempted to reconcile, or choose between the different approaches of Lord Steyn and Lord Bingham, but have

not resolved the issue so as to give a clear meaning to the term 'miscarriage of justice'.

## Has Adams widened the scope for compensation?

The decision in *R v Adams* has been considered by some commentators as a widening of the meaning of 'miscarriage of justice' and, therefore, allowing more victims to become eligible under the s133 scheme. However, many are more cautious and see the courts as still restricting access to compensation.

The Supreme Court decided *Adams* in May 2011. The correct construction of s133 divided the court and in a lengthy and complex judgment, a bare majority of five justices held that the statute does not require a claimant to prove beyond reasonable doubt that he was actually innocent of the offence in question. Instead, it is enough if the applicant can show that a new fact so undermines the case against him that no conviction could possibly be based upon it. In reaching their conclusion, the court also touched upon a number of other important issues, including the relationship between the statutory scheme and the presumption of innocence enshrined in Article 6(2) of the European Convention on Human Rights, the meaning of 'new or newly discovered fact' and the ability of the Court of Appeal to make declarations of innocence in criminal cases.[46]

Lord Justice Dyson in the Court of Appeal had identified four possible categories of miscarriage of justice. This fourfold categorisation was used as a framework for discussion when the Supreme Court came to analyse the correct construction of s133. His categories were:

> *Category 1 – Cases where fresh evidence shows that the defendant is innocent of the crimes of which he or she has been convicted.*
>
> *Category 2 – Cases where fresh evidence is such that, had it been available at the time of the trial, no reasonable jury could have properly convicted the defendant.*
>
> *Category 3 – Cases where fresh evidence renders the conviction unsafe in that, had that evidence been available at the time of the trial, a reasonable jury might or might not have convicted the defendant.*
>
> *Category 4 – Cases where something has gone seriously wrong in the investigation of the offence or the conduct of the trial, resulting in the conviction of someone who should not have been convicted.*

In the Supreme Court, the majority preferred a broader construction than the minority would have adopted. The minority would have limited the scope of s133 to cases where the claimant could show beyond reasonable doubt that *'he was actually innocent'* of the crime of which he was convicted (ie, category 1 cases only). The majority felt that this test was too narrow and instead they held that a miscarriage of justice should be deemed to have occurred whenever a new fact 'so undermines the evidence against the defendant that no conviction could possibly be based upon it'. This formulation extends beyond category 1 cases and covers the cases that would fall within a tightly defined version of category 2 as well. The court also held that it is the responsibility of the secretary of state to decide in each individual case whether or not the applicant has suffered a 'miscarriage of justice' within the meaning of the legislation. [47]

Some commentators are optimistic and are of the view that the Supreme Court has made it easier for victims of wrongful imprisonment to get compensation.[48] JUSTICE considered it to be *'*fair, though narrower than we were hoping for*'*.[49] The question of how future cases for compensation will be decided post *Adams* appears to be a difficult one.

There have been many applications for compensation while *Adams* was being brought to the Supreme Court. These cases were stayed pending its outcome. The High Court has now selected a group of cases with very different facts to be heard together as 'test cases' to see how *Adams* will apply in different sets of circumstances. Stephen Cragg[50] who is representing some of the claimants[51] says that 'The High Court is interested in how *Adams* will affect s133 cases and needs to create some guidance in deciding cases in the future'.

There are currently pending more than a dozen judicial review applications against the secretary of state's decision to grant compensation under s133. Once these test cases have been decided, it is thought that it will become clearer to the courts how to decide on these other judicial review applications in the future. Stephen Cragg is of the view that *Adams* will not have a significant impact on future cases and perhaps no impact at all. His view of the judgment is that it still poses a restriction on potential applicants and excludes out of time applications. Only a few claimants will be able to uncover new evidence or a newly discovered fact in their case and be in a position where the circumstances around their cases will allow them to do so.[52]

The test does not appear to cover those cases in categories 3 and 4 and this will leave many victims of wrongful convictions without any right to redress. Those miscarriages that result from a failure of the criminal justice system will not be eligible for compensation. In practice, it seems likely that most cases where convictions are quashed will fall into category 3 and will, therefore, continue to

remain outside the ambit of s133. The decision is, therefore, likely to disappoint a fair number of individuals (such as Mr Adams) who are unable to meet this exacting standard.

## Reforms

Stephen Cragg argues that the Court of Appeal has a vital role to play in assisting claimants in their applications for compensation after their convictions have been quashed. Civil compensation lawyers consider the criminal case papers carefully and are looking for evidence to meet the strict s133 test. However, it is almost impossible to identify any comments made by judges about the innocence of the victim, criticisms about the cause of the wrongful convictions and an apology would appear to be very rare indeed.[53]

It would appear that the civil compensation system is failing victims of miscarriages of justice. There should surely be a system where every victim of a wrongful conviction has the right to compensation. The problems highlighted are faults within the scheme itself. For victims having to go through the criminal justice system to obtain an acquittal, proving themselves all over again under the current civil justice system appears to serve no justice whatsoever.

The government should consider reform and suggestions for a new scheme which provides all victims of miscarriages of justice with a statutory minimum level of compensation, something like the ex gratia scheme which is currently being campaigned for by practitioners, academics and campaigners involved in this area of work.[54] A person's loss of time in prison is significant when you consider that it could have been spent in employment, education, with family and friends. These are losses which are difficult to quantify but which are very real.

## The merits of a system beyond compensation?

What is undoubtedly lacking for those who have been wrongfully convicted is any form of rehabilitation programme. Prisoners who are guilty can receive rehabilitation inside prisons and outside. However, for victims of miscarriages of justice there appears to be a lack of such services.[55]

*Suzanne Holdsworth* served more than three years in prison for killing two-year-old Kyle Fisher. She was, however, acquitted of murder and manslaughter in 2009. In a meeting at the House of Commons she recounted her experience. After release from prison, she was frightened to go home. She is on medication and has been diagnosed with post-traumatic stress disorder. She wants an apology and believes that this would assist her mental wellbeing.[56]

The Miscarriages of Justice Organisation[57] set up in Scotland by Paddy Hill, one of the Birmingham Six, carries out work in assisting victims in and out of prison. It is currently campaigning to establish a retreat or trauma centre to help de-stress victims and prepare them for their return to society, using shared counselling experiences. Adrian Grounds, a consultant psychiatrist in forensic psychiatry is an authority on this issue. He has produced a study of the victims of miscarriage of justice and found that the majority suffer from psychiatric and psychological problems. Some suffered from post-traumatic stress disorder. He found that the symptoms suffered by the victims were similar to those found in clinical studies of war veterans.[58] This issue has been highlighted in the case of *Sam Hallam*, who is in need of intensive medical support and counselling but this support has not been forthcoming from the state.

The UK has a Miscarriages of Justice Support Service in the Citizens Advice Bureau situated in the Royal Courts of Justice. Victims are referred there by the CCRC. The service supports the victims during their appeal against conviction, immediately following release and subsequently for as long as they need it. It provides services such as finding accommodation, establishing income, applying for national insurance credits, registering with a GP and accessing healthcare and counselling.[59] This is clearly a much needed service for victims of miscarriages of justice but is only a skeleton system and there is a need to provide many more services than those currently being provided.

There is a strong case for extending existing services to an intensive rehabilitation programme with counselling support services and medical care. As the state has caused – or been complicit in – the miscarriage of justice, such services should be funded by the state and it should not be left to voluntary organisations to supply this vital service.

## The way forward?

Michael Mansfield reckons that it is the individual police officers and personnel who are responsible for wrongful convictions. He says that:

> *There is still a culture within elements of the police service, the CPS and the courts which harbours a belief that too many guilty people are acquitted, and this in turn can lead to the rules of due process being broken or marginalised in such a way that the risk of wrongful conviction ensues.*

The criminal and civil justice system fails victims of miscarriages of justice in two ways: in causing the errors in the first instance and then failing to redress the errors in the second. The causes of miscarriages of justice today are similar to those of 30 years ago. As with the cases of the 1980s and 1990s, laws were enacted to help reduce those miscarriages of justice but the results are not

perfect. Miscarriages still seem to occur and the reasons in many cases remain, in essence, the same.

Victims of wrongful convictions have the right to redress and this includes compensation and aftercare. The civil compensation system is in need of a complete overhaul if it is to ensure that it is upholding the rights under the ICCPR and the Seventh Protocol of the ECHR.

There is a very real need for those linked to miscarriages of justice to work towards preventing them as well as redressing them. Key stakeholders include the police, the CPS, the CCRC, the Ministry of Justice, lawyers and campaign groups. The constructive scrutiny of the miscarriages of justice in the 1980s and 1990s led to a better understanding of the nature of the system and how it functions. However, time has shown that there is no quick remedy to eradicate all miscarriages of justice but a constructive dialogue between stakeholders would be an important step forward at the present time.

The rules are made a mockery of when they are broken, and appropriate sanctions should be placed on the authorities breaching them. The main priority should be upholding the basic principles of natural justice, due process of rights and those rights under the ICCPR and the Seventh Protocol of the ECHR 'though the heavens fall'.

***Yasmin Husain is a trainee solicitor at Matthew Gold Solicitors. She was seconded to JUSTICE for three months during 2012.***

**Notes**

1 *Report of the Legal Action Group*, LAG 8 (1993) (concluding that the bulk of miscarriages are traceable to the early actions of the police).
2 Michael Mansfield, Memoirs of a Radical Lawyer, Bloomsbury, 2009, chapter 17, p293.
3 *R v McIlkenny*, et al, 93 Cr App R 287 (1991) ('*The Birmingham Six*').
4 Lissa Griffin, 'The Correction of Wrongful Convictions: A Comparative Perspective', 16 *American University International Law Review* 5, 2001.
5 Lissa Griffin, ibid.
6 Police and Criminal Evidence Act 1984 (PACE).
7 There are two tests set by crown prosecutors in deciding to charge a suspect: the evidential test and the public interest test and then along with looking at the papers from the case and evidence from the police they will make their decision whether to charge. Available at http://www.cps.gov.uk/news/fact_sheets/decision_to_charge/
8 Bob Woffinden, 'Convictions without crimes? Too many guilty verdicts are made on questionable evidence', the *Guardian*, 30 July 2002.
9 *R v Sally Clark* [2003] EWCA Crim 1020.
10 Radio Four's 'File on Four' programme, Can be found at: http://www.sallyclark.org.uk/FileonFour.html
11 Dr Michael Naughton, 'Convicted for crimes that never happened', *Guardian Unlimited*, 19 October 2003.
12 *R v McIlkenny*, et al, 93 Cr App R 287 (1991).
13 The *Times*, 19 February 1992 discussing *R v Kiszko* in relation to non-disclosure.

14 Interview with Michael Mansfield QC, barrister at Tooks Chambers, Friday 3 August 2012.
15 Michael Mansfield, Memoirs of a Radical Lawyer, Bloomsbury, 2009, chapter 15, pp260, 2009.
16 Ibid.
17 The police trial collapsing in the Steven Miller trial reported at http://www.channel4.com/news/police-corruption-trial-collapses
18 Interview with Michael Mansfield QC, barrister at Tooks Chambers, Friday 3 August 2012.
19 Interview with Susie Labinjoh, partner at Hodge, Jones & Allen on 9 July 2012.
20 Centre for Criminal Appeals, Researchers at the University of Warwick in their 2009 report to the Legal Services Commission examining the extent and impact of legal representation on applications to the CCRC and the ensuing outcomes in the Court of Appeal.
21 Laurie Elks, Righting Miscarriages of Justice, Ten years of the Criminal Cases Review Commission, JUSTICE, 2008.
22 See Criminal Cases Review Commission website - http://www.justice.gov.uk/about/criminal-cases-review-commission
23 See Criminal Cases Review Commission, Annual Report and Accounts, 2011-2012, http://www.justice.gov.uk/about/criminal-cases-review-commission
24 Criminal Cases Review Commission, Annual Report and Accounts, 2011-2012, see http://www.justice.gov.uk/about/criminal-cases-review-commission
25 Ibid.
26 Interview with Lord Avebury, House of Lords, 5 July 2012.
27 Laurie Elks, Righting Miscarriages of Justice, Ten years of the Criminal Cases Review Commission, JUSTICE, 2008, p218.
28 Ibid, p14.
29 S23 Criminal Appeal Act 1968.
30 *Wrongly accused: Who is responsible for investigating miscarriages of justice?* The JusticeGap Debate, 6 July 2012, Manchester.
31 Michael Mansfield QC of Tooks Chambers, interview on 3 August 2012.
32 Jon Robins, 'The CCRC isn't perfect, but calls for reform need to be part of a wider debate', Jon Robins, the *Guardian*, Thursday 26 January 2012.
33 Laurie Elks, 'Miscarriages of justice: a challenging view', *JUSTICE Journal*, Volume 7, Number 1, 2010, p19.
34 International Covenant on Civil and Political Rights, Article 2 (a).
35 Clive Walker and Keir Starmer, Miscarriages of Justice – A Review of Justice in Error, Blackstone Press, 1999, chapter 12, p250.
36 Jon Robins, 'Righting New Labour's wrong to victims of miscarriages of justice', the *Guardian*, Friday 8 July 2011.
37 JUSTICE, *Report on Compensation for Wrongful Imprisonment,* London, 1982.
38 Ibid.
39 S133, Criminal Justice Act 1988, Miscarriages of Justice, Legislation.gov.uk
40 Interview with Susie Labinjoh, partner at Hodge, Jones & Allen, 9 July 2012, at HJA offices.
41 *R (Mullen) v Secretary of State for the Home Department* [2004] UKHL18.
42 Interview with Stephen Cragg, barrister at Doughty Street Chambers on Thursday 19 July 2012.
43 *R (Mullen) v Secretary of State for the Home Department* [2004] UKHL18.
44 Ibid.
45 *R (Mullen) v Secretary of State for the Home Department* [2004] UKHL18.
46 Case Comment: *R (Adams) v Secretary of State for Justice* [2011] UKSC18, UKSC blog, Edward Craven, Matrix Chambers. See website: http://ukscblog.com/case-comment-r-adams-v-secretary-of-state-for-justice-2011-uksc18
47 Ibid.
48 'Degrees of Innocence', *The Economist*, 19 June 2012.
49 Ibid. Quote from Eric Metcalfe, former director of human rights policy at JUSTICE.
50 Interview with Stephen Cragg, barrister at Doughty Street Chambers, Thursday 19 July 2012.

