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Legal aid: the end – or not

Tony Blair signed out from his premiership – theatrical to the end – with a quote from the Pet Shop Boys: 'That's it, the End'. Is this what we now have to say about legal aid with the massacre of the original concept of civil legal aid as a universal benefit based on the core principles of a lack of means and reasonable merits? The Legal Aid, Sentencing and Punishment of Offenders Act (LASPO) leaves a contorted rump of a statutory scheme. Restrictions on scope take up around two dozen pages of text. The intention is to slice spending by just under a quarter. There have been cuts before but they have always been for the purpose of redistributing or containing spending. These have been applied assassin style – with no real malice, just as part of the everyday business of a government. The coalition is committed to cutting overall expenditure in part to meet an overall deficit that any party in power would have had to address and, in part, as a response to the ideological desire to cut taxation.

The legal aid provisions of LASPO come into force in April 2013. On the first of the month, the Legal Services Commission will then transmute into the Legal Aid Agency. The first director will be Matthew Coats, a former health administrator and now interim director of the harassed UK Border Agency. He may be the only possible appointee who would find a spell as head of the Legal Aid Agency a bit of a rest.

LASPO slipped through the Commons without serious injury but encountered a steady campaign in the Lords led by Lord Bach, Labour's final legal aid minister. He secured 14 initial victories over the government on the legal aid sections. Few of them, however, survived the process of 'ping pong' as the government deployed its firepower in the elected chamber. A couple of JUSTICE's 'rule of law' points were successful. The government conceded an improved emphasis on the independence from government of the Director of Legal Aid Casework: there is also a requirement for an annual report to Parliament which will, at least, give a measure of transparency to what is being done. An absurd provision which originally allowed only further cuts to scope was amended so that there could also be extensions – which would, otherwise, have required new legislation. Lord Pannick lost a hard fought battle (eventually on a tied vote) to introduce a symbolic statement of purpose to the bill.

There were relatively few changes to scope. The government conceded on only the more contentious and draconian of its original proposals. Thus, legal aid remains for cases involving special educational needs; child abduction;

catastrophic birth injuries in the form of clinical negligence claims for babies up to eight weeks old; victims of human trafficking and – a special point for a one-time solicitor to the Child Poverty Action Group – welfare benefit appeals in the Upper Tribunal and above. A power to introduce means-testing of police station legal advice was withdrawn at an early stage. The government claimed that the draft had been inherited from Labour and they had no such intention. The definition of domestic violence was widened, with details still to be seen in regulations to be drafted. In the still to come 'category' is also the possible unfreezing of assets restrained in a serious fraud investigation. Community care has been dropped from the mandatory 'telephone gateway' now reserved in the first instance for debt, discrimination and special educational needs. Concessions were made about the continuation of face to face legal services in 'emergency cases, those in detention and under-18s, but even where a case is in scope and not in those groups, face to face advice will always be available where deemed to be required'.

So how bad will it be? It is hard to tell. Clearly, the withdrawal of a quarter of legal aid income by way of a mix of scope and remuneration cuts will challenge the legal profession. Reeling already from the reform of regulation and the encouragement of alternative business structures, lawyers will face a further major challenge to the long-standing structure of the legal profession. The historical division of the profession into solicitors with a traditionally limited mandate, self-employed counsel and an upper echelon of Queen's Council will do well to survive in anything much like a recognisable form: there will just not be the money to support it in the criminal field.

The government will, it is true, still be pumping around £1.75bn of expenditure into legal services – considerably more than in any other country. The scope of criminal legal aid will be maintained though remuneration will be cut severely and the future of the sole practitioner, counsel or solicitor, must be in doubt. Civil legal aid will be a mess. There must be some concern that some of the cuts just won't work. Domestic violence statistics will rise sharply as women find that it is better to drag allegations through the court than to suppress them. Such an allegation, though it may impair the ending of difficult relationships, will carry an entitlement to legal aid. An odd trio of issues falls to be covered by telephone advice. In particular, discrimination cases are not particularly easy to handle and it is difficult to see why they have been selected for early disposal in this way.

The decisions on these cuts were made within weeks of the establishment of a new administration. The line was that, if not made then, such cuts would require too much courage from ministers. That may well be right but it does mean that ministers did not know very much or have very much experience when they made their decisions. It is interesting to contrast this with the

practice of the Dutch – who also wished to contain the cost of legal advice. They had a programme over some years which eventually wiped out their existing front line advice provision, replacing it with a series of advice points, information provision and internet services. It was orderly, thoughtful, not without difficulties but maintained a coherent approach. Ministers may well survive long enough to regret that they did not give their cuts more thought. Defence may well provide the paradigm where it appears that you can have aircraft carriers but no sea-borne aircraft or sea-borne aircraft but no carriers. The effects may be less visual but no less real in legal aid.

As we move into the implementation stage of these cuts, it is really important that their effect on clients is charted. In the 1970s, the expansion of services into the areas now cut was led by volunteer lawyers, students and other advisers who showed just how much need there was for legal assistance not then available from the mainstream legal profession. We may need exactly that level of commitment to prove once again how necessary is a universal legal advice scheme for those unable to afford commercial provision. Let us hope that, as in fact for a Tony Blair who is contemplating his come-back into domestic politics, this is, indeed, not the end.

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Human rights in 2011

Helen Mountfield

This article is based on the 'Review of the Year' given at the JUSTICE Human Rights Law Conference on 19 October 2011.

2011 was a busy year for those who toil in the fields of human rights, and for those who watch and comment on their efforts. It has been a long time since human rights talk, albeit pretty disparaging human rights talk, has been so much part of the political mainstream.

This paper is not, therefore, an attempt to cover, inadequately, the 40 (or so) 'top cases' of the year, but, rather, a survey of some of the themes which have emerged in the human rights debate this year. The paper is also – save in limited respects – confined to UK law. Although they have been part of the cultural story, the paper does not analyse the important international developments, such as the Arab Spring; repression of the Libyan uprising and subsequent international intervention; the trial of Yulia Tymoshenko in the Ukraine and ongoing human rights issues in Iraq and Afghanistan.

Scope of Convention protection

The first important question which has been clarified this year is the scope of the European Convention on Human Rights (ECHR or 'the Convention'). In times when British forces are spread around, and exercising authority, in various places around the globe, just how far can you go, using the Convention, in terms of extraterritorial effect?

The European Court of Human Rights (ECtHR) had established in 2009 that the UK has an obligation to secure Convention rights and freedoms within a territory over which the UK Armed Forces have effective lawful control: *Al Sadoon v UK* (2009) 49 EHRR SE11 at 8[85]. But in *R(Smith) v Secretary of State for Defence* [2010] UKSC 29, [2010] 3 WLR 233, the Supreme Court had held that the *Al Sadoon* exception should be restrictively applied. The Convention obligations were owed to people whilst they were on British military bases, but not to soldiers on active service abroad in areas over which there was no effective lawful control.

However, in July 2011, the *Smith* approach was called into question by the decisions of the Grand Chamber of the ECtHR in *Al-Jedda v UK* and *Al-Skeini v UK* Apps 27021/08 and 55721/07. In those cases, the ECtHR analysed the exceptions to a territorial approach to Convention applicability: state agent

authority and control; effective control over an area; and Convention legal space. Without quite overruling *Bankovic,*[1] the ECtHR used these concepts to hold that the UK was responsible for applying and enforcing Convention standards in Southern Iraq when it was the lead occupying power there from May 2003 until June 2004. In an extraordinary concurring judgment, Judge Bonello criticised the legality of the Iraq war, and held that 'those who export war ought to see the parallel export of guarantees against the atrocities of war'.

Back to basics

If *Al-Skeini* was a broad and perhaps novel decision as to the territorial scope of human rights obligations, poring over the details of incidents which took place during the Iraq war also took us back to what are, or at least ought to be, human rights basics. On 8 September 2011, Sir William Gage published his very lengthy Inquiry Report into the death of Baha Mousa at the hands of British troops in Iraq. In addition to an exhaustive analysis of the incident which led to Baha Mousa's death, the report made a series of criticisms of systematic failures by the Ministry of Defence. Sir William Gage identified individuals who, by their acts and omissions, were responsible for what he called 'cowardly abuse' and 'shameful events'. The inquiry also asked the fundamental question of why the banned 'five techniques' for interrogation (hooding, white noise, sleep deprivation, food deprivation and painful stress positions) were used in the Iraq campaign, when they had been banned by Edward Heath in 1972, and condemned as inhuman and degrading treatment by the ECtHR (*Ireland v UK* (1978) EHRR 413). The inquiry concluded that knowledge of this ban had 'largely been lost' by the time of the Iraq war, and that 'there was no proper MoD doctrine on interrogation of prisoners of war'.

Liam Fox, Secretary of State for Defence (as he then was) accepted most of the recommendations of the report, but was unable to accept that there were no circumstances in which a 'harsh approach' to tactical questioning might be justified.

However, on 3 October 2011, a strong Divisional Court held in *Al-Bazzouni v Prime Minister, Secretary of State for Defence, Secretary of State for Foreign & Commonwealth Affairs, Secretary of State for the Home Department and Attorney General* [2011] EWHC 2401 (Admin) that government guidance on cruel, inhuman and degrading treatment on detainees needed to be amended. The guidance said that there was a presumption that members of the UK armed forces should not proceed with questioning in circumstances where there was a serious risk that a detainee would be tortured at the hands of a third party. But it then contained a list of practices, such as obscuring vision or hooding, which, it was said, would constitute cruel inhuman or degrading treatment, except 'where this did not pose a risk to the detainees' physical or mental health and

was necessary for security reasons during arrest or transit'. The court held that hooding was always cruel, inhuman or degrading treatment in English law, and so the exception to the annex should be changed so as to omit references to it. Given the long-established case-law on hooding, it is perhaps disappointing that it took a court decision to establish this point.