51 Stephen Cragg, barrister at Doughty Street Chambers, is representing Ismail Ali for Matthew Gold Solicitors and other claimants for Hodge Jones & Allen Solicitors.
52 Ibid. In November 2012, the Grand Chamber of the European Court of Human Rights considered a challenge to a decision to refuse compensation under s133 on the grounds that it was incompatible with the presumption of innocence post-acquittal in miscarriage of justice cases. It is likely that this judgment, when handed down, will impact on the development of the domestic case law. See *Allen v United Kingdom,* App No 25424/09 (Ed).
53 Interview with Stephen Cragg, barrister at Doughty Street Chambers, Thursday 19 July 2012.
54 Interview with Michael Mansfield QC, barrister at Tooks Chambers, 3 August 2012.
55 Clive Walker and Keir Starmer, Miscarriages of Justice – A Review of Justice in Error, Blackstone Press, 1999.
56 'Jon Robins, 'Righting New Labour's wrong to victims of miscarriages of justice', the *Guardian*, Friday 8 July 2011.
57 The Miscarriages of Justice Organisation, Scotland.: See website - www.miscarriagesofjustice.org/
58 See website: http://www.miscarriagesofjustice.org/wp-content/uploads/2011/09/Adrian-Grounds-10.pdf
59 See website: http://www.rcjadvice.org.uk/miscarriages-of-justice/

# Restorative justice: not yet a 'household term'[1]

**Clare Hayes**

> *Restorative justice emphasizes the humanity of both offenders and victims. It seeks repair of social connections and peace … Unlike retributive approaches, which may reinforce anger and a sense of victimhood, reparative approaches instead aim to help victims move beyond anger and a sense of powerlessness. They also attempt to reintegrate offenders into the community.*[2]

Over the last three decades, models of restorative justice have proliferated globally as an alternative approach to resolving conflict and responding to crime. In its application to the criminal justice system, restorative justice denotes the idea that the victim, offender and the community need to repair the damage caused by a criminal offence through dialogue and negotiation. In 2004, JUSTICE researchers investigated the potential of incorporating restorative justice into the whole criminal justice system, including innovative work in the youth justice system in England and Wales, as well as examples of burgeoning international practice. Eight years later, this paper returns to the story to review progress, following the clearly stated commitment to restorative practices by the coalition government. In the interim, pioneering projects have continued to materialise, carving out creative approaches in areas previously assumed to be off limits, such as hate crime and use with women offenders. With the results of a large scale research trial of its use with adult offenders in circulation, we now know much more about the efficacy of restorative justice. This paper will revisit the judicial implications of restorative justice and situate it within the framework of human rights principles with which it must cohere. We will explore where the use of restorative justice might most effectively be expanded, such as with adults who have committed crimes at the more serious end of offending and across a diverse range of offences. Restorative justice has received rising international notoriety since the 1980s; its enthusiasts believe passionately that it has a major contribution to make in serving victims' as well as offenders' needs, and enlightening a criminal justice system, which has become somewhat stuck in processes, procedures and punishment. It has attracted many very remarkable pioneers who are dedicated and inspired by its philosophy and often by the possibility of deconstructing myths about the lives of people who offend. The challenge that was first taken up by the JUSTICE researchers in 2004 remains today: how to tap into the potential of restorative justice to shed a light on the

human impact of crime whilst ensuring human rights protection and legitimate process for the victim, offender and others involved.

## The policy context

> *What we want to see is restorative justice and restorative principles embedded in the criminal justice system as a whole and operating at every part of the criminal justice system* – Nick Herbert, Minister for Policing and Criminal Justice.[3]

Early in its administration, the present coalition government was swift to conceive a radical criminal justice reform programme, which aimed to stem the spiralling numbers of people entering the prison system. In 2003, when the first JUSTICE publication on restorative justice was in production, the prison population in England and Wales stood at 73,279. The figure in June 2012 had risen to 85,697 with 24 per cent of the prison population held in over-crowded accommodation in 2010–11.[4] Successive governments have attempted to tackle crime and its causes by relying on increasingly heavier penalties, when there is little empirical evidence that these have worked.

Included in *Breaking the Cycle* Green Paper in 2010 was a clear commitment to expand the range and availability of restorative justice measures.[5] It was recognised that hitherto, despite developments in the youth justice system, restorative justice approaches with adults have often been treated as an 'afterthought' to sentencing, rather than a relevant consideration. *Breaking the Cycle* envisaged that, in appropriate cases, restorative justice could become a 'fundamental part of the sentencing process'. It was anticipated that restorative justice programmes could intervene pre-sentence, in the form of victim-offender conferencing, where the offender admits guilt and the victim and offender agree to meet. The green paper explicitly proposed that, with the victim's consent, restorative justice outputs at the pre-sentence stage could directly inform the court's decision about the type and severity of sentence handed down. Restorative justice advocates hope that enabling victims and communities to influence or temper the types of sentence handed down will lead to less punitive responses to crime. However, checks and balances are clearly required to prevent abuse.

Interest in restorative approaches is not limited to the upper echelons of criminal justice campaigning organisations and policy makers. There is some evidence of an appetite for a more participatory model of criminal justice apparent in the views of the general public as well as by many organisations that represent victims. In an ICM survey commissioned by the Prison Reform Trust one month after the August 2011 riots, almost three-quarters of people

polled believed that victims should have a say in how offenders could best make amends for the harm caused and less than two-thirds considered that a prison sentence would be effective in preventing crime and disorder.[6] Victims have also advocated for the benefits of restorative justice, including Joanne Nodding, who spoke out publicly about her experience of meeting the person who raped her.[7] Nodding's comments about the criminal trial illustrate how restorative justice can give survivors of violent crime a greater sense agency:

> *He said [to the guilty man], 'you've ruined this woman's life'... I can understand why the judge said it, but I didn't want [the man] to think that he had ruined my life. Partly because I didn't want him to think, 'ha ha, I've got this power over her'. But also I didn't want him to have that burden.*[8]

A fruitful victim-offender conference between Will Riley and Peter Woolf resulted in the founding of *Why Me?* a charity that campaigns for victims to have access to restorative justice. Woolf had burgled Riley's house and in a powerful video available to view on the Restorative Justice Council website, *The Woolf Within*, the two men talk about the profound impact that their meeting had for addressing the trauma experienced by Riley and causing Woolf to reformulate his plans for the future.[9]

## Models of restorative justice – restoration over retribution

Restorative justice aims to replace the notion that criminal justice is a matter between the state and offender, with the idea that victim, community and offender should own the process. While some models have drawn on indigenous and community-based conceptions of justice, other articulations build on critiques of conventional criminal justice from victims' movements, the civil rights movement and communitarianism as well as those concerned about retributive models of justice; from prison abolitionists to faith groups and some feminist scholars.[10]

Restorative approaches adopt a future-orientated perspective on crime and seek to respond to 'post-crime needs of some of those involved, which modern criminal justice systems have tended to overlook'.[11] Restorative justice enthusiasts contrast this with retributive justice, focusing on punishment of the offender, with less regard to the needs of victims and the wider community.[12] At its core is a commitment to the idea that the victim, offender and the community need to repair the damage caused by the offence through dialogue and negotiation. This can take place directly in face to face conferencing or indirectly via a letters or shuttle mediation (where the mediator communicates with the victim and offender individually).

There are many types of restorative intervention that can be introduced at various stages of the criminal justice process. Principal models include:

- Victim-offender mediation: Dialogue between the parties, facilitated by a mediator, in order to try to resolve the issues and questions raised by the offence. This often involves a face to face meeting, following an admission of guilt by the offender. The ground rules require a consensus to work towards a resolution rather than conflict and an emphasis on putting things right, and reaching a realistic and proportionate agreement.

- Restorative conferencing: Brings together victims, offenders and their supports, including family, friends or professional supporters. It is a 'problem-solving method to allow citizens to resolve their own problems in a constructive forum'.[13]

- Sentencing circles: Community-based interventions that work in partnership with the criminal justice system and which seek to develop appropriate sentencing plans, using traditional circle ritual and structure to reach a consensus for responding to the problem.[14]

In the full model, restorative justice approaches are procedurally distinct from the conventional criminal justice system. In the adversarial court-based system, a neutral third party determines the appropriate outcome. Restorative justice transforms the role of the third party to facilitator. The domain of restorative justice is not generally fact-finding but forging an 'appropriate response to an admitted offence', [15] influencing sentencing rather than the core criminal trial. The role of lawyers is mostly limited to advising before and after. Courts generally play a 'background role', though they have been described as a 'safety net', checking that outcomes are broadly acceptable and that the quality of decision making is sufficiently high. Judges, therefore, need to be aware of the philosophy of restorative justice and check whether agreements are the result of negotiation and participation. Referral to restorative justice projects is often through police diversion or, in more serious cases, via recommendation from probation officers. However, there may be more scope for defence lawyers to indicate suitability of their clients and in South Africa the prosecutors are the gate-keepers.[16] Ideally, the two systems would become more porous so that restorative justice outcomes could hold some sway over court sentencing decisions. It is possible to see how there can be interplay between courts and restorative justice processes but the relationship between the two requires further examination.

Restorative justice meetings give a voice to victims in the criminal justice process as well as recognise that crime affects more than just the victim of the

offence – including the offender, the families of the victim and the offender, the community and the state.[17] In this sense, participating in a restorative justice process has the potential to provide a 'more humane and respectful'[18] approach to victims and offenders. In any event, empirical evidence (that will be visited later in this paper) suggests lowered rates of reoffending and more meaningful repair of harm for victims as well as a genuine possibility of making amends for offenders.

## A restorative philosophy

Given the many theoretical and practical traditions that have fed into the development of restorative justice, it is important to take a step backwards and critically review what is driving our interest in it. Restorative justice is often described as a 'social movement'. At its best, it aims not only for reparation for victims but also for wider social good; such as 'lessening the fear of crime, strengthening the sense of community, and restoring the dignity of those harmed, including the perpetrators'.[19] However, it is easy to imagine circumstances under which the flexible and participatory model could open the door to inadvertently degrading or patronising people who have offended.

Notwithstanding a note of caution, restorative justice approaches present an opportunity to deconstruct the dichotomies between victims and offenders. Criminologist, Carolyn Hoyle, distinguishes between the 'monologues' of a court setting and the dialogic approach of restorative justice, which does not aim for one 'unequivocal truth' but allows for the different agents to 'modify their narratives in response to the other's account'.[20] Many offenders have been victims themselves and mediation allows the victim and offender to discuss the circumstances that led up to the commission of the offence, often leading to a more nuanced understanding that has little resonance with stereotypical views of offending.

## International development

The development of restorative justice has become a 'worldwide criminal justice reform dynamic', [21] spreading from a small number of countries in the 1970s and 80s, to an estimated 100 countries today. In 2004, the JUSTICE researchers drew heavily upon practice abroad, including early examples of family group conferencing in New Zealand, legislative conferencing in Australia and restorative justice in institutionalised settings in Austria and Norway. For a comprehensive review of current international practice, the European Forum of Restorative Justice last year published a series of country reports.[22] There is enormous variation, with some countries still at an experimental stage while others are actively using restorative justice as an integral part of their criminal justice system.

## Taking stock: restorative justice in England and Wales

Back in 2004, restorative justice in England and Wales was most developed in the youth justice system, although non-statutory provision with adults was evolving, predominantly delivered by the police. The victims' lobby was still relatively young and there was very little knowledge of how restorative justice methods affected victims. There is now a much more substantial evidence base about the utility of restorative justice with adult offenders and for victims of a range of offences.

Restorative justice practice has grown in scale since 2004. Over 18,000 police officers have been trained to use restorative practices as diversionary measures for low level, often first-time offences. The coalition government has also provided funding for the training of over 1,000 probation and prison staff to establish restorative justice as a component of community orders and to produce and distribute best practice.[23] Innovative work has also emerged in secure settings for serving prisoners. For example, the Sycamore Tree programme, pioneered by the Prison Fellowship, delivers a training course on the principles and application of restorative justice in a range of prisons. The evaluation of the programme demonstrates positive results in terms of effecting attitudinal change and increasing victim empathy.[24]

Notwithstanding this activity, developments have translated unevenly into the system and restorative justice practice remains on the margins of criminal justice practice. In 2011, the Restorative Justice Council estimated that less than one per cent of victims of adult offenders had access to restorative justice.[25] Though the *Breaking the Cycle* Green Paper commits to an increase in the use of restorative justice, a critical question is what form of restorative justice this will mean and how that will determine who will have access to it. Commentators have identified restorative justice in the UK as one of the most 'over-evaluated and under-practiced area(s) of criminal justice ... typically only for shallow-end crime'.[26]

## The victim perspective

The victims' lobby now has a far more articulated position on restorative justice. Organisations such as Victim Support have been vocal in their support but advocate for a more consistent approach and standards for its delivery, warning against restorative justice 'on the cheap'.[27] Restorative justice has captured the imagination as a method by which to expose the complex harms that crime can cause to people's emotional and social well-being, reaching beyond 'palpable material harm'.[28] The government's recent consultation with victims and witnesses garnered almost unanimous support for restorative justice,

with the main point of contention the suitability of different type of crimes.[29] Consultees were divided over whether sensitive cases, such as domestic violence, sex offences and hate crime, should be considered for restorative interventions. Rather than a blanket prohibition, some suggested that these cases called for more research and careful assessment before referral. The new Victim's Code will include restorative justice for victims of adult as well as young offenders.

## The evidence: restorative justice with adults

In a major empirical development, three restorative justice schemes under the Home Office Crime Reduction Programme in England and Wales were independently monitored from 2001 to 2006 by researchers from the University of Sheffield, culminating in four research reports.[30]

The three projects, CONNECT, the Justice Research Consortium and REMEDI, were designed to focus on adult offenders at different stages of the criminal justice system, including pre-sentence and pre-release from prison. It was intended that the interventions would take place at active decision making points within the criminal justice system and they included serious offences, such as robbery, burglary and grievous bodily harm.