Expanding the sources of human rights protection

A third overarching theme in 2011 was the debate on the sources of human rights norms, and competing claims for supremacy The Home Secretary's call at the Conservative Party conference to repeal the Human Rights Act rather pre-empted the question currently being put out for consultation by the Bill of Rights Commission: 'Do we need a Bill of Rights?'. The commission's terms of reference do not, however, suggest that the purpose of creating a Bill of Rights would, or even could, be removing rights which are enshrined in the Convention. The terms of reference are:

> To investigate the creation of a UK Bill of Rights that *incorporates and builds on all our obligations under the ECHR*, ensures that these rights continue to be enshrined in UK law, and protects and extends our liberties (emphasis added).
>
> To examine the operation and implementation of these obligations, and consider ways to promote a better understanding of the true scope of these obligations and liberties.
>
> To provide advice to the government on the ongoing Interlaken process to reform the Strasbourg court ahead of and following the UK's chairmanship of the Council of Europe.
>
> To consult, including with the public, judiciary and devolved administrations and legislatures, and to aim to report back by the end of 2012.

So, whilst the commission has a remit to consider extending our liberties, examine the operation and implementation of rights to promoting understanding of them, and to reform of the Strasbourg court, there is no question of its proposing a dilution or diminution of existing human rights standards.

Unless and until we have any such Bill of Rights, however, the sources of human rights protection are common law, Convention values mediated through the Human Rights Act 1998, and the EU Charter of Fundamental Rights.

There is a strong judicial instinct to suggest that common law rights and Convention rights jurisprudence are similar or the same. In *Kulkarni v Milton Keynes NHS Hospital Trust* [2009] EWCA Civ 789, [2009] IRLR 289, for example, Smith LJ expressed the view that in considering what a fair trial required the precise source of the legal obligation, whether common law, contract, or Convention, should not matter ('I do not think it should matter how the question is framed, the answer should be the same ...' [63]).

It is, however, increasingly clear that the source of the legal obligation is highly material to its content.

Article 6 ECHR fair trial standards, for example, apply only to the 'determination' of 'civil rights and obligations' or 'criminal charges'. Since 'civil rights' equate largely with private law rights, this leaves important areas out of the scope of Article 6 protection – for example, Special Immigration Appeals Commission (SIAC) decisions, including bail decisions (see *R(W) Algeria R(BB) v Special Immigration Appeals Commission* [2011] EWHC 2129 (Admin); *IR (Sri Lanka) v SSHD* [2011] EWCA Civ 704 (in which Article 8 standards of procedural fairness, but not the stricter Article 6 standards were required in the immigration context).

Moreover, whilst the Supreme Court issued ringing endorsement of the principle of open justice as an absolute common law entitlement (*Al-Rawi v Secretary of State for the Home Department* [2011] UKSC 35), it accepted in that case (at [48]) that these safeguards can, in principle, be displaced by clear language; and in *Tariq v Home Office* [2011] UKSC 34, it decided that they had been.

However, those debates may fade somewhat into the background in future. In a growing multitude of contexts, the important human rights standards will be those contained in the EU Charter of Fundamental Rights. The Charter, which acquired legally binding force after the Lisbon Treaty, has the same weight as other EU Treaties; is directly effective and – where it applies – any inconsistent national legislation must be read down.

There are already indications that it will have a wide reach. For example, the Charter right to a fair trial, set out in Article 47, applies to 'everyone whose rights and freedoms guaranteed by the law of the Union are violated' – whether those rights arise in public or private law, and whether or not the decision in question is a final 'determination'. The ECJ has also held that the Charter has horizontal direct effect – that is, it can be relied upon in disputes between private parties (*Kücükdeveci v Swedex GmbH* [2010] IRLR 346). Moreover, the Court has so far interpreted the Charter generously. For example, in *DEB Deutsche Energiehandels und Beratungsgesellschaft mbH v Germany C279/09*, 22 December 2010, the Court

appeared to suggest that legal aid should in principle be available to legal as well as natural persons when they are engaged in disputes which concern EU law.

Finally, it would appear that Protocol 30 of the Lisbon Treaty – which purported to limit the application of the Charter to Poland and the UK – will have no practical effect in limiting the application of Charter rights in the UK. *NS v Secretary of State for the Home Department Case* C-411/10, concerned the Secretary of State's decision to return an Afghan asylum seeker to Greece. The matter was referred to the ECJ on a preliminary reference. The questions referred included whether this decision engaged the duty of a member state to observe EU fundamental rights as set out in the Charter, and the question of whether the UK's obligations in these respects were qualified by the terms of Protocol 30.

On 21 December 2011, the Grand Chamber of the Court of Justice of the EU handed down its decision. It held that the Charter was engaged by the exercise of a discretion provided by an EU regulation, and that Protocol 30 did not qualify the UK's obligations in this regard. It held (at [119]-[120]) that

> *According to the third recital in the preamble to Protocol No 30, Article 6 TEU requires the Charter to be applied and interpreted by the courts of Poland and of the United Kingdom strictly in accordance with the explanations referred to in that article. ... the Charter reaffirms the rights freedoms and principles recognised in the Union and makes those rights more visible, but does not create new rights or principles.*
>
> *In those circumstances, Article 1(1) of Protocol No 30 explains Article 51 of the Charter with regard to the scope thereof and does not intend to exempt the Republic of Poland or the United Kingdom from the obligation to comply with the provisions of the Charter or to prevent a court of one of those Member States from ensuring compliance with those provisions.*

The Court, therefore, upheld the reasoning of Advocate General Trstenjak in his opinion of 22 September 2011, namely that the wording of the Protocol which provided that the Charter did not have the effect of shifting powers at the expense of the UK or extending the field of application of EU law but 'merely reaffirmed' the normative content of Article 51 of the Charter, which itself sought to prevent precisely such an extension of EU powers or of the field of application of EU law. Whilst the Protocol might prevent any expansive interpretation of social fundamental rights and principles as contained in Articles 27-38 of the Charter, it had no application to the types of fundamental rights (rather than principles) contained in the *NS* case.

The door is open, therefore, for creative use of the Charter by human rights lawyers, and in future reviews of the year, therefore, we can expect far more analysis of EU case-law.

Fair trial mechanisms

That, however, is for the future. The large number of important cases concerning fair trials this year have mostly, though not exclusively, turned on construction of Article 6 ECHR, and have otherwise been determined by reference to the common law. Reference has already been made to the Supreme Court decisions in *Al-Rawi*, and *Tariq*. Other notable 'fair trial' cases this year have been:

- *Bank Mellat v HM Treasury* [2010] EWCA Civ 483; application of the requirement that a litigant be granted a 'core irreducible minimum' of disclosure to answer a freezing order granted on national security grounds.

- *R(G) v Governing Body of X School* [2011] UKSC 45 – a teaching assistant was disciplined following an allegation of inappropriate conduct with a pupil, a decision which there was every 'likelihood' would profoundly influence the secretary of state (later, the Independent Safeguarding Authority)'s decision as to whether to place him on a barred list. The Supreme Court, however, held that there was an insufficiently close nexus between the school disciplinary hearing and the barring decision to warrant application of Article 6 ECHR to the school disciplinary hearing such as to require G to be permitted the assistance of a lawyer in the course of it.

- Cases in the criminal law context, on such issues as the presumption of innocence *(R(Adams) v Secretary of State for Justice* [2011] UKSC 18); jury trials (*Twomey* [2011] EWCA Crim 8; *Taxquet v Belgium* ECtHR GC, App no 926/05 16 November 2010; *AG v Fraill* [2011] EWCA Crim 1570); contempt of court (*AG v Associated Newspapers* [2011] EWHC 418 (Admin) and *AG v MGN Ltd* [2011] EWHC 2074); and the fruits of the poisoned tree (*Gafgen v Germany* (2011] 52 EHRR 1 GC).

An important access to justice issue, coming over the horizon for 2012, is the question of whether there can be realistic access to court at *all* in the absence of realistic and affordable access to a lawyer. There were several legal challenges to various aspects of the government's proposed legal aid changes – to the single telephone gateway as the exclusive means of obtaining community care advice (a claim brought by ten specialist law firms); to various aspects of the scheme which prejudice the interests of disabled people (brought by the Disability Law Service); and to the exclusion of clinical negligence cases from the legal aid scheme (brought by the Association of Victims of Medical Accidents). Although these claims were dismissed as premature pending the passage of the Legal Aid,

Sentencing and Punishment of Offenders Bill, the Lord Chancellor subsequently announced that the reforms would be deferred for a year after the bill passed into law, and it is undoubtedly the case that a fierce political battle looms (as well as threatened legal challenges if and when the reforms are introduced). The extent to which a right of access to a lawyer is an implicit aspect of the right to a fair trial is likely to be a contested human rights battleground in 2012 and beyond.

Conflicts of rights

The controversies which have arisen in earlier years as to conflicts between gay rights and the rights of the religious have not gone away, and remained live and controversial issues in 2011.

In particular, the question was not finally resolved as to the extent to which actions which are manifestations of, or motivated by, religious beliefs can be justified if they infringe the rights of others.

The cases of *Ladele v London Borough of Islington* (2009) EWCA Civ 1357, (2010) 1 WLR 955 and *McFarlane v Relate* [2010] EWCA Civ 880, (2010) IRLR 872 clearly established that to require people engaged in the provision of services to provide them on a non-discriminatory basis (in those cases, without discrimination on grounds of sexual orientation) was justified for the enforcement of generally applicable work rules, even where the rules had an indirectly discriminatory effect against those who shared particular religious beliefs. Those cases drew on Article 9 principles as to the extent to which manifestations of belief might be curtailed to serve wider public interests, including protecting the Articles 8 and 14 rights of others. Ms Ladele and Mr McFarlane have now taken their cases to Strasbourg, and judgment is awaited (App Nos 517671/10, 36516/10 (pending)).

However, the issue has not gone away at a national level either. There was media furore following the decision in *R(Johns) v Derby City Council* [2011] EWHC 375 (Admin) which upheld Derby City Council's decision not to approve as foster carers a couple whose (religiously inspired) views on sexual orientation cut against the council's requirements that prospective foster carers should value individuals equally (regardless of characteristics such as sexual orientation) and should promote diversity. The Divisional Court held that, to the extent that these requirements amounted to indirect discrimination against Christians, or interfered with their Article 9(1) rights, that was justified by the council's need to ensure compliance with anti-discrimination legislation and to prohibit discrimination on grounds of sexual orientation.

'Conflicts' cases illustrate the importance of taking a nuanced approach to the application of qualified human rights. Other important cases of this kind this year have included the conflict between freedom of expression and the right to free and fair elections untainted by mendacious factual remarks: *R(Woolas) v Parliamentary Election Court* [2010] EWHC 3136 (Admin), [2011] 2 WLR 1362, and the conflict between fair trial rights under Article 6 and Article 10 rights, in terms of stringent punishments for breaches of judicial oath and contempt of court (*Fraill, AG v Associated Newspapers; AG v MGN Ltd* (above)).

But by far the highest profile issue of conflicting rights this year – and indeed the biggest political debate of the year, in human rights terms – was the drawing of the line between respect for private life and the right to freedom of expression.

The role of the media and freedom of expression in a 'democratic society'

It may conveniently be forgotten that Max Moseley lost his challenge in the Strasbourg courts in which he claimed that the law's failure to require the press to give prior notice of publication of private information breached his rights under Article 8 ECHR (*Moseley v UK*, App No 48009/08 (10 May 2011)).

This has not prevented anguished cries of 'censorship' from the Fourth Estate. In May of this year, the media had a self-righteous outpouring of indignation over the perceived 'gagging' of the press by orders which prevented them from reporting the extramarital dalliances of various captains of football and captains of industry. After the terms of one such injunction were broken – and then the identity of the footballer in question was mentioned in Parliament – Tugendhat J, not generally regarded as an enemy of freedom of expression, upheld the privacy injunction on the basis that its purpose was no longer to preserve a secret but 'to protect the claimant and his family from taunting and other intrusion and harassment in the print media' (*CTB v (1) News Group Newspapers Ltd (2) Imogen Thomas* [2011] EWHC 1334).

The prevailing tone of the media coverage of this decision was that the courts were completely out of touch; and that this approach was so harmful to the media's right to freedom of expression that – it was suggested in some quarters – flouting court orders could be justified. A joint committee of both Houses of Parliament was established to consider privacy and injunctions.

At around that time, I participated in the *Daily Telegraph* debate at the Hay Festival, the sole lawyer on a platform of journalists. In that debate, I expressed the unpopular view that freedom of expression was not the only fundamental right in a democratic society: respect for private life and the rule of law were also important. The relative importance of those rights had to be assessed on the

facts of a particular case. And, I suggested, the media did not help its own case by presenting its right to publish tittle-tattle about sexual peccadilloes as some kind of human rights crusade. The content of what the papers were fighting so hard to publish was not actually very important. It seemed to me that there were other circumstances (eg, the whereabouts of paedophiles) where there were genuine and important competing interests both in publication and non-publication, and, I suggested, we needed to have a sensible and nuanced debate about where the balance lay.

This line did not make me particularly popular in Hay, but I think it was vindicated by the scandal which emerged soon after that, when it emerged that there was evidence of widespread hacking of telephones, not only of celebrities, but of victims of crime and many others. Suddenly, respect for privacy was the human right de jour, and the closure of the *News of the World*, parliamentary enquiries and the establishment of the Leveson Inquiry, with its enormously wide range of reference followed.

The needle swung back again later in the summer, when it was suggested that the serious outbreaks of looting and rioting had in part been arranged on social networking sites, and that Blackberries had been used to outwit the police as to vulnerable premises. Suddenly, there were calls for mobile networks to be withdrawn in times of emergency, or for provisions to enable the police to access all instant messaging.

Meanwhile, the Wikileaks saga continued apace. Wikileaks was founded in 2006, as a new, innovative platform for exposing government wrongdoing. It described itself as being a

> *non-profit media organisation dedicated to bringing important news and information to the public. We provide an innovative, secure and anonymous way for independent sources around the world to leak information to our journalists. We publish material of ethical, political and historical significance, whilst keeping the identity of our sources anonymous, thus providing a universal way for the revealing of suppressed and censored injustices.*

Before 2010, Wikileaks received support from several NGOs with an interest in human rights and freedom of expression (it won awards in 2008 from Index on Censorship and in 2009 from Amnesty). At first, Wikileaks worked with responsible media partners to redact data, but in November 2010, Wikileaks released all its US cables: far more information was released in a form which made harm to third parties far more likely (for example, fears were expressed for Belarusian opposition activists named in the cables). In August 2011, the entire

cache of Wikileaks documents was placed, unredacted, into the public domain, and it was evident that the lives of dissidents around the world were placed at risk, as well as international relations more generally.

Two big human rights questions arise here. The first is where the proper balance lies between freedom of expression and competing rights to international relations, respect for private life, or the bodily integrity and lives of others. The second big question is this: what price the rule of law? Where, as here, there are difficult and controversial questions of balance, *someone* has to decide where this balance lies; and if the matter is put beyond the jurisdiction of judges, then the question is, who? And how?

Constitutional fundamentals: the rule of law

The confused response to the Wikileaks saga is, therefore, but one illustration of the biggest issue in human rights discourse this year: the breakdown of a shared understanding of society's rules and how to enforce them.

We live in a time of very rapid and confusing economic and technical change. National boundaries, and the barriers between that which is private and that which is public, are breaking down very fast. Legal regulation has not caught up with the information revolution.

I sense an increasing public feeling that rules can be ignored and may be ignored. This may be because people perceive that the rules are ignored with impunity by the rich or powerful. It may be because laws appear to be unenforceable. Means for breaking rules, like the internet, appear beyond judicial control and law-breaking behaviour organised, for example, on a social networking site, can make it difficult to organise an appropriate police response.

But that growing sense of impunity is mixed too, with a sense of powerlessness: if rules cannot be enforced, nor can rights. Courts may lack power to prevent their orders being breached in the relatively Wild West world of cyberspace. Or rights may be unenforceable because there is a real barrier to justice in the expense and complexity of getting to court, in the face of legal aid cuts and complex costs rules. This is worrying, because theoretical rights alone are worthless: a right without a remedy is no right at all.

This is a cultural problem. Whether it is News International journalists hacking into voicemails, or Julian Assange putting his cache of secret documents on the internet; whether it is an unknown tweeter or a Member of Parliament breaching an injunction because no one can stop them; whether it is Liam Fox breaching the ministerial code or a looter taking what s/he can from a neighbour's convenience store, there has been a sense of loss this year: loss of

the shared values and understandings which underpin a democratic society and loss of a shared sense of the value of the rule of law. We live in a Hobbesian state of nature indeed if those who dissent from rules, whether rich or poor, powerful or disenfranchised, ignore the rules they dislike with impunity.

I do not want to be accused of naivety. There have always, of course, been people who disobey rules. What makes this a new, or at least an expanding, trend is that lack of respect for the law appears to reach to, and, in part to be led from, the top. To take an example, in 2005, the Grand Chamber of the European Court of Human Rights (*Hirst v UK* [2006] 42 EHRR 41) said that the blanket ban on prisoners voting was unlawful. The last government managed to push the issue into the long grass by conducting an inordinately lengthy two-stage consultation, which it managed to drag out over more than two years, despite getting only 86 responses to its first-phase consultation. The present government, supported by Jack Straw, the former Home Secretary, has by its actions flagrantly deferred compliance with the judgment without any reasonable excuse, and it is clear that it does not respect the spirit of the judgment and later judgments of the ECtHR such as *Scoppola v Italy* (No 1) 50550/06, No 2 (10249/03) and No 3 (125/05), (18 January 2011). The Prime Minister said the thought of giving prisoners the vote made him 'physically ill'. The *Hirst* decision of the ECtHR may be right and it may be wrong – I happen to think it was right – but even if it was wrong, it is difficult to tell those banged up for breaking the law that the government is going to ignore its own international legal obligations, because it does not agree with them.

This is not a party political point. Successive Home Secretaries, starting with David Blunkett and then John Reid have lambasted judicial decisions on the Human Rights Act when they don't agree with them. So Theresa May's cat – the existence of which she did not make up, but the importance of which she undoubtedly misrepresented[2] is only an example (but a significant example) of a decline in mutual respect between the executive and the courts.

Likewise, it is astonishing that parliamentarians, members of the legislature, should think it appropriate deliberately to flout privacy injunctions under cover of parliamentary privilege because they do not agree with them. Surely the role of a legislator is to make law, not to break it? As Lord Justice Eady remarked in a recent lecture[3] – commenting with laconic judicial understatement on the breach by John Hemming MP of the injunction he had granted Ryan Giggs – 'If individual parliamentarians think it appropriate to act as one-person tribunals of appeal from judicial decisions, and without troubling to read the evidence, it may not be the end of civilisation as we know it, but it can lead to a little constitutional untidiness around the edges.'

There is a funny side to all this: If John Hemming had not told tales out of school about Ryan Giggs' private life, he (Mr Hemming, that is) would not be nearly so famous. And then we might never have been treated to the media coverage of the second entertaining cat story this year: the criminal trial, in October 2011, which turned on the theft by Mrs Hemming of a cat belonging to Mr Hemming's lover. Titillating stories of footballers, and indeed MPs, who play away, and feline faux pas did something to brighten a year in which the news was otherwise unremittingly gloomy. But at the risk of sounding a little pompous, there is also an extremely serious side.

Those who rioted in Tottenham and elsewhere this summer were not political protesters; but they were actors in a society whose trust in its political and professional leaders – politicians and bankers, police chiefs and media moguls – has been severely dented. A democratic society is founded upon respect for the rule of law. Politicians who demand respect for the law from others whilst showing little themselves are tilting at the wind. If we lose a shared sense of respect for the values underpinning a democratic society, and for the rule of law as the safeguard of those values and of that society, the outlook for human rights is grim indeed.

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Notes

1 *Bankovic and others v Belgium European Court of Human Rights*, 12 December 2001 (Application 52207/99).

2 At the Conservative Party Conference, the Home Secretary, the Right Honourable Theresa May, assured her audience that an overstaying immigrant had been allowed stay in this country because – and she assured conference she was not making this up – 'he had a cat'. This was swiftly contradicted by the Judicial Press Office, which said that the reason the claimant in that case had been permitted to remain was because the Home Office had not obeyed its own guidance on those in established stable relationships.