CONNECT worked with cases from two magistrates' courts in inner London, between conviction and sentence, or post sentence, offering a wide variety of restorative justice services, from indirect mediation to conferencing.[31]

Justice Research Consortium worked in three sites providing conferencing for adult offenders: in London, with adult offenders convicted of burglary and street crime offences, pre-sentence at the Crown Court; in Northumbria, with adult offenders pre-sentence in magistrates' court and young offenders given final warnings; and in Thames Valley, with prisoners nearing release and adult offenders given community sentences.

REMEDI worked with adult and youth offenders, providing both direct and indirect mediation in South Yorkshire. The service took cases from various stages of the criminal justice system, including offenders given community sentences, youths given police final warning and adults in prison.

### *Headline findings*

The results of the Sheffield research were quite startling, in terms of the level of positive affirmation given to the restorative process by all parties. The research trials demonstrated exceptionally high satisfaction rates from both victims and offenders who participated in conferencing and mediation, with 85 per cent of victims and 80 per cent of offenders very or quite satisfied with conferences.[32] The schemes received high victim participation rates, with the caveat that

victims generally chose indirect mediation where that was available but overall satisfaction rates were higher in cases where direct mediation was used.

The researchers found that offenders who participated in restorative justice schemes committed statistically significantly fewer offences in the subsequent two years but the sample size was regarded as too small to constitute decisive evidence of reduced reoffending.[33]The Restorative Justice Council argues that the inconclusive status of the reoffending data has been used to 'justify inaction' and has held back the development of restorative justice in this country.[34] However, in 2010, Ministry of Justice analysts returned to the raw data and ran a further meta-analysis, which suggested that when restorative justice is used with adult offenders committing serious offences, there is a statistically significant 14 per cent reduction in frequency of reoffending.[35] In aligning research on the same cohort of offenders, it was indicated that a restorative justice programme reduced post-traumatic stress symptoms in victims of robbery and burglary, especially in adult women.[36]

### *A complex picture*

Beyond the statistics, the research papers are rich in detail, analysing the efficacy of the process, perceptions of fairness and quality of facilitation and follow-up. Most evaluations of restorative justice across different nationalities have focused predominantly on measures of victim satisfaction. Unusually, the Sheffield researchers sought to duplicate, as far as possible, the same questions for both victims and offenders.[37] The research findings, therefore, reveal the plethora of different motivations and meanings that can be derived from a restorative approach, and that militate against a one-size-fits-all approach.

Conferencing was regarded as significantly more useful for both victims and offenders in relation to more serious offences.[38] The researchers sought empirically to assess some of the claims made for restorative justice by its advocates, with largely positive results. Eighty-three per cent of offenders and 60 per cent of victims thought the process had to some extent 'made the offender realise the harm caused by the offence'.[39] Over half of the victims responded that the restorative process helped to give a sense of closure, which the researchers considered to be high, given the seriousness of offences that were dealt with. Though perhaps not a resounding endorsement, these findings certainly provide robust support for restorative justice, taking us firmly beyond the realm of intuition about the benefits of the approach.

All the schemes struggled to gain sufficient referrals and operated 'under the premise that they were add-ons to current criminal justice operations, whilst these operations tried to carry on as usual'.[40] Problems emerged for pre-sentence schemes subject to the strict time constraints on courts for processing cases

and the need to ensure that an offender is not held subject to bail or custodial constraints for longer than necessary.[41]

### *Judicial implications*

The evaluation revealed that the three schemes were valued by criminal justice practitioners and sentencers, despite operating on the margins of the criminal justice system.[42] Victims who had participated in a conference were significantly more likely to think that the right sentence had been handed down.[43] There was some evidence, particularly for street crime, that pre-sentence restorative justice led to shorter custodial sentences as victim-offender conferencing provided concrete evidence of remorse and intention to make amends.[44] For example, as a result of viewing footage of a victim-offender conference, one sentencing judge handed down a community rather than a prison sentence. The comments of Martyn Zeidman QC illuminate the insight the conference gave him into the context surrounding the offence:

> *You agreed to take part in a restorative justice programme. This would not have saved you from a prison sentence but you participated in a very active and sensitive manner. I now know more about your attitude than perhaps any other defendant … I found it a very moving experience. It was not only helpful to hear what the victim said but it was also useful to see the expression on your face and I do not believe that you were acting. Every possible indication is that you were genuinely contrite … I do accept that you are genuinely sorry. You are a better person than you were before the restorative programme commenced. So, in that sense, although you bear the same name, the person who committed this offence is not the same person standing in the dock today.*[45]

The research trials led to several Court of Appeal cases that establish that participation or willingness to participate in a restorative justice programme can be factored into sentencing decisions. In *R v Collins,*[46] the defendant had been sentenced to seven years' imprisonment after pleading guilty to unlawful wounding and robbery. The Court of Appeal held that the appellant's sentence should be reduced by two years because of the productivity of a victim-offender conference that had taken place. Moses J considered a number of factors: evidence that restorative justice programmes are going 'at least some way' to ensuring effective sentencing; 'agreement from the appellant to participate'; the fact that restorative justice is not a 'soft option'; the appellant's letter of apology and agreement to attend Narcotics Anonymous on a regular basis and a 'merciful letter' written by the victim. In *R v Barci,*[47] despite a question mark over whether the case was suitable for restorative justice, the defendant's willingness to undertake the programme could be taken into account in his favour where it was clear on all the evidence that the offer was genuine. *Collins* was followed

in *R v O'Brien*,[48] where the defendant had been sentenced to six months' imprisonment for theft and two years for burglary to be served consecutively. The court held that the sentences should instead be served concurrently following a restorative justice conference where the appellant committed to undertaking drugs rehabilitation in prison, employment training and to write to the victim. Significantly, the victim's attitude was particularly highlighted as a factor that was taken into account in the decision:

> *The victim wrote to the appellant, speaking of her impression that the appellant had shown genuine remorse at the meeting and a positive wish to lead a more constructive life in the future. The source of that letter is such that we are satisfied that she was not one to have the wool pulled over her eyes and genuinely accepted the intentions of the appellant.*

Though these judgments are welcome in terms of their progressive approach towards the relevance of restorative justice to sentencing decisions, they raise more questions than they answer. In reviewing *Collins* and *O'Brien*, Ian Edwards raises the potential incompatibilities between restorative justice and the sentencing principles of objectivity, consistency and proportionality.[49] The judgments do not offer a clear definition of what is meant by restorative justice or which elements are pertinent to sentencing decisions. A preliminary question relates to how much information about restorative justice proceedings should be available to courts and sentencers. There is a risk that judges might be unfairly influenced by a charismatic offender or by the attitude of the victims, some of whom will be more talkative, emotional or sympathetic while others are more reserved or demanding.

Fluidity is a strength of restorative justice because it makes it highly responsive to human experience but it also renders it a process that is susceptible to capture by a participant who aims to push his or her own agenda. The Supreme Court of Germany has considered the need to ensure that restorative justice is not used in a tactical or instrumental manner. In a case of rape, the offender denied responsibility until the evidence against him became overwhelming. He then offered an apology and financial compensation to the victim for the pain and suffering caused, which was accepted by the lower court.[50] The Supreme Court refused to accept this outcome, holding that the offender must accept responsibility in 'an honest and serious way'.

There is a need to promulgate wider guidance to courts on how to give principled consideration to restorative justice, perhaps by the Sentencing Guidelines Council as suggested by Edwards. In South Africa, non-governmental organisation, the Restorative Justice Centre, acts as amicus curiae to courts

advising on restorative justice options, a model that could be followed in the UK.

## Human rights and accountability

The relationship between restorative justice, human rights and judicial process remains an under-analysed area. Informality and the appearance of lenience give rise to dangers that are more pernicious than failing the public acceptability test. While restorative justice approaches aim to subvert the predilection for retribution, it is important that this does not precipitate neglect of the procedural protections that would normally be in place within the context of crime and punishment.[51] Many proponents of restorative justice believe that strict procedural rules disturb the fluidity of restorative processes, while others recognise the dangers of allowing 'erosion of important procedural safeguards, unwelcome net-widening or weakening of already weak parties'.[52]

Notwithstanding the need for carefully honed procedures, restorative justice philosophy and its participatory approach poses an opportunity to promote wider human rights norms within criminal justice practice. When implemented according to what criminologist, Kathleen Daly, terms 'procedural justice', restorative justice allows participants to talk, without one person dominating the exchange; encourages all parties to speak; treats all parties with fairness and respect and provides a safe environment in which to resolve the harm that has been caused by an offence.[53] As observed by Hoyle, operationalising restorative justice poses an 'attractive prospect to those who do not subscribe to the "criminology of the other" and who yearn for a more humanised response to crime'.

## Proportionality

It is vital that reparative measures given out as a result of a restorative conference are both proportionate to the offence committed and recognisably coherent with sentences received by others convicted of similar offences. Restorative outcomes must be reasoned and reasonable and must comply with upper and lower limits, which is a refinement of earlier ideas that outcomes should reflect the participants' needs and wishes alone. Judicial oversight is important to protect against an unusually vengeful victim or community and to guard against bogus penalties or activity requirements. For example, in a well-known case in Canberra, it was agreed that a young offender should make amends by wearing a t-shirt emblazoned with the words 'I am a thief'.[54] Blatantly denigratory outcomes can be avoided by ensuring oversight and good quality training but this example also points to the need to be alert to less overt cases of stereotyping.

The possibility that outcomes from restorative justice processes might be distorted by the sentiments of victims towards particular types of crime also need to be considered. A representative from the Thames Valley Probation Service spoke to the researcher for this paper about the possibility of an offender receiving an onerous financial requirement for a property-related offence, while for the victim of a very serious, violent crime, financial reparation may seem a wholly inappropriate response. In such cases, it might be that the victim wishes to receive an apology or some form of explanation. Edwards proposes a middle ground whereby courts might follow restorative justice principles but within a proportionality framework.

Proportionality applies not only to the outcome but also to the process of a restorative process. The dialogue will generally include 'forms of moral disciplining'[55] and a fairly intrusive inquiry into the circumstances and motivations of the offender but it is critical that it does not become belittling, particularly in subtler forms. Good quality facilitators are required to prevent revictimisation of the offender and to ensure that he or she is not stigmatised and discriminated against by the victim, or either party's supporters.

## Privacy

There is tricky balance to be struck between the demands of a transparent justice system and the imperative of protecting the privacy of the participants. Both parties may choose to disclose deeply personal information, which has no place in the public domain but may be a critical element of a conference. Confidentiality becomes even more of a predicament where the offender admits to guilt prior to the conclusion of coterminous criminal justice proceedings or admits to other previous offences. In Northern Ireland and New Zealand, safeguards are in place that prevent admissions of guilt from being used as evidence in other criminal or civil proceedings.[56] In England and Wales, the legal position still requires clarification.

As in other areas, the ever expanding domain of social media presents a challenge to human rights protection. Schemes have used a variety of mechanisms to facilitate restorative justice proceedings. For example where a face to face meeting is not suitable, a written or recorded apology may be substituted. However in the age of Facebook, the risk to the privacy of the offender is aggravated by the possibility of a vengeful victim posting the material online for their peer groups, families or prospective employers to view in permanent form. Social media makes it that bit easier to create an indelible record of a very personal process and places the offender in a potentially vulnerable position. Careful assessment of the victim's, as well as the offender's, readiness and suitability to participate is important.

## Fair trial and due process

There are a number of legal issues that need disentangling when it comes to the presumption of innocence and opportunities to participate in restorative justice. The role of lawyers within restorative justice conferences remains an open debate, though indications suggest that lawyers who are not trained in restorative practice may hinder rather than assist the process.[57] In New Zealand, youth advocates assist young people in family group conferences, playing a supportive role while ensuring rights protection.[58]

One of the traditional touchstones of restorative justice is the principle of voluntarism from all parties. Coerced participation substantially increases the risk of revictimisation if an offender is unwilling to meaningfully engage with the process or to make genuine commitments to reparative gestures.[59] However, the precise complexion of voluntarism, at least with regard to the offender, will inevitably vary. Clearly, as restorative justice becomes more embedded within the criminal justice system, a certain aspect of voluntarism is lost. If restorative justice forms a component of a person's community or deferred sentence or licence conditions, then there will be the possibility of repercussions for failure to comply. Many defendants may seek to avoid the trauma and uncertainty of court hearings by admitting offences that they could successfully defend. Practitioners now generally talk in terms of 'informed consent' for offenders and 'informed choice' for victims, rather than voluntary agreements.

The problem of protecting the presumption of innocence is further exacerbated in cases of co-defendants. In some of the London research trials, serious cases involving co-defendants were screened out due to the possibility of conference proceedings 'tainting' any subsequent trial of co-defendants whose cases were still pending or who had not been caught.[60]

These dilemmas lead to questions about access to restorative justice, where either the victim or offender is unwilling or unable to participate.

## Accountability

The importance of mechanisms for accountability and transparency to protect against abuse and to ensure that restorative justice outcomes influence criminal justice processes was highlighted in the research trials.[61] This is crucial to ensuring the quality and legitimacy of decision making within restorative justice programmes. However, the researchers also warned against deterring participation or perpetuating harm by publicising private information disclosed by offenders or victims within restorative justice conferences. The researchers, therefore, recommended that a record of the event be kept – in the form of a videotape or the report of an uninvolved observer – to be consulted in the

case of an allegation of abuse. The researchers also suggested that anonymised reports of individual cases or the occasional broadcast of a restorative justice process with consent could be utilised to educate the wider public.