3 Mr Justice Eady, 'How private is private?' (8 October 2011), 2011 Young Bar Conference.

The EU Charter of Fundamental Rights: scope and competence

Jodie Blackstock

This paper examines issues of particular relevance to practitioners in relation to the application of the European Union's Charter of Fundamental Rights.

Introduction

Recognition of human rights is not new for the EU. It has increasingly prioritised human rights in its Treaty provisions. This is now enshrined in the first substantive article of EU primary law, Article 2 Treaty on the European Union:

> *The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.*

The EU Charter of Fundamental Rights was concluded in 2000 following a conclusion at Council level that EU law concerning fundamental rights was set out in a fragmented fashion across numerous primary and secondary law provisions, as well as ECJ[1] jurisprudence. The intention was to consolidate these legal principles. The Charter would, however, not only cover the social and economic rights recognised as general principles of EU law, but also the fundamental rights adopted by the EU from the European Convention on Human Rights (ECHR) and the constitutional traditions common to the member states. Contrary to the debate as to the legitimacy of the European Convention on Human Rights (despite this in fact being the brain child of Winston Churchill and drafted largely by David Maxwell Fyfe), and the expansion of EU law generally, the Charter was specifically devised by the member states acting in the European Council at Tampere in 1999. Therefore, the heads of state gave express approval to the idea and instigated its creation. The content was proposed by a Convention appointed to the task from the member states, the European Commission, the European Parliament and national Parliaments. This was approved by the European Council at Nice in 2000. Its legal status remained unclear until the Lisbon Treaty was finally adopted in December 2009.

The Charter (CFR) is, therefore, a binding set of principles 'bringing together in one place all of the personal, civic, political, economic and social rights enjoyed by people within the EU' (at least according to the Commission website) aimed at protection of the individual against actions of the state. It is a free standing instrument that derives its authority from Article 6(1) Treaty on the European Union (TEU):

> *The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.*

Its scope is, however, circumscribed by the subsequent part of Article 6(1):

> *The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.*
>
> *The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.*

The Charter does not, therefore, operate in the same way as the ECHR. Firstly, it has direct effect in the UK, in that there is no need for enacting UK legislation for it to have force. However, it only applies (a) to EU law and (b) with vertical effect. This is because of the general provisions under Title VII of the Charter. A reason for this can also explain the origins of the Charter. Until this point, the European Court of Justice had been developing the fundamental principles of EU law and its approach to human rights. By setting out which rights would be adopted by the Union, the member states were making clear not only to citizens of the Union what their rights were, but also to the Court how far they were prepared to accept advancement of these principles. The Charter, therefore, can only apply where the Union has already agreed it will legislate, and where it has agreed it has competence. It also records the rights and principles that the EU member states deem to be recognised by Union law.

This paper will focus on Title VII of the Charter in order to ascertain how the Charter is intended to function. It will also consider briefly the rights and principles that the Charter contains; the relationship between these concepts; and what impact this has on the individual seeking to invoke the Charter. It will, finally, consider whether Protocol 30 to the Treaty on the Functioning of the European Union (TFEU), which the UK and Poland secured during negotiations on the Lisbon Treaty, will influence the operation of the Charter in the UK.

Title VII – General provisions governing the interpretation and application of the Charter

Application of the Charter

Article 51(1) sets out the application of the Charter:

> *The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.*

The Charter is to have direct effect since it is addressed to the institutions of the Union and to the member states. The Explanations to the Charter clarify that its application extends to all institutions, bodies, offices and agencies of the EU set up by primary or secondary legislation in accordance with Articles 15 and 16 TFEU. This means that not only will the law making institutions such as the Commission and Parliament be bound but also agencies such as Frontex, Europol and OLAF. This is good news. The member states were already bound by the ECHR which at least provides for fundamental rights protection. However until the Charter became binding, the EU institutions had no requirement to act within a human rights framework. Rather, the piecemeal and fragmented principles developed under EU law applied to activity undertaken where challenges were taken through the CJEU system. The Fundamental Rights Agency was created in 2007 when the Lisbon Treaty was signed but it does not have any powers to require conformity with human rights principles. Rather, it has the authority to conduct research and report on its findings, which are hoped to then form the basis of legislative action. Whilst this is useful to justify legislative acts, the EU law making bodies are free to ignore its advice. Following the adoption of the Lisbon Treaty, the Commission produced a strategy for the effective implementation of the Charter in 2010 and is publishing annual reports on its progress. This includes a fundamental rights checklist which it is bound to follow whenever it proposes legislation. The checklist will also include dissemination to the public to ensure that the enshrined rights are effective in practice. It is too early to know whether this process will improve knowledge and application of Charter rights.

Whilst the Charter is binding upon the member states, commentators have presumed that it could not be engaged in an action against a private individual in the way that some Treaty provisions expressly allow (eg, with respect to free movement and employment discrimination). There may be an argument for

saying that because the courts form part of the state, the Charter can be invoked before the courts in horizontal proceedings because the court has a vertical obligation to apply its provisions. The practical reality is more likely to be that the courts will use the Charter as an interpretative aid, thereby creating an indirect horizontal effect, as institutions which must 'respect the rights, observe the principles and promote the application of the Charter'. Interestingly, the Grand Chamber of the Court of Justice of the European Union has already invoked the Charter in private proceedings: see Case C-555/07 *Kücükdeveci v Swedex* GmbH, 19 January 2010 (unreported) concerning employment discrimination. The Court noted that the Charter is to have the same legal value as the Treaties and that Article 21(1) CFR prohibits age discrimination. In Case C-400/10 PPU *Deticek v Sgueglia* 5 October 2010 (unreported), the Court specifically referred to the requirement to ensure consideration of the best interests of the child in accordance with Article 24 CFR in a contact dispute between parents. These cases suggest that the Court may simply apply the Charter as it does existing Treaty provisions which have horizontal effect, unless a member state seeks to argue otherwise (something the Netherlands has in mind by way of an intervention in a forthcoming reference, I am reliably informed by a lawyer at its Ministry of Justice). At the very least, it will find the Charter very persuasive in horizontal proceedings so that the distinction is virtually non-existent in the final outcome. In any event, even the most conservative interpretation could not deter an individual bringing an action against the state for failing to prevent the violating act of a private individual (in the exercise of a positive obligation).

Scope of the Charter

Article 51(2) reiterates the Article 6(1) provision:

> *The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties.*

Thus, this means that the Charter cannot enter new territory and only attaches to EU law which is the expression of agreement between member states that the EU has competence in conformity with the subsidiarity principle. There is nothing new about this (C-249/96 *Grant* [1998] ECR I-621, paragraph 45 states that rules against discrimination on grounds of sex in employment do not extend to discrimination on grounds of sexuality because the Treaty provision was not intended to concern this. Whilst the International Covenant on Civil and Political Rights (ICCPR) contains a prohibition of this kind, the relevant EU Charter provision could not be interpreted to extend this far because that would be outside its competence). Nevertheless, 'law' for these purposes includes

everything passed by the EU institutions and the EU acquis. It, therefore, covers a lot of ground.

Taken with Article 51(1), once there is EU competence in a given field, for the Charter to apply to actions of the member states, they must be *implementing EU law*. There is broad consensus that the Charter binds member states whenever they act within the scope of EU law (the phrase in fact adopted in the Explanations). This means that the Charter applies in two wider scenarios. Firstly, the ECJ has treated the phrase 'implementing Community rules' as synonymous with member state rules falling within the scope of EU law (Case C-442/00 *Caballero v Fondo de Garantia Salarial* (*Fogasa*) [2002] ECR i-11915 [29] – [30]). This means that where EU law is not directly applicable (as with directives as opposed to Treaty law, regulations and decisions and requires implementing national legislation) whether a member state has relevant pre-existing legislation or introduces new legislation to give effect to the EU law, the Charter will apply.

Secondly, where a member state derogates from EU legislation, or part of legislation, the Charter will still apply in relation to the whole of the operative national law (Case C-260/89 *ERT v DEB* [1991] ECR I-2925 where a monopoly on broadcasting that breached the freedom to provide services could not be justified by way of a Treaty provision allowing for discrimination as that only applied on objective grounds of public morals, safety or health, which were not present). This is because the power to derogate is given by EU law and derogation can only be effective in accordance with EU law, which intrinsically must conform with fundamental rights as per Articles 2 and 6 TEU. Otherwise, member states could derogate so as to avoid protection of fundamental rights, as Lloyd Jones J demonstrates in the following decision:

> *69. Mr. Chamberlain, on behalf of the Defendant submits, nevertheless, that in the present case the Defendant has decided not to legislate and that it is difficult to see how a Member State, in deciding not to legislate, can be described as 'implementing EU law' even if, had it done so, it would have been acting under a power of derogation conferred by the EU Regulation. ERT is distinguishable, he submits, because the decision to derogate in that case was required to be justified.*
>
> *70. We are concerned here with the question whether, in taking a decision, the Defendant is acting within the material scope of EU law. The field in question – the imposition of export restrictions – is one occupied by EU law which nevertheless includes a power of derogation to Member States. It would be surprising if the answer to the question whether the Defendant was acting within the material scope of EU law depended on which way*

> *his decision went. Nor do I consider that to be the case. Rather, in deciding whether or not to exercise the power of derogation the Defendant is implementing EU law in the sense of applying it or giving effect to it and he is bound to do so in accordance with the fundamental principles and rights which form part of EU law.*
>
> *(R (on the application of Zagorski and Base) v Secretary of State for Business, Innovation and Skills [2010] EWHC 3110 (Admin))*

Opt outs under the protocols are considered in the final section of the paper. Given the interpretation by the courts in these cases, it could be argued that any derogation will be of limited impact upon a claim under the Charter. What will fall for consideration is whether any limitations on the protection of the right can be justified, either due to balancing competing rights, or due to the familiar derogations provided in qualified ECHR provisions.

As regards whether the Charter could be seen as extending competence, whilst the Court cannot legislate in new areas, it can enhance rights protection in areas where EU law directly or indirectly impacts upon the rights of an individual, eg, extradition and the rights of children of the requested person. Whilst the framework decision on the European arrest warrant does not mention the rights of the child as a bar to extradition, nevertheless it has to be read in accordance with the Charter, Article 24 of which concerns the best interests of the child. Thus, any consideration of fundamental rights in the decision to surrender must not only take account of the general right to family life provided under Article 8 ECHR, interpreted in light of the obligation provided by the UN Convention on the Rights of the Child to consider the impact upon children, but also directly under Article 24 CFR (judgment pending on this point in *HH et al v Italy et al*, UKSC). It may also mean that in developing the jurisprudence of the Charter, the Court recognises circumstances, as has the ECtHR, where a positive duty to act to protect the Charter right will be required in order for the national law to remain in compliance (a step already taken, Case C-68/95 *T. Port GmbH & Co KG v BLE* [1996] ECR I-6065, [37] –[41]).

Rights and principles

The Charter contains both *rights* and *principles* which are to be treated differently, and were drafted as a mechanism to achieve consensus on the broad range of rights included in the Charter. What, then, is a right and what is a principle? In many cases this is not clear-cut. The Explanations do in some places identify the distinction, eg, the 'rights' of the elderly (Article 25 CFR), and environmental protection (Article 27 CFR). However, socio-economic rights can have as much importance as interference with civil liberties: consider the right to vote discourse, for example. Furthermore, rights and principles may be

expressed in the same article, eg, right to family and professional life (Article 33 CFR). Nor is there a mechanism for division between prohibition and positive action, as both remedies can be sought against a breach of civil liberties. Before any claim is commenced, it will be necessary to ascertain whether the violation pertains to a right or a principle, and in some instances litigation may ensue to clarify the matter where there is disagreement.

Practical difference between rights and principles?

If the action relates to a right, a judicial claim can be pursued. If it relates to a principle, Article 51(1) states that this can only be *observed* and, further, Article 52(5) asserts:

> *The provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. They shall be* ***judicially cognisable only in the interpretation of such acts*** *and in the ruling on their legality. (Emphasis added.)*

The Explanations further provide that principles become significant for the courts only when such acts are interpreted or reviewed. They do not, however, give rise to direct claims for positive action by the Union's institutions or member state authorities. Principles must, therefore, have been legislatively enacted in order for a court to determine whether they are sufficiently protected. However, it is not stated that the implementing law has to be directed solely towards the principle. The words 'implemented by legislative and executive acts' could, therefore, refer to a Union law or act which indirectly impacts upon a principle. The Court has previously interpreted the impact of laws upon principles by way of the precautionary principle in the context of agriculture (Case C-236/01 *Monsanato Agricultura Italia SpA v Presidenza del Consiglio dei Ministri* [2003] ECR I-8105 where the simplified procedure in labelling GM foods as equivalent to normal foods was challenged due to safety concerns. The Court held that this was acceptable, so long as a challenge is based upon at least some form of risk assessment, because the precautionary principle provides that where there is uncertainty of the risks to human health, protective measures may be taken prior to the seriousness of the risks becoming fully apparent). The Explanations recognise this dicta and, therefore, this approach is likely to be undertaken by the Court when considering principles contained in the Charter.

Since rights will also only be considered in the context of existing EU law and not as free standing rights, there does, in fact, appear to be little difference in practice between how rights and principles should be treated. Rather, it could be argued that the creation of principles was something of a political invention

to deal with the problem of rights not recognised in some member states, as impetus to ensure the Charter was enacted.

Limitations of the Charter

The Charter includes a general limitation clause to all articles. Article 52(1) provides:

> *Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are* ***necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others****. (Emphasis added.)*

This is a test of proportionality previously developed by the European Court of Justice (in particular Case C-112/00 *Schmidberger Internationale Transporte und Planzuge v Austria* [2003] ECR I-5659 in which an environmental protest was held blocking a road for 30 hours and the claimant company complained that its right to free movement of goods was infringed. The Court considered Articles 10 and 11 ECHR, which are not absolute rights, and applied the above test, concluding that it had been a limited disruption for a genuine aim and efforts had been taken to limit the impact, whereas a ban on the demonstration would have been an unjustified interference with freedom of expression). The Explanations confirm that the reference to 'general interest' relates to Article 3 TEU as well as to Articles 4(1) TEU, 35(3), 36 and 346 TFEU. This general provision is in contrast to the specific limitations to the rights under the ECHR, which can be derogable but also absolute. In *Schmidberger*, the Court recognised that Articles 2 and 3 ECHR were non-derogable so it is reasonable to assume that these rights will, nevertheless, be similarly interpreted. In any event, Article 52(3) CFR provides that rights corresponding with those in the ECHR must be interpreted with corresponding meaning and scope though it goes on to state that this does not preclude more extensive protection within the EU (see below). Since the ECtHR considers the margin of appreciation to be afforded to the state in cases before it, the impact of this doctrine will also apply in the EU. However, whilst the ECJ has considered the margin in previous cases, sometimes by a different analysis (*Schmidberger*, but above analysis applied; Case C-274/99 *Connelly v Commission* [2001] ECR I-1611 where the principle was not applied on the facts), it applies the limitation test differently, bearing in mind the democratic set-up to EU law making and the scope of the Charter's application. Nevertheless, the margin of appreciation could be an important consideration where a member state seeks derogation from an EU law and the non-application of the Charter in that instance.

Interpretation in accordance with Treaty provisions

Article 52(2) requires that rights recognised by the Charter for which provision is made in the Treaties shall be exercised under the conditions and within the limits defined by those Treaties. Fundamental rights were scattered throughout the previous Treaties and this provision aims to retain consistency with the remit the European Council previously expressly agreed, in particular Union citizenship and non-discrimination. The Explanations, unfortunately, provide no list of which rights are decreed to correlate with a Treaty right and comment rather intermittently where a right is based wholly or partly on a Treaty provision. As such, this raises three issues concerning when Article 52(2) is engaged.

Firstly, there are situations where it is not clear how the relationship between the two provisions should operate in the application of the Charter. For example Article 21(1) CFR prohibits all forms of discrimination, whereas Article 19 TFEU merely empowers Union action on discrimination. Equally, Article 19 TFEU provides for legislative acts including harmonisation which will allow horizontal effect, but Article 21(1) CFR is similar to Article 14 ECHR and only prohibits Union institutions and member state action when implementing EU law (cf *Kücükdeveci* et seq). This may ultimately mean that for the wider rights provided in Article 21 CFR where action under Article 19 has not been taken, the interpretative limitation contained within Article 52(2) is inapplicable. All equivalent instances in the Charter would be similarly excluded from its ambit.

Secondly, where the Treaty has been interpreted by secondary legislation, through regulations, directives, decisions, etc, do these limitations bind the application of the Charter? This would, arguably, defeat the whole purpose of the Charter. Since its inception, the normative jurisprudence of the ECJ has interpreted secondary legislation and where it has not accorded with fundamental rights as protected by the Treaties, general principles of Community law (which are usually created by the Court), or constitutional principles of the member states, the Court has struck it down. It would be quite remarkable if the Charter were to be relied upon to limit or reverse the development of fundamental rights jurisprudence, particularly as the values that the Court has thus far interpreted are the same values to which the Charter is supposed to relate. Accordingly, the better interpretation would appear to be that secondary legislation will not limit the reach of the Charter or the Court's application of it to protect or enhance fundamental rights and any secondary legislation will have compatibility with the Charter read into it. Where secondary legislation has specifically legislated for the remit of a Charter right or principle, however, the Court will have to respect this intended interpretation unless it causes a clear incompatibility.

Thirdly, where the right is partially derived from the jurisprudence of the Court, but also from legislative acts, which approach is to be determinative? For example, the right to good administration in Article 41 CFR is derived from a general principle of law first recognised by the Court (the history is set out in the Explanations). However, the obligation to give reasons is established in Article 296 TFEU and Articles 41(3) and (4) CFR replicate Article 340 TEU and Articles 20(2)(d) and 25 TFEU respectively. Whilst the Explanations identify these discrepancies and require specific adherence to Article 52(2) CFR, it is unlikely that the Court will inhibit itself from developing the jurisprudence of the Union, particularly now that binding and codified rights are available to enable the Court to advance rights protection. But it will be interesting to see how the Court approaches these hybrid provisions.

Relationship with the ECHR

Article 52(3) confirms that:

> *In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.*

The Explanations list all rights which correspond with the ECHR and where the Charter provides wider scope. This will assist with arguing for greater protection under the Charter. For example, citizens of the Union cannot be treated as aliens for the purposes of Article 19 ECHR because of the Union prohibition on discrimination on the grounds of nationality. Furthermore, Article 47 on the right to a fair trial is not limited to civil rights and obligations or criminal charges as in Article 6 ECHR. Some Charter rights also specifically extend the protection afforded, for example, the prohibition on slavery and forced labour derived from Article 4 ECHR expressly prohibits trafficking in human beings in Article 5 CFR. The Explanations clarify that it is not only the rights as set down by the ECHR that are to correspond, but also the meaning given through the jurisprudence of the ECtHR. It is insufficient, therefore, to simply refer to the ECHR (the Court already refers to the Strasbourg jurisprudence in the interpretation of corresponding rights: see Case C-400/10 PPU *J McB v LE,* 5 October 2010 (unreported)). In any event, as the final paragraph of Article 52(3) illustrates, the Union can provide greater protection and, therefore, must only ensure that it does not provide less. Whilst this provision aims to ensure that the two European Courts do not develop conflicting jurisprudence, the problem remains for novel or narrowly developed rights. This is why the Lisbon Treaty also paves the way for accession to the ECHR by the Union, which will

ultimately make the court in Strasbourg rather than the court in Luxembourg the final arbiter on a corresponding right.

National constitutional traditions and international standards

The Charter is specifically injuncted to be interpreted in harmony with the constitutional traditions of the member states where the right in question is so derived. This is how the Court has always approached its jurisprudence. The Explanations confirm that it is not the lowest common denominator which ought to be protected, but a high level of protection adequate for the law of the Union as well as *common* constitutional traditions. Where there is conflict between those traditions it seems that the least common approach will lose out. The Court has already had to make these difficult choices (see *ERT* above).