## Guidelines and standards

The United Nations Economic and Social Council endorsed *Basic Principles of Restorative Justice* in 2002, adding that all member states should consider establishing guidelines governing restorative programmes.[62] These *Basic Principles* provided the basis for a Handbook on Restorative Justice produced by the UN Office on Drugs and Crime in 2006.[63] The handbook draws upon developing practice around the world. Interestingly in some countries, the law relating to restorative justice requires the establishment of an ethical commission to provide a complaints procedure for victims, offenders and others involved and to elaborate on ethical principles and guidelines for restorative justice practitioners. Such a co-ordinating function would be worthy of consideration in England and Wales. So far, the Restorative Justice Council has produced a *Statement of Restorative Justice Principles* and provides quality assurance through a system of accreditation for practitioners and best practice guidance.

The European Commission published a draft Directive on Minimum Standards for Victims in 2011, which includes in Article 11 the right to safeguards in the context of restorative justice services. This includes informed choice, the duty to consider power imbalances and prejudices created by age, maturity or intellectual capacity and protection of privacy.[64]

## Legislating for restorative justice

> *Although restorative justice is possible, there is no provision in legislation yet, as far as I am aware that makes clear in express terms, using the expression 'restorative justice', what is the precise, core role of the courts ... [Legislation] will be a message to those who are involved in the justice process that restorative justice has come of age - Lord Woolf, House of Lords debate on the Legal Aid, Sentencing and Punishment of Offenders (LASPO) Bill.*[65]

For those lobbying for its extension in England and Wales, the legal position of restorative justice within the criminal justice system is ripe for change. International research suggests that a legislative basis provides for more frequent use of restorative justice, lends legitimacy, improves consistency and predictability in the process and, crucially, establishes the necessary legal safeguards.[66]

In comparison with many other European jurisdictions, the legislative basis for restorative justice with adults in England and Wales has been described as a 'dead letter'.[67] Though the Criminal Justice Act 2003 provides for 'reparation' to be a requirement of a conditional caution or part of an activity requirement, the Thames Valley Probation Service is 'almost unique' in utilising this provision to make restorative justice a specified activity requirement under a community sentence.[68]

Many of its UK advocates see legislation requiring the consideration of pre-sentence restorative justice and enabling restorative justice to routinely inform sentencing decisions as the vital tipping point. Though technically possible, since the closure of the restorative justice trials in 2004, pre-sentence restorative justice has hardly taken place in this jurisdiction.[69] This chimes with the international evidence that the major problem faced by non-legislative restorative justice programmes is lack of referrals.[70] With no obligation on the court to consider the use of restorative justice, innovation has been curtailed in most regions.[71] The Restorative Justice Council emphasises that the optional nature of restorative justice within the statutory framework has left provision largely to 'the enthusiasm of pioneers'.[72]

The opportunity to firm up legislation on restorative justice was discussed in the initial debates on the LASPO Bill in March 2012. However, the decision was deferred until the conclusion of the pending consultation on community sentences. The arguments put by the government were that: legislation might not be necessary in view of innovations that had taken place within the existing statutory framework; legislation could stifle local innovation; and any delay in the development of restorative justice was simply due to time required for 'culture change' in the criminal justice system.[73] The current official government policy position on restorative justice, as articulated in its community sentences consultation, is that it should not be operationalised in a way that is 'over prescriptive or places unnecessary restrictions and burdens upon the system'.[74]

The UN Handbook notes that restorative justice programmes depend upon the 'proper use of discretionary decision-making by law enforcement and justice officials', which has to be facilitated and guided, often by legislation. The character of legislative provisions around the world differs in significant ways. Restorative justice pioneers, Dobinka Chankova and Daniel Van Ness, divide measures into two types: those that *allow* justice officials to divert cases into restorative justice programmes and those that *require* the use of restorative justice.[75] Both models require compromise; making restorative justice entirely optional appears to minimise its use while imposing restorative justice as a mandatory requirement impacts upon the core value of voluntarism. However in reality, the drafting possibilities are probably more sophisticated. For

example, by insisting that sentencers *consider* restorative justice as an option or, as suggested by the Restorative Justice Council, by amending s142 Criminal Justice Act to include the achievement of restorative justice as a purpose of sentencing.[76]

## Expanding the boundaries of restorative justice?

There is a danger of vitiating restorative justice if the mainstream approach leads to net-widening, whereby people who have committed very low level crime are swept into sentencing, cautionary or diversionary programmes when they might have been dealt with informally and diverted out of the criminal justice system to better effect. Policy makers should be alive to the risk of taking an overly punitive approach to offences that would not otherwise have been escalated as one can anticipate the damaging and patronising effect of imposing a restorative justice process in the wrong circumstances or for victimless crimes.

In surveying developments since 2004, one of the most interesting findings is the very striking practice that has emerged with offence categories that would previously have been considered too risky or inappropriate for restorative justice. While it may be highly politically contentious, it is in such cases that restorative justice may have the greatest transformative potential.

## Serious offences

The Sheffield research broke new ground with its focus on adult offenders. Victims of more serious offences were significantly more likely to cite an improved understanding about how the offence had come about and to believe that the offender was taking steps to address his or her problems following the restorative encounter. In Germany, where there is statutory provision to mitigate, or in minor cases dispense with, the sentence where the offender has made an effort to reach reconciliation with the victim and has provided restitution or made a serious effort to do so, roughly half of victim-offender mediation cases relate to violent offences.[77]

These findings present a challenge to the government and suggest why there may be high-level nervousness about a wholesale roll-out of restorative justice. The critical work lies not in creating strict criteria for crime eligibility, but in ensuring a high quality process for judging suitability in individual cases. The process requires the investment of a great deal of trust in the skills of criminal justice professionals and facilitators, where the consequences of a wrong turn could mean press scandal and deeply harmful consequences for an unwitting victim. It requires pliability in criminal justice procedures, an area over which the state is accustomed to holding a huge amount of control over process, outcome and in the end the liberty of people who have offended.

It also requires a flexible approach to the purposes of restorative justice. For very serious offences, interaction with the criminal justice system is not likely to mean substantial mitigation of sentence and may be more about answering victims' questions or contributing to an offender's preparation for release from prison.[78] Restorative justice can provide a vehicle for victims and offenders to voice details that, though rightly irrelevant to the independent and impartial process of the criminal trial, can be highly pertinent to those most affected by the crime. This is demonstrated in the following case extracted from the Restorative Justice Council website:[79]

> *David Rogers' son Adam was killed at the age of twenty-four in an attack on a night out. He had been attempting to shepherd a young man, Billy, away from a fight in order to calm him down. Billy suddenly turned round and punched Adam in the head. Adam was knocked backwards and hit his head on the ground. Very soon after Adam died, David told the police that he wanted to meet Billy. The meeting took place in the prison while Billy was still serving his sentence. David explains that part of the reason for wanting to meet with Billy following Adam's death was the importance of Billy knowing 'who Adam was'. David showed Billy photographs and told him about the sort of person that Adam was. Following the meeting, David felt that he understood more about what happened and why, which was helpful for diffusing the anger. David says he can now think about Billy without getting angry and, while it doesn't help with the grief, it does make a difference.*

## Complex cases and specialist areas

While advocating for an approach that does not mechanically exclude particular offence categories from consideration for restorative justice, particular circumstances may militate against its use. Factors that have been identified include: crimes where there is no clear victim; cases where the accused has not pled guilty or completely denies responsibility or engages in total victim-blaming; stalking cases; highly politically motivated cases; sexual offences and cases of child abuse and domestic violence.[80] In 2004, domestic violence, race hate and homophobia were all identified by the government strategy as areas that might require different considerations to be made. However, recent research suggests that skilful mediation may allow restorative justice to have a beneficial effect in carefully selected cases.[81]

### *Domestic violence*

Domestic violence is a setting in which power imbalances between the victim and offender are especially pronounced. This has raised concerns internationally over the appropriateness of restorative justice in this context, including the implications for victim safety, the potential to use an informal process to

'trivialise violence, diminish guilt or reinforce abusive behaviour' and the likelihood of revictimisation.[82] Feminist critics point to the danger that an informal process 're-privatises' violence perpetrated against women in an intimate setting.[83] In fact, the UN Handbook for Legislation on Violence against Women expressly prohibits mediation on the basis that it 'removes cases from judicial scrutiny, presumes both parties have equal bargaining power, reflects an assumption that both parties are equally at fault for violence, and reduces offender accountability'.[84]

The European Forum for Restorative Justice has challenged this blanket ban approach. Efforts have been made in some jurisdictions, most notably Austria, to explore the import of restorative justice to domestic violence cases. These projects demonstrate the possibility of building mechanisms to redress power imbalances. The women's refuge movement was originally opposed to out-of-court settlements in cases of domestic violence in Austria. However, research in co-operation with the Austrian Centres for Protection from Violence since the 1990s, has found that victim-offender mediation can lead to empowerment for women victims and, albeit in a smaller percentage, a change in the behaviour of male perpetrators.[85]

In 2010, 8.5 per cent of criminal cases and civil cases referred for mediation in Austria concerned domestic violence.[86] A model called the 'mixed double' is used, where a female and a male facilitator present the stories and experiences of each partner.[87] The 'distancing' or 'alienation effect' aims to rebalance power imbalances and lend support to the party that has been in the weaker position. The majority of women interviewed in the study contended that victim-offender mediation had contributed to empowerment both directly, and indirectly, through creating an impetus to seek further help and support and to leave abusive situations.

Domestic violence cases are often the product of a long history of violence and this makes them more intractable. Criminologist, Julie Stubbs, warns against integrating domestic violence within generic restorative justice practice, instead proposing a more directive role for the facilitator or wider involvement of victim advocates to ensure that the process does not inadvertently revert to discourses that subordinate women.[88]

### *Hate crime*

Hate crime has traditionally been approached prohibitively in national policy statements on restorative justice. It should certainly be treated as a specialist area given the power dynamics operating in relation to offences that are aggravated by homophobia, racism, disability discrimination and other forms of prejudice. One justification for excluding hate crime from the provision of restorative

justice is the 'heightened emotional harm' experienced by victims and minority communities following the commission of this type of offence.[89] Retributive justifications may have more purchase in this context. Criminologists, Mark Walter and Carolyn Hoyle, acknowledge that, while it may have very little deterrent effect on individuals, strict and visible punishment may contribute to evolving attitudes towards minority groups by powerfully rejecting crimes rooted in identity prejudice.[90] However, developing literature and practice demonstrates the scope of restorative justice as a tool for actuating a more direct transition in individual and social attitudes. International discourse on restorative justice sees it as a method that can be used in some of the gravest circumstances, for example, following mass atrocity to engender healing, accountability and community reconciliation. For example, following the Rwandan genocide, restorative practices were introduced through a hybrid system that brought together victims, offenders and the community to discuss harms that had been committed in Gacaca courts.

Following in-depth research on restorative mediation for hate crimes, including the Hate Crimes Project set up by Southwark Mediation Centre, Walter and Hoyle argue that restorative justice presents an effective model for challenging prejudices held about minority communities.[91] They stress that the critical component is effective facilitation. Offenders will often resort to techniques such as 'neutralisation' to rationalise past events. However, good facilitation skills can provide a space for victims and community members to challenge entrenched prejudices. While, on the one hand, the power imbalances associated with hate crime are a reason for caution, on the other, restorative justice may present a method for bridging the 'empathetic divide' that is often perpetuated between victims and offenders who come from very different social or cultural backgrounds.[92]

Until recently, some very innovative work was carried out by the Southwark Mediation Service's Hate Crime Project. In 2003, an evaluation of the service by Goldsmith University reported that it substantially reduced repeat victimisation.[93] This service has now closed due to funding problems. In researching for the present paper, it was clear that, despite a cautious national policy approach to hate crime, it is being used on a fairly routine basis by a number of police forces and other criminal justice agencies at local level. A case study from Thames Valley Restorative Justice Service shows how victim-offender mediation allowed for a wider discussion of the impact of the crime on the victim in relation to a racially-aggravated offence:

> *J had consumed a considerable amount of alcohol when he came across K. J accosted K, was verbally abusive towards him and made racial insults, then punched K in the face, breaking his nose. J was sentenced for common*

*assault and given a community order that included a restorative justice requirement. K suffered physical repercussions from the assault, including ongoing dizzy spells and severe headaches. K also became nervous about hearing shouting or being alone in the house. Both J and K agreed to a restorative justice conference. J apologised very early on and acknowledged that his behaviour had been 'yobbish and unprovoked'. K spoke at great length about how he had been affected, including the effect of the racial abuse. He explained that he was very worried about revenge or reprisals from J. K also talked about his upbringing in East Africa and how difficult it had been for him to communicate with his family during the time he had been incapacitated by his injuries; they would have been shocked and upset if they had known that he had been attacked. As well as apologising, J acknowledged the damaging element of the racial abuse. The outcome agreement included intention from both J and K to be friendly if they met again in the future.*

## Diversity and disproportionality

The disproportionate impact of the criminal justice system on particular diversity groups could be reproduced in a roll-out of restorative justice or effectively counteracted by redressing the harm that contributed to the commission of offences, including societal harm to the offender as well as the victim. The research trials found no evidence that restorative justice 'works' better with any particular demographic group, on the basis of age, gender, ethnicity or offence type.[94] While this is a green light for taking an inclusive approach, any government committed to expanding restorative justice must be alive to the imperative of ensuring access and resonance with different groups. Smaller community and grass-roots organisations often provide the best intelligence of how different approaches are impacting at a very local level and help to increase the reach of projects. For example, Belong London, a London based charity, believes that the views of black, asian, minority ethnic and refugee communities are underrepresented in the field of restorative justice and is currently leading a consultation.[95]

Research for this paper uncovered very little publicly documented restorative justice activity with women offenders. In 2007, the Corston Report was published as the product of a review of the situation of women within the criminal justice system. The report concluded that women are marginalised by a criminal justice and prison system 'largely designed by men for men'.[96] Proportionately more women than men are remanded in custody and women with a history of violence and abuse are over-represented in the criminal justice system. Women tend to commit different types of offences from men, many of which are acquisitive in nature and it is estimated that only 3.2 per cent of women in prison pose a high or very high risk of harm to others.[97] Limited

restorative justice practice with women so far is probably partly due to the relatively smaller numbers in the system. However, it is also due to evidence that restorative justice practice needs to be tailored for use with women. Julie Stubbs presents evidence that 'apology and forgiveness may be used in gendered ways'.[98] Attitudes are divided but, in 2004, the JUSTICE researchers raised the possibility that restorative methods are particularly beneficial with women offenders. This was qualified with the concern that evidence suggests that women may be more likely to accept an excess of responsibility, leading to overwhelming feelings of guilt and responsibility, particularly concerning given the very high incidence of self-harm in the female prison population.

Speculative comments made by service providers interviewed for this paper suggested that generic restorative justice programmes have often not considered the need to use a distinct approach with women offenders. Rosie Miles, a Griffins Society Research Fellow, has identified this gap and will undertake research over the next year to explore the implications of restorative justice with women offenders, including whether its use could be increased to divert more women from custody. Innovative approaches are emerging in some women's community centres, including at Eden House in Bristol, where they hope to make volunteer opportunities available to some of the women that they work with to assist in developing their restorative justice practice.

## Harms beyond what is criminalised

A persistent challenge to restorative justice relates to its capacity to address the social injustice and exclusion that underlie patterns of offending behaviour within society.[99] Exposed in restorative justice conferences is very often 'the context of relative deprivation, dysfunctional relationships, poor educational or health services, or failures of those in authority to identify or respond effectively to evidence of criminogenic factors'.[100] It is argued that this is precisely where restorative justice can make its greatest contribution in terms of demystifying the lives of people at risk of offending, challenging stereotypes and informing wider policy changes. Margarita Zernova and Martin Wright compare restorative justice conferences with small truth and reconciliation commissions, which expose: 'not merely security factors such as easy-to-steal goods in supermarkets, but high unemployment, lack of recreational facilities for young people, ethnic minorities denied opportunities because of discrimination'.[101] The challenge for restorative justice is to move beyond its transformative potential in individual cases to inform structural societal change.[102]

## Conclusion

Ultimately, restorative justice remains marginalised and attempts to increase its use are yet to crystallise into concrete measures that enable its consistent and effective use on a broader scale in England and Wales. Despite a profusion

of pilots and innovative practice at local level, it is questionable whether it is receiving the 'institutional focus'[103] required to embed it nationally. This is reflected in the European Forum report on current practice:[104]

> *England and Wales showed great advances when conferencing was still little known around the world and especially in Europe. However it has now also become an example of the problems and challenges that many initiatives and countries may encounter … many schemes have been discontinued, have stagnated or have simply remained underfunded and very local. Many pilots were set up with great enthusiasm in the 1990s and early 2000s, even with government funding, but despite some good results, they were not transformed into stable and expandable initiatives.*

A stronger statutory footing for restorative justice and precise guidance about the role of courts, lawyers and sentencers in operationalising restorative justice are long overdue. Restorative justice is proving to be a malleable approach, suitable for a wide range of offences and perhaps most constructive at the serious end of offending. Nevertheless, any roll-out of restorative justice should recognise that effectiveness will depend upon funding for specialist approaches to complex cases. The interaction between restorative justice approaches and human rights protection is an area that remains to be more thoroughly addressed.

***Clare Hayes is currently an LLM student at the School of Oriental and African Studies. She spent part of 2012 with JUSTICE as a legal policy intern, completing work on this project.***

**Notes**

1 J Shapland, A Atkinson, H Atkinson, B Chapman, J Dignan, M Howes, J Johnstone, G Robinson and A Sorsby, *Restorative justice: the views of victims and offenders. The third report from the evaluation of three schemes,* 2007, Ministry of Justice Research Series 3/07.
2 Martha Minow, Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence, Beacon Press, 1998.
3 *Restorative Justice, Policing and the Big Society*, 16 February 2011. Transcript available online: http://www.homeoffice.gov.uk/media-centre/speeches/Herbert-Restorative-Justice
4 Prison Reform Trust, *Bromley Briefings Prison Factfile,* June 2012.
5 Ministry of Justice, *Breaking the Cycle: Effective Punishment, Rehabilitation and Sentencing of Offenders*, CM 7972, 2010.
6 Prison Reform Trust, *Public want offenders to make amends*, September 2011.
7 Z Williams, 'Restorative Justice: Why I confronted the man who raped me', the *Guardian*, 27 June 2011.
8 Comments extracted from above article.
9 Available to view: https:www.restorativejustice.org.uk/rj-in-action/the_woolf_within_peter_wills_story/ #.UGA9GrJlQUo
10 D W Van Ness, *An Overview of Restorative Justice Around the World*, Eleventh United Nations Congress on Crime Prevention and Criminal Justice, 18 – 25 April 2005.
11 National Commission on Restorative Justice - Ireland, *Final Report*, 2009.
12 C Hoyle, 'The Case for Restorative Justice', Debating Restorative Justice, Hart, Oxford. 2010.
13 National Commission on Restorative Justice - Ireland, *Final Report*, 2009.
14 Ibid.

15 M Walters and C Hoyle, 'Healing harms and engendering tolerance: the promise of restorative justice for hate crime', Hate Crime: Concepts, policy, future directions, N Chakraborti, ed, Willan Publishing, 2010.
16 United Nations Office of Drugs and Crime, *Handbook on Restorative justice programmes*, United Nations, 2006.
17 National Commission on Restorative Justice - Ireland, *Final Report*, 2009.
18 Ibid.
19 C Hoyle, 'The Case for Restorative Justice', 2010.
20 Ibid.
21 D W Van Ness, *An Overview of Restorative Justice Around the World*, 2005, p1.
22 E Zinsstag, M Teunkens and B Pali, 'Conferencing: A way forward for restorative justice in Europe', *European Forum for Restorative Justice,* 2011.
23 Ministry of Justice, *Punishment and Reform: Effective Community Sentences*. CP8/2012, p31.
24 S Feasey and P Williams, *An evaluation of the Sycamore Tree Programme: based on an analysis of Crime Pics II data,* Sheffield: Sheffield Hallam University, 2009.
25 Restorative Justice Council, *A new way of Doing Justice. The response of the Restorative Justice Council to the Sentencing Green Paper – Breaking the Cycle,* 2011.
26 C Hoyle, 'The Case for Restorative Justice', 2010, p26.
27 Victim Support, *Policy Statement on Restorative Justice,* April 2011.
28 G Johnstone, Restorative Justice: Ideas, Values, Debates, 2nd edn, Routledge, 2011.
29 Ministry of Justice, *Getting it right for victims and witnesses: the Government Response*, London, Stationery Office, CM 8392, 2012.
30 All reports available to download from: http://www.restorativejustice.org.uk/resource/ministry_of_justice_evaluation_of_restorative_justice/
31 All project information extracted from J Shapland, A Atkinson, H Atkinson, B Chapman, E Colledge, J Dignan, M Howes, J Johnstone, G Robinson and A Sorsby. *Restorative Justice In Practice. The second report from the evaluation of three schemes, 2*006.
32 J Shapland et al, *The third report from the evaluation of three schemes,* 2007.
33 J Shapland, A Atkinson, H Atkinson, J Dignan, L Edwards, J Hibbert, M Howes, J Johnstone, G Robinson and A Sorsby, *Does restorative justice affect reconviction? The fourth report from the evaluation of three schemes,* 2008, Ministry of Justice Research Series 10/08.
34 Restorative Justice Council, *A new way of Doing Justice,* 2011, p64.
35 Ministry of Justice, *Green Paper Evidence Report, Breaking the Cycle: Effective Punishment, Rehabilitation and Sentencing of Offenders,* December 2011.
36 C M Angel, L Sherman, S Bennet, A Keane and T Richmond, *Effects of restorative justice conferencing on post-traumatic stress symptoms among robbery & burglary victims: a randomised control trial,* Jerry Lee Centre for Experimental Criminology,
Online: http://www.campbellcollaboration.org/artman2/uploads/1/Angel_restorative_justice.pdf
37 J Shapland et al, *The third report from the evaluation of three schemes,* 2007.
38 Ibid, p36.
39 Ibid, p38.
40 J Shapland et al, *The second report from the evaluation of three schemes*, 2006, p41.
41 J Shapland, A Atkinson, E Colledge, J Dignan, M Howes, J Johnstone, R Pennant, G Robinson and A Sorsby, *Implementing restorative justice schemes (Crime Reduction Programme) A report on the first year,* 2006, p53.
42 J Shapland et al, 2006, *The second report from the evaluation of three schemes*, p46.
43 J Shapland et al, *The third report from the evaluation of three schemes,* 2007, p41.
44 J Shapland et al, 2006, *The second report from the evaluation of three schemes*, p26; Restorative Justice Council, *RJC response to Punishment and Reform: Effective Community Sentences consultation paper,* 2012.
45 Thanks to the Restorative Justice Council for access to these comments.
46 [2003] EWCA Crim 1687.
47 [2003] EWCA Crim 2816.
48 [2004] EWCA Crim 2572.
49 I Edwards, 'Restorative justice, sentencing and the Court of Appeal', *Criminal Law Review*, 2006, 110–123.
50 Reported in A Hartmann, 'The Practice of "Täter-Opfer-Ausgleich" in Germany',

*European Best Practices of Restorative Justice in the Criminal Procedure,* 2010, 205–208.
51 A Skelton and M Sekhonyane,'Human rights and restorative justice', Handbook of Restorative Justice, G Johnstone and DW Van Ness, eds, Willan Publishing, 2007.
52 G Johnstone, Restorative Justice: Ideas, Values, Debates, 2nd edn, 2011.
53 J Shapland et al, *The second report from the evaluation of three schemes*, 2006.
54 J Braithwaite, *Standards for Restorative Justice*, Online: http://www.restorativejustice.org/10fulltext/braithwaite/
55 C Hoyle, 'The Case for Restorative Justice', 2010.
56 J Shapland et al, *The second report from the evaluation of three schemes*, 2006.
57 A Skelton and M Sekhonyane, 'Human rights and restorative justice', Handbook of Restorative Justice, G Johnstone and DW Van Ness, eds, Willan Publishing, 2007.
58 Ibid.
59 C Hoyle, 'The Case for Restorative Justice', 2010.
60 J Shapland et al, *A report on the first year,* 2006, p15.
61 J Shapland et al, *The second report from the evaluation of three schemes*, 2006, pp42–43.
62 United Nations E/CN.15/2002.
63 United Nations Office of Drugs and Crime, *Handbook on Restorative justice programmes*, 2006.
64 COM(2011) 275 final, Brussels, 18 May 2011.
65 House of Lords Debate, 27 March 2012, c1336.
66 United Nations Office of Drugs and Crime, 2006.
67 E. Zinsstag M Teunkens and B Pali, 'Conferencing: A way forward for restorative justice in Europe', *European Forum for Restorative Justice,* 2011, p284.
68 Restorative Justice Council, *RJC response to Punishment and Reform: Effective Community Sentences consultation paper,* 2012.
69 Ibid.
70 National Commission on Restorative Justice - Ireland, *Final Report*, 2009.
71 Ibid.
72 Restorative Justice Council, *RJC response to Punishment and Reform: Effective Community Sentences consultation paper*, 2012.
73 Baroness Northover, House of Lords Debate, 20 March 2012, c815.
74 Ministry of Justice, *Punishment and Reform: Effective Community Sentences*. CP8/2012, p35.
75 D Chankova and D W Van Ness, 'Regional Reviews: Themes', Handbook of Restorative Justice, G Johnstone and D W Van Ness, eds, Willan Publishing, 2007.
76 Restorative Justice Council, *RJC response to Punishment and Reform: Effective Community Sentences consultation paper,* 2012.
77 R Allen, *Reducing the use of imprisonment, what can we learn from Europe?* Criminal Justice Alliance, 2012.
78 J Shapland et al, *A report on the first year*, 2006.
79 Case study extracted from the Restorative Justice Council where a fuller version is available, as well as other stories: http://www.restorativejustice.org.uk/resources/case_studies
80 J Shapland et al, *The second report from the evaluation of three schemes*, 2006, p6.
81 Ibid.
82 K Daly and J Stubbs, 'Feminist theory, feminist and anti-racist politics, and restorative justice', Handbook of Restorative Justice, G Johnstone and D W Van Ness, eds, Willan Publishing, 2007, p159.
83 Ibid.
84 United Nations Division for the Advancement of Women, Department of Economic and Social Affairs, *Handbook on Legislation on Violence against Women*, 2010.
85 C Pelikan, 'On the Efficacy of Victim-Offender-Mediation in cases of Partnership Violence in Austria, or: Men Don't Get Better, But Women Get Stronger: Is it Still True?' *European Journal on Criminal Policy and Research*. 16: 1. 2010. 49–67.
86 A Flinck, S Säkkinen and T Kuoppala. *Mediation in Criminal and Civil Cases 2010, Statistical Report*. Online: http://www.stakes.fi/tilastot/tilastotiedotteet/2011/Tr19_11_e.pdf
87 C Pelikan. 'On the Efficacy of Victim-Offender-Mediation in cases of Partnership Violence in Austria, or: Men Don't Get Better, But Women Get Stronger: Is it Still True?' 2010.