Article 53 confirms that the Charter should not be interpreted to restrict or adversely affect human rights as recognised by Union, international or constitutional law. It refers to 'spheres of application' for these other sources, which raises an issue as to the supremacy of the Charter vis a vis other sources of rights protection. The Court grappled with this in C-402/05 *Kadi v Commission and Council* [2008] ECR I-06351 and determined that the Court should focus on the Union measure and its compliance with Union fundamental rights protection. However, this case was about the restriction of a right rather than the application of international law to extend protection. Given that the Charter seeks to incorporate rights standards from a variety of sources, it is likely that the Court will take a purposive approach and interpret the Charter right to reach the international norm.

The UK Protocol

The UK and Poland (the Czech Republic also intends to extend its application) negotiated Protocol 30 to the Lisbon Treaty in relation to the application of the Charter. In most respects it simply reiterates the content of the general application title of the Charter itself but it seeks to clarify certain aspects in two specific ways.

Firstly, Article 1(1) states that the Charter does not extend the ability of the Union courts or domestic courts to find that domestic acts are inconsistent with the rights and principles that it reaffirms.

Secondly, Article 1(2) states that Title IV (providing solidarity rights) creates justiciable rights only in so far as such rights are already provided for in domestic law. More generally, Article 2 also provides that where the Charter refers to national laws and practices it will only be applicable to the extent

that the relevant provision contains rights or principles already recognised in domestic law.

The purpose of the Protocol was obviously to enable political compromise. It is clearly not an opt out as this would have been easy to state, though it was described in that way by the UK media until recently, when the UK government accepted this was not the case during the course of litigation (see below). But it cannot in reality create much limitation to the Charter either. What it perhaps attempted, amongst other negotiated arrangements for the UK, was to demonstrate to the British public a distinction between the Constitutional Treaty, which would have required a referendum, and the Lisbon Treaty which the government hoped to show was less of a radical development of EU integration and, thereby, justify the absence of consultation.

Article 1(1) of the Protocol does nothing more than Article 51 CFR. Article 51 already confirms that courts cannot extend the application of the Charter outside the scope of EU law and prior to the Charter where fundamental rights were impacted by EU legislation the courts would interpret the provision to give effect to the right anyway. Therefore, no 'extension' is required to operate the Charter as intended in Title VII, and Article 1(1) simply affirms current practice. This was confirmed by the Court in C-411/10 *NS v Secretary of State for the Home Department et al* (21 December 2011) (unreported), the most recent interpretation of the Charter in the UK where the Court specifically considered the impact of the Protocol. This was because in the High Court the Secretary of State asserted that the Charter did not apply to the UK, though this position was not maintained on appeal. Nevertheless the Court, in particularly succinct language confirmed that Protocol 30 does not call into question the applicability of the Charter in the UK (or Poland). Furthermore,

> *In those circumstances, Article 1(1) of Protocol (No 30) explains Article 51 of the Charter with regard to the scope thereof and does not intend to exempt the Republic of Poland or the United Kingdom from the obligation to comply with the provisions of the Charter or to prevent a court of one of those Member States from ensuring compliance with those provisions (at [120]).*

Articles 1(2) and 2 do, in fact, create a substantive limit which has not yet been considered by the domestic or EU courts, but only in so far as the UK has not recognised the right or principle in question, and this will evolve with domestic policy and legislation. Moreover the fundamental rights jurisprudence of the Court is not limited by the Charter or the Protocol, such that claimants can still rely on the established body of case-law even if the Protocol prohibits favourable

interpretation by the Charter. It would seem, therefore, that the Protocol is largely toothless in practice.

Conclusion

It is not yet clear how far the Court of Justice of the European Union will go to favourably interpret the Charter in the application of EU law, whether it will engage with the enshrined principles in a normative fashion or actually add nothing to the existing law. However, it has already started to use the Charter in its consideration of cases, both indirectly and upon application, as identified in the above analysis.

Whether the Charter will make a difference to individuals by building upon the ECHR and national law remains to be seen. It will certainly engage lawyers in litigation about the reach of its application and, if nothing more, ensure that the rights of EU citizens are more visible, which was after all the stated aim, even if access to them in practice remains complex.

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Notes

1 The references to the Court in Luxembourg vary in this paper. Prior to the Lisbon Treaty, the Court was referred to by its constituent parts, the European Court of Justice and Court of First Instance. Post Lisbon Treaty the Court as a whole, comprising the General Court (the re-named Court of First Instance), Civil Service Tribunal, European Court of Justice, and specialised courts (which may be established) is termed the Court of Justice of the European Union. The ECJ has jurisdiction over appeals from the General Court and deals with references from the courts of the member states.

Building on Brighton: a foundation for the future of the European Court of Human Rights?

Angela Patrick

Angela Patrick analyses the implications of the 'Brighton Declaration' on the future of the European Court of Human Rights.

The Brighton Declaration on the Future of the European Court of Human Rights – adopted earlier this year by the 47 states of the Council of Europe, under the chairmanship of the UK government – has stirred an already lively legal and political debate in the UK about the justiciability of individual rights and, specifically, the role of the European Court of Human Rights.[1]

The brief UK stint in the chair of the Committee of Ministers at the Council of Europe was hailed by the Attorney General, Dominic Grieve MP, as a 'once in a generation' opportunity to drive forward reform of the Court.[2] As the UK hands the chair on to Albania, work now begins to implement the commitments made at Brighton.[3] However, legal commentary on the significance of the reforms has been muted. Political commentators are divided. Either the exercise has been a success, securing the future of the Court or it has been a costly failure unable to secure the radical reforms the government had promised.

Described as 'a breath of fresh air';[4] a 'success story',[5] 'fudge' and a 'failure',[6] for a relatively obscure intergovernmental agreement, the nine-page Declaration has attracted a significant number of column inches. Attracted by the controversy surrounding a few high profile decisions of the Court – prisoners voting rights and the furore surrounding Abu Qatada – the UK press has woven the otherwise dry negotiations between the 47 states of Europe into the narrative on the heated domestic political debate on rights. Over the course of the past two years, the focus of that debate has slowly shifted away from the Human Rights Act 1998 – and the role of our domestic judiciary – to the role of the European Court of Human Rights in Strasbourg. The domestic arguments have been magnified with a zoom lens focused on the peculiarly 'European' judges of the European Court of Human Rights.[7]

But, Brighton was not all about Britain. The real picture is more complex. Understanding the role of the Strasbourg Court, the long-standing reform

process and the immediate goals of the UK government is key to assessing the success or otherwise of the Brighton Declaration and its long-term impact on the future of the Convention system. Unpicking the history of the reform process, the text of the Declaration and the surrounding political narrative paints a much more uncertain picture than portrayed by the UK press. While the domestic narrative was shifting, this reflected a similar shift in discussions about the future of the Court. At home, the debate moved away from the effectiveness of domestic measures for the protection of individual rights, to the need to limit the role of the Court. On the international stage, the discussion was similarly changing. Whereas a decade of discussion on reform had focused on increased judicial efficiency and greater national responsibility for the protection of rights, restrictions on the role and function of the Court were given new priority.

While the Brighton Declaration and its negotiation has played its part in the highly politicised debate over the protection of rights at home, in its final form it has the potential to help secure the future effectiveness of the Convention system. However, Brighton is a work in progress. The Declaration makes broad commitments, including promised amendments to the ECHR yet to be drafted. Whether Brighton provides a solid foundation for the future of the Court – or sends an unavoidable political message which ultimately undermines its role – remains to be seen. It is clear, however, that the reform process has been significantly changed by shifting political debate both at home and abroad. The question remains how the domestic narrative might be influenced by change at Strasbourg.

A Court in crisis?

The Court has been habitually described as 'in crisis' for many years. That an unacceptably large backlog of cases has built up over the past decade is unavoidable. Currently sitting at around 150,000 applications,[8] this bottleneck is often cited as evidence of mismanagement and an overburdened Court incapable of focusing on the most important human rights cases. However, it is evident that the Court has been a victim of its own success and its increased burden has resulted from the unification and speedy expansion of Europe. When the European Convention on Human Rights was signed, the Council of Europe was made up of only a handful of states. Now 47 countries across Europe apply the Convention and the Court exercises jurisdiction over claims from a population of around 800 million people. Over 91 per cent of all the Court's judgments have been handed down since 1998.[9] Applications by individuals seeking redress have exploded, with around 9,000 applications a year in 1999 rising to around 60,000 only a decade later.[10]

This expansion of the Court's jurisdiction has not been matched by a corresponding rise in resources. The Court's budget is relatively small. At

around £50 million a year, it, arguably, represents a relatively cheap deal when compared to the Supreme Court (which services a far smaller jurisdiction for £12 million) or, for example, the Court of Justice of the European Union (which has a similarly large constituency, but a far larger budget at around £300 million). However, the impact of the growing backlog – and the associated delays in hearing cases brought by vulnerable individuals – is damaging for the effectiveness and the credibility of the Court.

Reform, reform and yet more reform

Brighton is the latest in a long line of steps taken by the Council of Europe to ease the Court's burden and maintain its legitimacy. An ever-increasing budget out of the question, report upon report has made recommendations for efficiency and improved prioritisation designed to ensure cases are cleared more quickly.[11] The Committee of Ministers has promulgated more and more recommendations, declarations and resolutions designed to stem the flow of cases to the Court in the first place.[12] Protocol 14 to the Convention was agreed; designed to amend the admissibility criteria for claims and to provide mechanisms to better deal with repeat and clone violations, including by providing a mechanism to allow the Committee of Ministers to send states ignoring the European Court of Human Rights judgments back to the Court for it to consider whether states are in violation of their obligations under Article 46 of the Treaty to give effect to final judgments from Strasbourg.