88 J Stubbs, 'Beyond Apology? Domestic violence and critical questions for restorative justice', *Criminology and Criminal Justice*. 7: 2. 2007, 169–187.
89 M Walters and C Hoyle, 'Healing harms and engendering tolerance: the promise of restorative justice for hate crime', Hate Crime: Concepts, policy, future directions, N Chakraborti, ed, Willan Publishing, 2010.
90 Ibid.
91 Ibid.
92 Ibid.
93 T Gavrielides, 'Restoring Relationships: Hate Crimes and Restorative Justice' *European Best Practices of Restorative Justice Practice in the Criminal Procedure Conference Publication*, 2010.
94 Where 'works' is defined as a decrease in subsequent reconvictions, J Shapland et al, The fourth report of three schemes, piii.
95 http://www.belonglondon.com/restorative-justice
96 J Corston, *The Corston Report: A review of women with particular vulnerabilities in the criminal justice system,* 2007.
97 National Offender Management Service Women and Equalities Group. *Judicial Engagement: Women in the CJS. A Briefing for Probation Trusts*. Online: http://www.clinks.org/assets/files/word_docs/judicial%20engagement%20briefing%20FINAL%2017%20Jan%202012.pdf
98 J Stubbs, 'Beyond Apology? Domestic violence and critical questions for restorative justice', *Criminology and Criminal Justice*. 7: 2. 2007. 169–187; K Daly and J Stubbs. 'Feminist theory, feminist and anti-racist politics, and restorative justice', Handbook of Restorative Justice, G Johnstone and D W Van Ness, eds, Willan Publishing, 2007.
99 A Skelton and M Sekhonyane,'Human rights and restorative justice', Handbook of Restorative Justice, G Johnstone and D W Van Ness, eds, Willan Publishing, 2007, p585.
100 C Hoyle, 'The Case for Restorative Justice', 2010.
101 M Zernova and M Wright, 'Alternative visions of restorative justice', Handbook of Restorative Justice, G Johnstone and D W V Ness, eds, Willan Publishing, 2007.
102 G Johnstone, Restorative Justice: Ideas, Values, Debates, 2nd edn, Routledge, 2011.
103 L W Sherman and H Strang, *Restorative justice, the evidence*, The Smith Institute, 2007.
104 E Zinsstag, M Teunkens and B Pali, 'Conferencing: A way forward for restorative justice in Europe', *European Forum for Restorative Justice,* 2011, p282.

# Discriminatory equality? Religious freedom and anti-discrimination policies in Europe

**Dr Ronan McCrea**

In early September 2012, the European Court of Human Rights held a hearing in two high-profile cases that will have a major impact on the development of the law in relation to the difficult relationship between religious freedom and the duty of non-discrimination. These two cases related to a registrar who felt that registering civil partnerships conflicted with her religious beliefs in relation to the sinfulness of homosexuality[1] and a sex therapist who felt that his religious beliefs precluded him from abiding by a duty to offer counselling to all clients of his employer irrespective of sexual orientation.[2] Both applicants claimed that the failure of UK law to require their employers to exempt them from a duty not to discriminate on grounds of sexual orientation was itself discriminatory and a violation of the right to freedom of conscience and religion guaranteed by Article 9 of the European Convention on Human Rights.

This article will consider these cases and the issues they raise in the broader context of the rapid change in social norms in relation to sexual orientation and the steady expansion in legal enforcement of non-discrimination law in recent decades, focusing particularly on the complex relationship of many religious groups to the promotion of anti-discrimination norms. It will give a brief overview of the domestic rulings in these cases and consider the likelihood of success for the applicants before the Strasbourg Court. Finally, I will assess the desirability of the approach sought by the applicants in these cases. I conclude by suggesting that the claims of the applicants to accommodation of their conscience claims cannot be accommodated without a major restriction of the scope of anti-discrimination law and a radical restriction of the margin of appreciation previously accorded to national authorities by the Strasbourg Court to date.

## Expansion in anti-discrimination law and rapid social change

These cases have attracted widespread publicity and understandably so. They take place against a background of interacting developments on a number of legal and social fronts that are having profound consequences for the relationship between, law, religion and the principle of equal treatment. Over

the past four decades, there has been a transformation in the role of anti-discrimination law. In order to protect the principle of equal treatment and the principles of autonomy and dignity which it embodies, the law has moved in to regulate a wide range of activities and transactions which were previously left to individual discretion. Decisions as to whether to employ someone or whether to serve someone in one's business are now regulated by the law to a significant degree.[3]

The anti-discrimination laws that brought about this shifting of the boundary between what is considered private and a matter of individual autonomy and what is regarded as the legitimate subject of the legal regulation involved a great restriction of individual conscience rights. After all, there would be no point in anti-discrimination laws that did not restrict conscience rights. Legislation which did not override the conscience of the employer, who sincerely believed, for example, that it is wrong for women with young children to take paid employment and who consequently wished to refuse employment to a female applicant, would be useless legislation. Despite the restriction in free conscience rights that it involved, religious organisations were not generally hostile to anti-discrimination law. Indeed, in the United States, the campaign of the Civil Rights movement for laws to prohibit racial discrimination was in large measure led by various Christian churches that were inspired by religious teachings in relation to human dignity.[4]

At the same time as anti-discrimination laws were expanding in scope, a revolution in social attitudes towards gender and sexual orientation was taking place. The traditional disapproval of mainstream versions of the main Abrahamic faiths (Christianity, Islam and Judaism), which had been the view of a large majority in most European societies, was, over a strikingly short period of time, replaced by a majority view that saw homosexuality as a largely morally-neutral phenomenon. This social change brought about major legal change. Anti-discrimination laws were amended to bring discrimination on sexual orientation within their purview[5] and legal reforms, such as the establishment of civil partnerships[6] or the opening up of marriage to same sex couples, were carried out in a large number of European countries. Social attitudes also influenced 'soft law' with many professional bodies and employers voluntarily adopting codes of practice that committed themselves, and required members and employees not to discriminate on grounds of sexual orientation.[7]

The result has been that religious institutions and individuals that continue to hold to traditional teachings in relation to sexuality have suddenly found themselves in a minority position. Furthermore, their scope to adhere to this minority view had been curtailed by the expansion of anti-discrimination law into a wide range of areas over the previous decades. While until recently

religious groups and individuals with conservative sexual ethics could rely on the fact that their views on matters of sexuality were shared by the majority and reflected in the law, the expansion of anti-discrimination legislation and the revolution in social attitudes to sexuality, therefore, left those who could not reconcile themselves with the duty not to discriminate on grounds of sexual orientation with little option but to invoke the fundamental right to religious freedom. It is, therefore, unsurprising that recent years have witnessed a dramatic upsurge in the use of the right to religious freedom in litigation, along with intense debates on the question of the boundaries of religious freedom and its relationship to anti-discrimination norms.

The problem from the point of view of such groups and individuals was that the anti-discrimination norms that many of them had supported meant that the scope of freedom of religion and conscience rights was rather narrow. While the European Court of Human Rights[8] and EU legislation[9] have both recognized that the Convention does protect religions from anti-discrimination law in the context of religious institutions, the protection accorded to freedom of conscience in the wider world in which religious people must work and live, is relatively limited. Indeed, as will be shown below, the jurisprudence of the Strasbourg Court in this area has, from the beginning, given states a relatively wide degree of discretion to curtail freedom of conscience and religion in order to protect other rights and constitutional principles.

## The domestic litigation

Ms Ladele won her case at first instance before the Employment Tribunal, which found that to require individuals not to discriminate on grounds of sexual orientation amounted to direct discrimination against individuals with Ms Ladele's religious beliefs.[10] The Employment Appeal Tribunal ('EAT') decisively overturned this ruling, noting that a generally applied requirement not to discriminate could only ever constitute indirect discrimination.[11] It held that the important nature of her employer's policy of discrimination on grounds of sexual orientation meant that it was inevitable that upholding such a policy would be found to be a legitimate reason which could justify any indirectly discriminatory effect. Furthermore, it noted that the nature of the aim of the employer's policy (the avoidance of discrimination in service provision) meant that there was no less restrictive way in which the employer could have achieved this aim.

Elias P stated:

> *Once it is accepted that the aim of providing the service on a non-discriminatory basis was legitimate - and in truth it was bound to be - then in our view it must follow that the council were entitled to require*

> *all registrars to perform the full range of services. They were entitled in these circumstances to say that the claimant could not pick and choose what duties she would perform depending upon whether they were in accordance with her religious views, at least in circumstances where her personal stance involved discrimination on grounds of sexual orientation. That stance was inconsistent with the non-discriminatory objectives which the council thought it important to espouse both to their staff and the wider community. It would necessarily undermine the council's clear commitment to that objective if it were to connive in allowing the claimant to manifest her belief by refusing to do civil partnership duties.*[12]

The Court of Appeal upheld this decision, concluding that the Council's policy was legitimate, proportionately applied and, in any event did not prevent Ms Ladele from holding whatever beliefs she chose or practising her faith. The Master of the Rolls concluded that:

> *the fact that Ms Ladele's refusal to perform civil partnerships was based on her religious view of marriage could not justify the conclusion that Islington should not be allowed to implement its aim to the full, namely that all registrars should perform civil partnerships as part of its Dignity for All policy. Ms Ladele was employed in a public job and was working for a public authority; she was being required to perform a purely secular task, which was being treated as part of her job; Ms Ladele's refusal to perform that task involved discriminating against gay people in the course of that job; she was being asked to perform the task because of Islington's Dignity for All policy, whose laudable aim was to avoid, or at least minimise, discrimination both among Islington's employees, and as between Islington (and its employees) and those in the community they served; Ms Ladele's refusal was causing offence to at least two of her gay colleagues; Ms Ladele's objection was based on her view of marriage, which was not a core part of her religion; and Islington's requirement in no way prevented her from worshipping as she wished.*[13]

The second discrimination-related case before the Strasbourg Court, *MacFarlane v RELATE Avon*, raised substantially similar issues. As noted above, Mr MacFarlane was a sex therapist who had been dismissed from his post with RELATE, a couples' counselling service, as his religious views on homosexuality made him feel unable to abide by a policy that required him to provide counselling, irrespective of sexual orientation. MacFarlane's appeal was decided after the decision of the EAT in *Ladele*. In his case, the EAT reached the same conclusion, finding that his dismissal did not amount to unjustified indirect discrimination as the employer was entitled to require all staff to fulfil their duties without discriminating on grounds of sexual orientation and there was no means of

achieving this goal consistent with allowing the applicant to refuse to provide services to gay couples. His high-profile application for permission to appeal to the Court of Appeal, which included high-profile support from Lord Carey, a former Archbishop of Canterbury, was refused by LJ Laws in April 2010. Laws LJ's judgment has been much discussed for its sharp criticism of Lord Carey's statement and for its discussion of the role of religion in lawmaking in the British constitution, though these remarks are beyond the scope of this article.

## European litigation

Both Ladele and MacFarlane applied to the European Court of Human Rights alleging breaches of their right to freedom of thought, conscience and religion protected by Article 9 and their right to equal treatment in relation to those rights (Article 14). Their cases were heard alongside two other cases relating to restriction of the wearing of religious symbols in the workplace that raised rather different issues and will not be discussed here.

The existing case law on Article 9 is not overly favourable to the applicants. The Strasbourg institutions have consistently held that generally applicable rules that have the effect of restricting religious freedom do not violate the Convention. In *C v United Kingdom,* the Commission on Human Rights held:

> *Article 9 primarily protects the sphere of personal beliefs and creeds and does not always guarantee the right to behave in the public sphere in a way which is dictated by such a belief*[14]

a holding which confirmed the decision in *Arrowsmith v United Kingdom,* where it had stated that

> *Article 9 does not give individuals the right to behave in the public sphere in compliance with all the demands of their religion or belief.*[15]

More specifically, it has repeatedly been held that Article 9 provides no right to have one's faith actively accommodated in public contexts such as the workplace. In *Ahmad v United Kingdom* [16] and *Stedman v United Kingdom*,[17] the failure of employers to give time off for religious activities was not held to violate Article 9. Reiterating its view that Article 9 did not provide the right to fulfil all the demands of one's faith in public, the commission held that the religious freedom of employees was sufficiently protected by their right to resign from their post.

Similarly, in relation to the clashes between duties of service provision and religious beliefs, the Strasbourg Court made clear in *Pichon and Sajous v France*[18] that religious objections could not override the right of employers to insist

on the provision of services (here upholding disciplinary measures against pharmacists who refused to fill prescriptions for the morning-after pill).

Overall, therefore, the Strasbourg Court has not been favourable to the idea that Article 9 requires active facilitation of religious belief in the workplace even when such facilitation does not involve accommodating discriminatory acts. If the court follows the logic of these rulings, it is unlikely that it will find a violation of Article 9 in either *Ladele* or *MacFarlane* or that the failure to accommodate their beliefs amounted to discrimination prohibited by Article 14. Of course, one should bear in mind the institutional position of the Strasbourg Court in relation to these questions. Member states have quite diverse approaches to these issues and the court is not saying that member states must not provide such active facilitation but rather that, in the light of its limited democratic legitimacy, it will not interpret the Convention to require such an outcome.

A win for the applicants in these cases would represent a major change in the case law of the Court of Human Rights and would herald a major shift in British law in relation to the boundary between the right to freedom from discrimination and freedom of conscience and religion, reversing the steady trend of increasing regulation of discriminatory behaviour over the past number of decades.

Of course, both Ladele and MacFarlane argue that a commitment to non-discrimination should lead to recognition of their claims and that failure to grant them exemptions from anti-discrimination duties is itself discriminatory. Ladele's legal team argued strongly that once there was no question of an individual actually being denied a service, then it was excessive and, therefore, illegitimate and discriminatory to require employees to adhere to a non-discrimination policy that clashed with their deeply-held religious beliefs. They argued that once service provision was ensured, accommodation of religious beliefs could take place without conflicting with the rights of others.

Such arguments are misconceived for two reasons. First, religion-specific opt-outs from anti-discrimination law are themselves discriminatory and second, anti-discrimination laws serve wider purposes than ensuring provision of services.

## The inegalitarian nature of religion-specific opt-outs

Turning first to religion-limited opt-outs; there is certainly a very respectable libertarian case to be made that freedom of conscience and religion is such a fundamental right that the state should not be permitted to constrain individuals to provide services in violation of their deeply-held beliefs. This is, however, not the case that supporters of Ladele and MacFarlane have made.

Neither the applicants, nor their prominent supporters have argued for a general repeal of anti-discrimination laws. Rather, they have sought a specific exemption for those whose religious convictions clash with anti-discrimination norms in relation to sexual orientation.

Some other jurisdictions have been receptive to the idea of belief-based opt-outs from general laws. The South African Constitutional Court, for example, assessed the issue of equality and religious exemptions from laws in *Christian Education v Minister for Education*. The court concluded that exemptions for religious individuals were very much in line with equality norms on the basis that:

> *To grant respect to sincerely held religious views of a community and make an exception from a general law to accommodate them, would not be unfair to anyone else who did not hold those views,(...) the essence of equality lies not in treating everyone in the same way, but in treating everyone with equal concern and respect. Permission to allow the practice to continue would, in these circumstances, not be inconsistent with the equality provisions of the Bill of Rights.*[19]

However, if one reads the South African court's reasoning as requiring exemptions for religious beliefs but not for other forms of belief then there is very clear unfairness and failure to treat everyone with equal concern and respect. Consider the following situation. Two employers, A and B, believe with equal depth and sincerity that it is deeply wrong to employ women who are mothers of young children. A holds these beliefs for religious reasons, B for ethical and moral reasons unrelated to religion. Were the law to exempt A but not B from an anti-discrimination law that requires employers not to discriminate on grounds of gender, then the law would be failing to give equal concern and respect to B's right to freedom of conscience and religion. By granting importance to A's beliefs that are denied to B's beliefs merely on the ground that A's beliefs are religious in nature, the law would be engaging in unfair discrimination on religious grounds.

One could avoid such discrimination by reading the South African jurisprudence as advocating a duty to respect freedom of conscience and religion to all fundamentally held beliefs whether religious or not. Sachs J argued in the same case

> *the state should, wherever reasonably possible, seek to avoid putting believers to extremely painful and intensely burdensome choices of either being true to their faith or else respectful of the law.*[20]

It would hardly be consistent with equal respect to insist that the pain of those forced to choose between their beliefs and the law should count if the individuals in question are religious but should be regarded as irrelevant if they are not. Indeed, the fact that Sachs J was careful to frame the issue in terms of how 'conscientious and religious freedom *has to be regarded with appropriate seriousness*'[21] (emphasis added) would tend to indicate that religion-specific exemptions would not be consistent with an egalitarian approach.

## The importance of discrimination

However, even if a religion-limited approach were adopted by the Strasbourg Court in *Ladele* and *MacFarlane*, the requirement to actively facilitate religion still comes up against the fact that discrimination involves harm beyond deprivation of the relevant service and, therefore, recognizing a religious opt-out from anti-discrimination where others will provide the relevant service will inevitably involve a significant undermining of anti-discrimination law.

Anti-discrimination laws are about more than ensuring that individuals receive particular services. As I have written elsewhere:

> *The wrong done by signs in 1960s boarding houses that said 'No Blacks, No Irish, No Dogs' went well beyond the denial of accommodation. Discriminatory acts have a moral significance beyond the deprivation of the relevant service. No one would say that Rosa Parks had suffered no relevant harm if there had been available to her in Montgomery, Alabama, a second bus company which had no discriminatory seating arrangements, even if that second company's buses were more comfortable and frequent.*[22]

Certainly, the reconciliation of the right to equal treatment and freedom of conscience and religion is difficult and is one where states can legitimately come to different conclusions but it is not the case that the discriminatory treatment in the absence of denial of service has no impact on the rights of others.

At the hearing in Strasbourg, Ladele's counsel energetically rejected the suggestion that there was any equivalence between legislation that sought to prevent discrimination in the provision of services on racial grounds. She did so on the basis that while racially discriminatory views were not worthy of respect in a democratic society and, therefore, fell outside the protection of the Convention, views on the sinfulness of homosexuality and of marriage as a uniquely heterosexual institution were worthy of some respect.

Aside from the fact that some religions have and continue to hold racist views as a matter of religious belief, this argument misses the point. The actions of the employers of Ms Ladele and Mr MacFarlane challenged in these cases sought to

regulate action not belief. Islington, as the Court of Appeal in Ladele pointed out, sought to prevent Ms Ladele from refusing service on the basis of her beliefs and did not seek to force her to change her views on homosexuality.

In other words, the fact that a belief is or is not worthy of respect in a democratic society is not the decisive issue. Even if a belief is worthy of respect in a democratic society it may, nevertheless, be illegitimate to seek to deny service to an individual on the basis of that belief. When the law requires a registrar who believes that God intended that different races should not marry to register a mixed race marriage, it does so because it judges it to be wrong to deny service to someone on racially discriminatory grounds, not because everyone must believe in the desirability of mixed race unions. As Advocate General Maduro noted in *Coleman v Attridge Law*, anti-discrimination law aims at protecting the dignity and autonomy of individuals. It prevents acts of discrimination because:

> *Treating someone less well on the basis of reasons such as religious belief, age, disability and sexual orientation undermines this special and unique value that people have by virtue of being human*[23]

Even if some view the case for the protection of the dignity of those of homosexual orientation as less compelling than the case for the protection of the dignity of racial identities, in the light of the long history of persecution, criminalization and marginalization of homosexuals, it must at least be legitimate under the Convention for national authorities to conclude otherwise and set out a legal framework which provides as much protection to the former as the latter.

## Margin of appreciation and the moral autonomy of member states

It is important to bear in mind the institutional position of the Strasbourg Court in this regard. The court has consistently stressed the subsidiary nature of the Convention and has held that national authorities, not the court, are best placed to assess what is best for their societies in relation to controversial matters. To this end the court has granted states a 'margin of appreciation' within which they are free to balance and reconcile conflicting rights without falling foul of the Convention. This doctrine, one of the foundation stones of the Strasbourg jurisprudence, means member states are to be granted considerable leeway in balancing conflicting rights and addressing complex social issues, such as the reconciliation of the right to freedom of religion and conscience and the right to freedom from discrimination. Given that the court has also held that discrimination on grounds of sexual orientation requires 'differences based on sexual orientation require particularly serious reasons by way of justification'[24] under the Convention system, it would be truly remarkable if it found that the

Convention precluded member states from legislating to allow the prevention of the moral harm caused by acts of discrimination beyond simple deprivation of service. Such considerations are all the more pressing in the context of a public servant such as Ms Ladele, as for a state agency to connive in acts of discrimination does even greater damage to an individual's status in the community than comparable acts by private employers.

Indeed, the *Ladele* case raises profound issues for the idea of what it means to be a public servant, which is central to the identity of many European states. For many countries, to allow conscience-based exemptions such as those demanded by Ms Ladele would strike at the heart of the idea of what it is to be a public servant. It would go strongly against the French tradition of the separation of church and state but also against the traditions of other less secular countries. The then Irish Minister for Justice, for example, stated when the Irish Parliament voted to introduce civil partnerships in 2010 that registrars could not be exempt from registering such partnerships as the state was a republic and

> *when we pass laws in the State, we expect our public servants to implement those laws to the letter without fear or favour under the Constitution.*

He concluded that it would be

> *impossible if there were people who decided that they were going to opt out of this and not enforce what we pass in the Oireachtas [legislature].*[25]

In other words, it was central to the republican nature of the state that civil servants, such as registrars, are employed to register unions that fulfil the criteria established by the legislature, not those unions that meet the registrar's personal approval. This distinction between one's personal identity and one's identity as a state official is a vital one in avoiding the corruption and unfairness that results from the personalization of public office. A win for Ms Ladele would effectively require states to permit civil servants to bring their personal views into the carrying out of personal functions, something which undermines a key tenet of the constitutional orders of states such as Ireland and France which have a republican ethos.

## Conclusion

These cases raise difficult issues. The combination of rapid social change in the area of sexual orientation and the growth of anti-discrimination law in recent decades has meant that for many religious individuals, quite suddenly, their

scope for adhering to their religious convictions in relation to sexual orientation in the workplace has been significantly restricted.

Under the Convention system, freedom of conscience has generally been protected as a private right and the European Court has repeatedly been of the view that Article 9 does not require the granting of exemptions from the duties of a particular post. Under its jurisprudence, member states have been entitled to decide that employees are employed to carry out particular tasks and do not have the right to pick and choose which tasks they will and will not fulfil, even if the desire to avoid certain tasks is religiously based. For the court to abandon this policy in circumstances where the exemption in question is discriminatory in nature would be remarkable, particularly in the light of the trend in its case law, which has been to restrict to an ever-increasing extent the ability of member states to do what the applicants in these cases seek the right to do: to discriminate on grounds of sexual orientation.

It is difficult to see how the exemptions sought in *Ladele* and *MacFarlane* could be granted without undermining anti-discrimination law more generally. To hold that anti-discrimination law could prohibit only discriminatory conduct that results in deprivation of service would radically restrict the scope of anti-discrimination law. Nor is it apparent how such exemptions could properly be restricted to sexual orientation. Once we accept that no relevant harm is caused by a discriminatory act that does not result in service deprivation, then what basis is there for resisting requests to respect the conscience rights of those who hold views that view particular religious identities or the mixing of the races as immoral?

One can easily have sympathy for the position in which many religious individuals find themselves. Orthodox Christian views on sexual orientation have moved from the majority to the minority position with astonishing rapidity. However, the solution cannot be to selectively exempt religious individuals from anti-discrimination norms. There is a case to be made that anti-discrimination law has gone too far in restricting individual freedom of conscience but it is a difficult case, which requires those who make it to own up to the fact that relaxing anti-discrimination norms will mean that some very unpleasant views will gain greater scope for expression. Very few backers of the claims of Ms Ladele and Mr MacFarlane make this case. Rather, they suggest that exemptions can be selectively granted to religious individuals in relation to sexual orientation without undermining anti-discrimination law. In other words, they seek for themselves a freedom to discriminate that they are not prepared to grant to others. If we are all to be treated with equal concern and respect, our conscience rights should be accorded equal concern and respect whether they are religious in nature or come from some other source. It is

either legitimate for the state to restrict the conscience rights of individuals in order to serve the ideal of non-discrimination or it is not. It would certainly go against the spirit of Article 9, which protects freedom of 'thought, conscience and religion' for the state to selectively protect only those conscience rights that are religious in nature.

Debate on these issues is likely only to increase. It would be a radical abandonment of Strasbourg's approach to date and a very regrettable development if the court were to find in favour of the applicants in these cases.

*Dr Ronan McCrea is a lecturer in the Faculty of Laws of University College London and a barrister. He is the author of Religion and the Public Order of the European Union (Oxford University Press, 2010). He acted along with Lord Lester QC and Max Schaefer for the National Secular Society in their intervention in the Ladele and MacFarlane cases before the European Court of Human Rights.*

**Notes**

1 *Ladele v United Kingdom* (Application no 51671/10).
2 *MacFarlane v United Kingdom* (Application no 36516/10).
3 See, for example, the Sex Discrimination Act 1975, the Race Relations Act 1976, the Disability Discrimination Act 1995, the Equality Act 2010 the Employment Equality (Sexual Orientation) Regulations 2003, the Employment Equality (Religion or Belief) Regulations 2003 and the Equality Act (Sexual Orientation) Regulations 2007. Domestic legislation has been complemented by EU legislation such as Directive 2000/78 establishing a general framework for equal treatment in employment and occupation and the Racial Equality Directive (Directive 2000/43).
4 See, for example, D Hein and GH Shattuck Junior, *The Episcopalians,* Westport Connecticut, Praeger 2004; see also G Gordon-Carter, *An Amazing Journey: The Church of England's Response to Institutional Racism,* London, Church House Publishing, 2003.
5 Note 3 above.
6 The Civil Partnership Act 2004.
7 See, for example, Solicitors Anti-Discrimination Rules 2004, Bar Council Equality and Diversity Code paras 1.36 to 1.47.
8 *Knudsen v Norway* (1986) 8 EHRR 45, *Rommelfanger v Federal Republic of Germany* (1989) 62 DR 151.
9 Directive 2000/78 establishing a general framework for equal treatment in employment and occupation, Article 4(2).
10 [2008] UKEAT 0453_08_1912 paras 42-50.
11 Ibid, paras 51-54.
12 Ibid, para 111.
13 Para 52 *Ladele v London Borough of Islington* [2009] EWCA Civ 1357, [2010] IRLR 211.
14 *C v UK* (Application No 10358/83) (1983) 37 DR 142.
15 *Arrowsmith v United Kingdom* (Application No 7050/75) (1978) 19 DR 5.
16 *Ahmad v United Kingdom* (1982) 4 EHRR 126.
17 *Stedman v United Kingdom* (1997) 23 EHRR CD 168.
18 *Pichon and Sajous v France* (Application No 49853/99) (2001).
19 *Christian Education South Africa v Minister of Education* (CCT4/00) [2000] ZACC 11; 2000 (4) SA 757; 2000 (10) BCLR 1051 (18 August 2000) para 41.
20 Ibid, para 35.
21 Ibid.

22 R McCrea 'Discriminatory Acts Have Moral Significance', *Law Society Gazette* September 2012. http://www.lawgazette.co.uk/opinion/comment/discriminatory-acts-have-a-moral-significance

23 Opinion of Maduro AG, para 10. Case C-303/06 *Coleman v Attridge Law.*

24 *PB and JS v Austria Application* No 18984/02. Judgment of 22 July 2010, para 38.

25 Civil Partnership Bill, 2010, report stage, Dail Debates, contribution of the Minister for Justice, Dermot Ahern TD.

# Book reviews

## A Practitioner's Guide to the European Convention on Human Rights

*Karen Reid*

**Sweet & Maxwell, 2012**

**915pp £145**

Now in its 4th edition, Reid's text is an indispensable weapon in the arsenal of anyone looking to bring a claim under the Convention to the European Court of Human Rights (ECtHR). I say anyone because although the book by definition was not designed with this intention, practitioners and laypersons alike (of which there are perhaps a surprising number in the initial stages of an application) will appreciate the clear and concise language of a text that is set out with ease of reference in mind.

Retaining the approach of previous editions, the book is set out in three main parts (i) practice and procedure (ii) problem areas and (iii) just satisfaction. Each section of the book opens by summarising the key provisions and case law before setting out the relevant general principles. Many of the same areas are covered as in the last edition but there are a few new sub-sections on topics such as corporal punishment, deprivation of liberty and legislative interference affecting trials.

Before embarking upon the detailed guidance offered in the 'problem areas', Reid usefully provides a general overview of the structure of the court and the life of an application from lodging to just satisfaction.

On admissibility, one might be forgiven for thinking that all an applicant need do to have a case heard by the court is to complete an application. Attractive though that might sound, it ignores the rigorous criteria that see 'only 1 in 10 applications' make it to the chamber. An applicant is in no such danger with the 'admissibility checklist'. As comprehensive as it is easy to follow, the practical focus is maintained by initially addressing the three most common reasons for rendering an application inadmissible: the six-month rule, non-exhaustion of domestic remedies or submitting an application which is 'manifestly ill-founded'.