While Protocol 14 languished for want of Russian political interest, the Council of Europe, under the Swiss chairmanship came together to consider how to secure the future of the Court. In what became known as the Interlaken process, states agreed a political declaration committing to secure the future of the Court through a combination of efficiency measures and more effective national implementation of Convention standards. This two pillar approach – tackling the backlog and diverting cases from the Court by getting it right first time – was broadly welcomed by commentators.[13] As the Court itself recognised:

> *A key element in the process initiated at Interlaken has been increased recognition that responsibility for the effective operation of the Convention has to be shared. The Court should not in principle, and cannot in practice, bear the full burden of the work generated by implementation of the Convention.*[14]

The Interlaken Declaration and its Action Plan set out a clear timetable for action between 2010-20; with states committing to consider further action should no progress be made. As JUSTICE's Jodie Blackstock commented in this Journal, the declaration was praised. It sought institutional reform to recognise the 'contemporary role of the Court'. Unfortunately, it was 'scant on practical

suggestions' relying on states parties and individual institutions to take action.[15] However, the declaration did commit states to act, and to report on the steps taken by the end of 2011.[16]

Before these reports could be compiled, reform was yet again on the agenda. In 2011, a little over a year later, the Izmir Declaration revisited familiar ground. States again confirmed that 'the attachment' of states to the right of individual petition was a 'cornerstone of the Convention'. Yet, its tone visibly shifted in some important aspects. A renewed focus was placed on the Court avoiding 'fourth instance' jurisdiction and caution was called for in immigration cases, where the Court was urged not to act as an Immigration Appeals Court. Particular concern was expressed over immigration cases where Rule 39 Interim Measures requests were made (as in the case of *Abu Qatada*) which prevented deportation while an application was being considered. At Interlaken, the states recalled that the 'subsidiary nature of the supervisory mechanism established by the Convention' meant that national authorities, including courts, governments and Parliaments should play a fundamental role to guarantee Convention rights at a national level. However, at Izmir, states expressed concern that 'appropriate steps' must be taken to 'ensure cases are dealt with in accordance with the principle of subsidiarity'. At Interlaken, the burdens were shared equally between states taking greater responsibility for rights at home and increased efficiency in Strasbourg. By contrast, at Izmir the focus shifted from states taking greater responsibility for meeting their international obligations and squarely onto restricting access to the Court. In addition to sensible efficiency measures – such as a new filtering mechanism to ensure the most important cases are heard first – the states put more radical proposals on the table, committing to negotiations on the introduction of an advisory jurisdiction for the Court, fees for individuals making applications to the Court and to consideration of a simplified amendment process for the Convention. In addition, the Izmir Declaration set out directions to the Court designed to restrict the number of cases deemed admissible: admissibility criteria were to be applied to ensure the Court did not consider trivial matters, the Court was to avoid re-examining issues of fact and law determined by national courts and it was to work more closely with government agents to 'further good co-operation'.[17]

The countdown to Brighton

Thus, the 'crisis' narrative had begun to shift from the demands on the Court's resources to the quality of its decision making and the propriety of its role, in part reflecting the UK debate on rights and the role of the judiciary. The Izmir Declaration was agreed at the height of UK consternation over the pilot judgment in *Greens v UK*, confirming its decision in *Hirst* that the absolute bar on prisoner voting in s3 Representation of the People Act 1983 was in violation of the right to participate in free and fair elections (Article 3, Protocol 1 ECHR).

Greens set a six-month deadline for action, requiring the UK to introduce proposals on prisoner voting by summer 2012.[18] In February 2011, backbench members of the Conservative and Labour parties initiated a successful motion on the floor of the House of Commons calling on the UK to affirm the absolute bar.[19] February and March saw sessions in UK parliamentary committees calling for evidence on the role of the Court, its judgments and specifically, the issue of prisoners' voting rights.[20]

During these debates, the Court's domestic critics highlighted a number of issues which, they argued, had contributed to the backlog. The first – that the Court is a 'living' instrument, its interpretation not set in stone – designed to ensure that the text of the Convention remains relevant to changes in social practice. Critics argued that this approach had expanded the scope of the Convention beyond the original intentions of the drafters. Secondly, critics focused on the text of the Convention, arguing that some issues were specifically excluded from the Convention and should not be written in by 'activist' judges. Votes for prisoners were excluded from the Convention, which was never intended to cover decisions on border control. The third criticism was couched in arguments based in democracy and sovereignty, both national and parliamentary. By failing to give adequate deference to national courts – and specifically, the Supreme Court – the European Court of Human Rights was neglecting the principle of subsidiarity and failing to grant states an adequate margin of appreciation in their interpretation and application of Convention rights.[21] These three arguments, arguably, fail to consider the familiarity of the evolutionary principles of interpretation, also adopted by the common law, and the principles of Treaty law which go beyond pure textual rules of interpretation.[22] However, this approach did effectively shift the discussion away from a discussion about protection of individual rights against state discretion to a seemingly greater constitutional argument about the role of international law, state sovereignty and the primacy of domestic Parliaments. In the UK, with a constitution hinged on the principle of parliamentary sovereignty, this criticism shifted the narrative significantly and captured the imagination of the popular press.

Setting the terms of reference for the UK Commission on a Bill of Rights, the new coalition government tied the domestic debate firmly to the future of the Court and to the Brighton Declaration. Established as a coalition compromise between the Conservative commitment to repeal the Human Rights Act 1998 in favour of a British Bill of Rights, and the Liberal Democrat commitment to preserve the Act, the Commission is tasked with investigating the creation of a Bill of Rights for the UK building on the commitments in the ECHR. The terms of reference of the Commission, set in March 2011, shortly before Izmir, included a requirement to 'provide interim advice to the Government on the

ongoing Interlaken process to reform the Strasbourg court *ahead of and following* the UK's Chairmanship of the Council of Europe (emphasis added).' [23]

Making good on Interlaken?

In the meantime, progress continued to be made on the commitments made at Interlaken and Izmir. Protocol 14 took effect. This introduced a number of significant measures – not least the ability of a single judge to deal with inadmissible cases and smaller chambers to deal with less complex cases – and led to increased efficiency at the Court. A number of impressive statistics bore proof of the impact of this work on the Court's case-load. In 2010, there was a 94 per cent rise in the number of friendly settlements in admissible cases; with a further 25 per cent rise in 2011.[24] A new practice direction on Rule 39 interim measures reduced the number of Rule 39 claims.[25] During 2011, the Court issued more than 47,000 decisions in outstanding claims. While the bulk of these determinations dealt with clearly inadmissible applications, the Court considers that, with some support, it can clear the existing backlog of cases by 2015.[26]

More please: The UK 'wish-list'

The Commission on a Bill of Rights published its interim advice on the future of the Court in July 2011. It called on the government to focus on three areas: (a) significant reform of the Court to ensure that it focused only on the most serious cases; (b) looking again at just satisfaction (the right of applicants to financial compensation) and (c) the need to improve procedures for the selection of judges to the Court. It called for the Court to focus on the most constitutionally important questions for the interpretation of the Convention and suggested that the Court should have the power to refuse to hear admissible claims which were of 'minor or secondary importance'. The Commission explained:

> *the need for urgent and fundamental reform to ensure that the European Court of Human Rights is called upon, as an international court, only to address a limited number of cases that raise serious questions affecting the interpretation or application of the Convention and serious issues of general importance. It is essential to ensure that the Member States and their national institutions – legislative, executive and judicial – assume their primary responsibility for securing the Convention rights and providing effective remedies for violations. Failure to put in place the necessary machinery for compliance should itself constitute a violation of the Convention.*[27]

Despite progress being made on the Interlaken Action Plan, this approach appeared to frame the UK approach to its chairmanship. The objectives for

the chairmanship – published a few weeks before it began – set reform of the Court as its first priority. Reform was 'more urgent' than ever before and the UK proposed a package of measures, including 'measures to strengthen subsidiarity – new rules or procedures to help ensure that the Court plays a subsidiary role where member states are fulfilling their obligations under the Convention'.[28] Taking over the chairmanship, the Prime Minister explained the UK's approach. The UK considered that, regardless of steps to increase the efficiency of the Court's work, there was a risk that it would always receive more cases than it could, or should, hear:

> *More and more of the backlog is now made up of admissible cases that, according to the current criteria, should be heard in full. […] The Court is properly safeguarding the right of individual petition – and it's a principle the UK is committed to. But with this, comes the risk of turning into a court of 'fourth instance'… because there has already been a first hearing in a court, a second one in an appeal court, and a third in a supreme or constitutional court. In effect that gives an extra bite of the cherry to anyone who is dissatisfied with a domestic ruling, even where that judgement is reasonable, well-founded, and in line with the Convention.*
>
> *Quite simply, the Court has got to be able to fully protect itself against spurious cases when they have been dealt with at the national level.*[29]

These new measures were to go hand in hand with commitments to better implementation of the Convention at a national level. Although this might suggest a reaffirmation of a commitment to the twin-track approach to efficiency combined with greater state responsibility, a leaked early draft of the UK proposals confirmed that the UK intended to take an altogether more aggressive approach than taken at either Interlaken or Izmir.[30] The draft included significant and important measures for the better implementation of the Convention at a national level, but it also proposed major changes to the right of individual petition. A few changes dominated discussion. The Convention would be amended to exclude claims where the national court had not 'clearly erred' from the jurisdiction of the Court and to codify the principles of subsidiarity and margin of appreciation and the Court would be empowered to give advisory opinions at the request of national courts. These advisory opinions would be non-binding, but would oust the right of an individual to ask the Court for a decision on the facts of his or her case. These measures seemed designed to significantly alter the role of the Court.

This shift in approach might be justified, if it were shown that across Europe states were taking more progressive steps to ensure that Convention rights were

respected at home, and that these were reducing the need for individuals to take the long road to Strasbourg. States were required to report progress under the Interlaken process by the end of 2011. However, the UK had not yet prepared its own report before setting its priorities for reform on the table. So, this begs the question, if the need for further reform going beyond that envisaged by the Interlaken and Izmir programme was self-evident, where was the evidence that states had upheld their side of the bargain? If fewer claims would be heard in Strasbourg, would these applicants be guaranteed a remedy at home? Apparently whether they would – or not – was secondary to the UK's determination that the role of the Court needed radical reform in order to secure its future.

The tone for the UK chairmanship was set. The five-year plan for the Interlaken process was essentially abandoned: more significant reform was on the table at Brighton in 2012, not in 2015.