In these early sections, consideration is also afforded to reforms brought in by Protocol 14 of the Convention but, unlike in the previous edition, there is no dedicated subsection on reforms; these are instead flagged up in the appropriate parts of the book. These include the new single judge procedure and the new admissibility criterion of 'no significant disadvantage'. That said, as far as the latter is concerned, there is little that can be said, given the obvious absence of case law on it.

Whilst it was in no way intended to provide an exhaustive coverage of the court's case law (there are other texts that offer that), there is a broad sketch of 'Convention principles and approach' in a little under 20 pages with sufficient referencing to support more detailed research.

By focusing on some of the 'problem areas' for the court, Reid offers considerable detail on fair trial guarantees and then 48 other topics, from abortion, extradition and asylum

to prisoners' rights, legal aid and welfare benefits. Again, this is an approach that facilitates ease of reference with the presentation of case law and principles in manageable proportions.

The guidance on just satisfaction is equally comprehensive, both in terms of setting out the underlying principles as well as how they have played out in the case law. The coverage includes the court's approach to giving directions following the finding of a violation and, of course, pecuniary and non-pecuniary losses. The particularly useful tables setting out some of the court's findings on quantum, according to their respective Convention Articles, are retained and updated.

Having worked with it for several weeks, I highly recommend this book. Its commentary on the role and importance of the court as a supranational body and its attempts at reform are commendably balanced. Moreover, its thoughtful construction and focused, if not exhaustive, consideration of key areas in the Strasbourg jurisprudence ensure that it delivers on its aim of explaining 'the what, when, how and why of … introducing applications before the European Court of Human Rights' in a practical and meaningful way.

**Michael Etienne is currently on an internship at the European Court of Human Rights having been awarded the Sir Peter Duffy Human Rights Award by Lincoln's Inn.**

## Renton and Brown's Criminal Procedure according to the Law of Scotland (Sixth Edition, no 44)

*Sir Gerald Gordon QC and Professor Christopher Gane*

**Sweet and Maxwell, 2012**

**848pp (loose-leaf) £744**

How does one attempt a review of such an institution in Scots law? This tome has pride of place in every courtroom and criminal law library in Scotland. The basic structure of the sixth edition was prompted in large part by seismic changes brought into force in Scotland by the Criminal Procedure (Scotland) Act 1995 and related statutes. This edition was written by Scotland's modern day institutional writer, Sir Gerald Gordon QC, with the assistance of Professor Gane, who contributed Parts XI and XII, civil liability and appeals. More recent loose-leaf updates record the contribution of James Chalmers, who has just been appointed Regius Chair of Law at The University of Glasgow.

The sixth edition has been updated by the loose-leaf additions three times every year since 1995. The current release is the forty-fourth release. It was published in October 2012 and it brought the law up to date to 1 July 2012. One of the changes reflected in the new release can be found at Appendix H and Appendix J. Appendix H is a reproduction of Appendix B of the ACPOS Manual of Guidance on Solicitor Access, which contains the Solicitor Access Recording Form ('SARF'). Section 2 is a pro forma, which is to be read to the suspect and it contains an explanation of the rights of a suspect; section 3 deals

with the offer of rights and suspect's decisions; section 4 makes provision for a decision to delay suspect's rights; while section 5 deals with a suspect's change of decision. Appendix J contains a reproduction of Appendix C of the ACPOS Manual of Guidance on Solicitor Access. This is a pre-interview review of rights designed to ensure that a suspect had his or her rights in relation to access to a solicitor explained before a caution is administered. JUSTICE has been instrumental in this particular reform of criminal procedure. It intervened in the landmark Supreme Court case of *Cadder v HMA* [2010] UKSC 43, which required Scots law to afford this right to suspects in detention. Following this ruling, emergency legislation, the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010, was passed to effect the right to legal assistance during detention.

The mental disorder section also contains new material. Sections 54 to 56 of the 1995 Act introduced a new system for dealing with cases involving persons found unfit to plead by reason of insanity. Previously, such persons were detained without any judicial ascertainment of the existence of even a prima facie case against them. Section 54 of the Act, as amended by para 8(2) of Sch 4 to the Mental Health (Care and Treatment) (Scotland) Act 2003, and s170(2) Criminal Justice and Licensing Scotland Act 2010, which applies to both solemn and summary procedure, now provides that where the court is satisfied that a person charged with an offence is unfit for trial so that his or her trial cannot proceed, or that if it has begun it cannot continue, the court shall make a finding to that effect and state the reason for the finding. It must then discharge the trial diet, or, where applicable, any first diet or preliminary hearing, and order an examination of facts, which may be held immediately. If it is not held immediately the accused may be remanded in custody or on bail. If the court is satisfied on the evidence of two medical practitioners that the medical conditions are met, and that a suitable hospital is available, it may make a temporary compulsion order authorising the person's removal to, and detention and treatment in, a specified hospital. Such an order remains in force until the conclusion of the examination of facts, subject to a power in the court to review it where there has been a change of circumstances, and to replace it with any other order it could have made at the outset.

There are also interesting changes to the developing jurisprudence on extradition. Although the work disavows any claim to being a specialist commentary, it does contain helpful references to developments of the substantive provisions relating to judicial proceedings under the Extradition Act 2003. This edition refers to recent cases under parts 1 and 2 of the Act and there is a helpful counterpoint that underscores the influence of the European Convention on Human Rights and Community law.

Practitioners continue to consider this work to be a vital tool of their trade. It is easy to use and the chapter divisions allow for ease of navigation. One of the few criticisms voiced is that, by contrast with the rest of the book, the index is decidedly unhelpful.

**Dr Juliette Casey, Advocate, Westwater Advocates**

## The European Public Prosecutor's Office: Analysis of a Multilevel Criminal Justice System

*Martijn Zwiers*

**Intersentia, 2011**

**504pp £118**

In the European Public Prosecutor's Office, Martijn Zwiers explores the constitutional challenges raised by the provision in the Treaty of Lisbon to introduce a European Public Prosecutor's Office (EPPO). The author skilfully assesses the fundamental issue of how to effectively entrench the EPPO within the constitutional structure of the European Union and member states, whilst ensuring that it functions in an accountable and transparent manner.

In order to demonstrate a comprehensive prospective picture of the EPPO and how it may function in practice, Zwiers presents a comparative discussion of key issues, including the different statuses and organisations of the prosecution services of member states, the European Union's institutional structure, Eurojust, direct enforcement in the field of competition law by the European Competition Network and the likely structure that the EPPO will take.

The author acknowledges that the success of the EPPO will depend upon its ability to function as a multilevel network that exercises a measure of authority and co-operation with the national authorities. Zwiers dedicates a part of his thesis to examining how the EPPO's supranational approach to criminal law enforcement, based upon its forerunner Eurojust, must overcome the constitutional and political barriers of its predecessor to become viewed as a credible and competent European instrument. By examining the history of Eurojust, the author acknowledges the operational limitations it had and its inability to command the respect of member states in a time of emerging EU internal security.

Zwiers is mindful of the transfer of substantial power to EU level that the EPPO brings and the criticisms it could attract if it is not seen to be a transparent and accountable body. He warns that problems of accountability that have plagued previous European Union institutions and left a questionable reputation could be transplanted onto the EPPO unless it is seen to be democratically accountable. In the absence of EU-level criminal law enforcement with which to compare the EPPO's competence, the author finds a parallel in the direct enforcement of competition law. The comparison is insightful as it demonstrates the similarities that exist between different European networks.

An important issue the author carefully considers is the institutional balance of the EPPO. He details the powers that it will possess and how control over that power will be checked and maintained as a new actor that, in theory, is independent, but in practice is likely to be subordinate to the Council. Zwiers warns that in order for the EPPO's activities to be legitimised, it must work alongside the European Parliament, the Commission and other relevant criminal justice authorities.

Owing to the broad approach taken by the author, various issues are not covered. However, the issues that have been omitted, such as discussion of substantive and procedural law, and how to guarantee an effective and quality service, are best evaluated after

the EPPO has been established. The biggest weakness of the book is its structure. Zwiers ignores traditional scholarly structure of separate chapters for individual topics, and instead opts for a comprehensive discussion of his thesis in one large chapter. This has an unfortunate effect on the reader's ability to navigate through the book when searching for a particular topic.

Overall, Zwiers tackles the subject of the EPPO with great enthusiasm and knowledge. By comparatively analysing the current prosecutorial practices operating in member states and the approach taken to European criminal justice by former agencies, Zwiers assesses an instrument that is likely to change the direction and influence of European security operations within the European Union.

**Penny Symeou, JUSTICE intern and Kalisher Scholar**

## Cruel Britannia: a secret history of torture

*Ian Cobain*

**Portobello Books, 2012**

**345pp £18.99**

This book is the linked account of three stories: the interrogation techniques used by the British authorities developed during the Second World War; their deployment in various colonial conflicts in the 1950s and 60s, culminating in Northern Ireland in the 1970s; and the involvement of the UK in the torture of suspects in Iraq and Afghanistan during the recent military action.

These episodes are fairly well known though they are rarely linked as clearly as Cobain puts them together. In a sense, the new material comes from the Second World War. Here, Cobain has access to new documents which have recently been released. These place the highly successful operations of British counter-intelligence in an entirely new light. It turns out that it was not a miracle of good 'old bobby' questioning that turned so many German agents into willing accomplices of the British. It was bad, old-fashioned torture. He tells the compelling story of the 'London Cage', located incongruously in Kensington Palace Gardens and one of a network of such sites across Europe and stretching into the Middle East.

The myth was successfully maintained that these sites obtained results through interrogation with one of the bosses specifically boasting that 'Violence is taboo ... Never strike a man'. However, accounts of prisoners somewhat challenged this assertion. In London and then in Germany as the Cold War escalated, it seems pretty certain that terrible suffering was inflicted on those unfortunate enough to have aroused interest in their activities. There are consistent accounts of prisoners being doused in cold water, made to sleep on the floor, beaten and deprived of sleep and warmth. One swallowed a spoon in order to escape: he also lost four toes from frostbite. Mostly, the experiences were suppressed but occasionally they surfaced. At the trial of a Richard Langham for torture at one of the British prisons, evidence was given by one of the supervising officers that interrogators were permitted to threaten to kill prisoners' wives and families and, chillingly, that if threats did not succeed than the prisoner was interrogated 'until broken'.

From these early experiences and then through the colonial wars in Malaya, Kenya, Aden and elsewhere,

British intelligence developed the 'five techniques' of interrogation that were later to be condemned as ill-treatment by the European Commission on Human Rights: starvation, sleep deprivation, hooding, 'white noise' and 'wall standing' – where the victim was forced to stand against a wall supporting his weight by his fingers. These were enforced by a sixth: sheer physical violence.

These five techniques were the ones that Edward Heath was finally forced to prohibit in 1972 as the mechanisms of the European Convention on Human Rights ground into effect and which were conveniently forgotten by British armed forces in Iraq. The book pays a short tribute to one of the great heroes of the Iraq conflict, Lieutenant-Colonel Nicholas Mercer who, coming across the blatant use of the techniques in a prison camp just outside Basra, ordered that they cease.

The book has little time for the obfuscation of British officials and politicians in relation to more recent complicity with extraordinary rendition and torture. The techniques of sensory deprivation that were used in Guantanamo – evident in the blacked out goggles, handcuffs, earmuffs and oversize overalls – were developed by the British. And, in Ian Cobain's view, it is pretty implausible for British agents to argue that they had no idea of the practices of various governments from (most shamefully) the United States to Pakistan when they supplied many of the questions for the interrogations and emerged before and after the torture sessions to ask them again.

Ian Cobain has made a valuable contribution to the nailing of UK complicity in dubious practices that illustrate the corruption of human rights brought about by the US's all-out approach to the 'war on terror'. He is as convincing on torture as Andrew Tyrie has been on extraordinary rendition, a practice to which it is integrally tied because the point of spiriting people away was often to take them to torture camps. This is not a book which will make any Briton proud. You can see why half the world may recognise the phrase 'perfidious Albion'.

**Roger Smith OBE is the former director of JUSTICE**

# JUSTICE briefings and submissions

## 1 February – 31 October 2012

Available at *www.justice.org.uk*

1. Written and oral evidence on Justice and Security Green Paper, to the Joint Committee on Human Rights, February 2012;

2. Police powers and public order, Consultation response, February 2012;

3. Joint NGO Briefing on the Draft Brighton Declaration on the Future of the European Court of Human Rights, March 2012;

4. Joint NGO Statement in advance of Brighton Negotiations on the Future of the European Court, April 2012;

5. Briefing on the Crime and Courts Bill, House of Lords Committee Stage, May 2012;

6. Supplementary Briefing to the Crime and Courts Bill on section 5 Public Order Act, May 2012;

7. House of Lords Second Reading Briefing, Defamation Bill, May 2012;

8. House of Lords Second Reading Briefing, Justice and Security Bill, May 2012;

9. House of Lords Committee Stage Briefing, Justice and Security Bill, July 2012;

10. Joint NGO Statement on the Directive on the Right of Access to a Lawyer and to Communicate Upon Arrest, May 2012;

11. Oral Evidence to the Joint Parliamentary Committee on the Draft Communications Data Bill, July 2012;

12. Written evidence to the Joint Parliamentary Committee on the Draft Communications Data Bill, August 2012;

13. Joint NGO submission on Protocols 15 and 16 of the ECHR (JUSTICE contributed to drafting and finalising of the document), August 2012;

14. Submission to the Joint Parliamentary Committee on the Draft E-TPIMS Bill, September 2012;

15. Second Submission to the Commission on a Bill of Rights for the UK, September 2012;

16. JUSTICE Scotland Response to the Carloway Consultation on Criminal Justice in Scotland, October 2012.

# Cumulative Index 2004-12

## Constitution

## Criminal Justice



## Equality



## European Union Charter of Fundamental Rights

## European Union Justice and Home Affairs



## Human Rights

## International



## Immigration and Asylum



## Law and Faith



## Legal Services

## Legal System



## Parliament