The Brighton Declaration

Unsurprisingly, four key aspects of the final Declaration now dominate discussion: (a) the future role of subsidiarity and the margin of appreciation; (b) advisory opinions; (c) restricted admissibility criteria and (d) new time limits for application to the Court. The remainder of the Declaration has been dismissed as 'ballast' and bluster by some commentators.[31] However, the final draft is, arguably, a mixed bag of missed opportunities, cautious promise and potential for either soaring success or irreparable disaster. A few additional aspects are worthy of comment.

'Subsidiarity' and the 'margin of appreciation'

UK ministers joked that 'subsidiarity' is written into the Brighton Declaration like a stick of Brighton Rock. It is. References to the principle of subsidiarity are peppered throughout the Declaration and it remains the key focus of the changes to the Convention proposed. However, the changes from the original UK draft proposal to the final Declaration are significant. The original draft included a definition of margin of appreciation which was legally inaccurate and which could have restricted the jurisdiction of the Court significantly. The final agreed text more accurately reflects the language of the Convention:

> *The jurisprudence of the Court makes clear that States enjoy a margin of appreciation in how they apply and implement the Convention, depending on the circumstances of the case and the rights and freedoms engaged. This reflects that the Convention system is subsidiary to the safeguarding of human rights at national level and that national authorities are in principle better placed than a national court to evaluate local needs and conditions. The margin of appreciation goes hand in hand with supervision under the Convention system. In this respect, the role of the Court is to review*

> *whether decisions taken by national authorities are compatible with the Convention, having due regard to the State's margin of appreciation.*[32]

The final draft incorporates several key qualifiers, notably (a) the margin of appreciation is variable and depends on the circumstances of each case and the right in question and (b) the margin of appreciation goes 'hand in hand' with the supervision of the Court.

The Declaration provides that the Convention will be amended for reasons of 'transparency and accessibility' to include a reference in the preamble to the principle of subsidiarity and the doctrine of the margin of appreciation by the end of 2013. Amendment to the preamble, as opposed to the operative part of the Convention, has been criticised by some as a failure on the part of the UK to secure significant change. It is a significant change. However, it is unclear how the amendment of the Convention was proposed to change the application of either the principle of the margin of appreciation or the principle of subsidiarity. The final text of the amendment of the Convention is yet to be agreed. It remains to be seen what significant increase in transparency might be achieved by including a reference to these complex judicial principles in the broad based commitments made in the precursor to the Convention. However, preamble or no, amendment of an international Treaty sends a powerful political message and it is yet to be seen how the Court responds. We return to the reaction of the Court, below.

Sir Nicolas Bratza, UK judge and President of the Court regretted the proposed amendment to incorporate margin of appreciation into the text of the Convention:

> *We [the Court] have difficulty in seeing the need for, or the wisdom of, attempting to legislate for it in the Convention, any more than for the many other tools of judicial interpretation which have been developed by the Court in carrying out the judicial role entrusted to it.*[33]

The domestic commentary has focused on Sir Nicolas' description of these provisions as unneeded as evidence that they will lead to little change. Against the background of the mixed messages sent in the UK about the goal and objective of these measures – to control the Strasbourg court – this assessment is perhaps understandable. The blunt text of the original draft was, arguably, an unachievable opening gambit in sensitive international negotiations, although it played to a particular political desire domestically.

On the principle of subsidiarity, Sir Nicolas Bratza underlined its true nature, in his speech at Brighton:

> *As to subsidiarity, the Court has clearly recognised that the Convention system requires a shared responsibility which involves establishing a mutually respectful relationship between Strasbourg and the national courts and paying due deference to democratic processes. However, the application of the principle is contingent on proper Convention implementation at domestic level and can never totally exclude review by the Court. It cannot in any circumstances confer what one might call blanket immunity.*[34]

Unfortunately, this realism has been missing in the domestic debate on the role of the Court. The Convention mechanism provides a supervisory role for the Court and that supervision is subject to the principle of subsidiarity. However, subsidiarity is not – as it has perhaps been sold by some commentators – a 'get out of jail free card' which allows states to adopt practices which are inconsistent with the rights in the Convention that they have committed to uphold. As Ken Clarke MP, Secretary of State for Justice recognised in his speech opening the Brighton Conference, without work by states to 'pull their weight', the Convention will not work. Protecting the rights in the Convention requires states ultimately to recognise the legitimate role of the Court:

> *The Court is there as the ultimate arbiter and guarantor. It may sometimes need to overrule national courts – where they have clearly failed to apply the Convention obligations, or where there are significant points of interpretation that need resolution.*[35]

Admissibility criteria

The original leaked draft contained controversial proposals to limit the jurisdiction of the Court by introducing new admissibility criteria. These admissibility proposals appeared to closely reflect the recommendations of the Commission on a Bill of Rights. They would bar all cases from the Court which had been considered at a national level except those where the national courts had 'clearly erred' or where an application raised a 'serious question' about the interpretation and application of the Convention. The existing manifestly unfounded criteria of the Court provide that where there is no evidence of a violation – including where the Convention has been applied by the domestic court – a claim will be inadmissible.[36] The proposal to amend the admissibility criteria in terms to limit the jurisdiction of the Court to cases where the national court had 'clearly erred' appeared designed to raise significantly the hurdle for individuals seeking a remedy. Civil society commentators – including JUSTICE – argued that this change would either shift substantive scrutiny of the quality of domestic decision making to the admissibility stage or it would mean that there would be a far lighter touch supervision of the application of the Convention at a domestic level with fewer decisions on the merits of the application of

the Convention across Europe. This would either remove efficiencies already introduced by the Court, increasing its workload, or it would lead ultimately to a reduction in protection of individual rights across Europe and the adoption of a multi-track approach to the implementation of the Convention, undermining significantly its universal application.

The Brighton Declaration affirms the existing case-law of the Court which provides that any case where the Convention has been applied domestically by national courts according to well-established case-law will be manifestly ill-founded and inadmissible. It does not adopt the language of the Commission. It encourages the Court to take a 'strict and consistent' approach to inadmissibility, clarifying its case-law if necessary. While this change has been criticised by some commentators as watering down the original proposal, without significant change the original draft could have had wide-ranging and unintended consequences not fully explored during the Brighton negotiations. As Sir Nicolas Bratza commented in evidence to the Joint Committee on Human Rights, by placing enhanced focus on the quality of decision making at a national level, the UK proposal was inviting the Strasbourg Court to take a more rigorous and open approach to their assessment of the work of the domestic judiciary.[37] In terms of judicial comity and international relations, this could in the long term have had a detrimental and unintended effect.

Advisory opinions

Advisory opinions have been on the table for consideration for many years, and were reopened at Izmir. However, the leaked draft exceptionally proposed that non-binding advisory opinions would oust the right to individual petition in any individual claim. This represented a clear departure and a significant risk to the value of the right of individuals to seek a remedy from the Court. So, for example, a government could ask the domestic court in a claim against it to seek an advisory opinion. That opinion would not be binding on the domestic court, which would be free to reach any decision on the facts of the individual case. However, the claimant would – by dint of the advisory opinion – be barred from taking his/her claim to Strasbourg.

This objectionable provision was removed from various drafts of the Declaration. In the final draft, the states commit to looking again at advisory opinions in a draft optional Protocol with the relevant text yet to be determined. This leaves the issue of jurisdiction, boundaries and ouster on the table for another Strasbourg drafting session. The issue of ouster aside, whether the power to issue advisory opinions adds to the burden of the Court or increases its efficiency will depend on the text yet to be agreed.

Time Limits

Possibly the most straightforward change in the Brighton Declaration is a procedural one. The deadline for applications to the Court is cut from six months to four.[38] This change is one of only a few that was not subject to lengthy discussion and consideration in the Steering Committee on Human Rights. It emerged late in the day from a suggestion by the Court.[39]

Although timelines at Strasbourg occupied the minds of UK lawyers in the aftermath of the Abu Qatada application to the Grand Chamber, the shortening of the deadline is unlikely to impact significantly on UK applicants. However, organisations and lawyers working with applicants from other countries have expressed regret that the impact of the shorter deadline on access to a remedy for individuals who have limited access to effective legal advice or modern communications technology has been overlooked.[40] The Declaration makes no commitment to return to this issue. However, an amendment to the Convention will be necessary to amend the timescale. In formulating this amendment, states may wish to instigate review arrangements designed to monitor the impact of any change. Reductions in the Court's substantive case-load by time-barring some of the most vulnerable clients would undermine the credibility of the Court and the Convention system.

The ones that got away?

The real casualties of the negotiations at Brighton were concrete proposals designed to strengthen national commitments to the Convention and to enhance penalties for failure to respect the Convention at a domestic level. So, for example, proposals to explore sanctions for failure to respond to judgments of the Court and to bolster technical assistance programmes were significantly excised or amended.[41]

The Court offered two alternative mechanisms to address the issue of the number of admissible cases processed. Both were focused on more efficient use of Court resources through the promotion of a more responsible approach nationally. Through the introduction of a mechanism of default and summary judgments, the Court proposed that it could both reduce its workload and sharpen the focus of states on getting it right first time. Significant numbers of repetitive applications would be subject to a default procedure, whereby the offending state would be invited to reach a friendly settlement with groups of applicants within a defined time, failing which the Court would enter a default judgment based on its earlier case-law.[42] Admissible cases which were not repeat claims, but which were not priority cases and could be easily determined according to the well-established case-law of the Court would be subject to a separate, but similar, summary procedure. States would be encouraged to reach a settlement with the applicant or to resolve the matter through a universal

declaration and the Court would envisage using a 'light-touch' review. If the matter were unresolved, it would proceed to judgment.[43]

The approach proposed by the Court is in keeping with existing measures recognised in Protocol 14[B1]. The leaked draft noted and welcomed both the default and summary practices proposed by the Court.[44] Neither is now mentioned in the final draft Declaration. The Court considers that it can adopt these practices within the bounds of its existing powers. It remains to be seen whether the decision not to offer a political endorsement in the Declaration will deter the Court's development of either default or summary jurisdiction.

Ballast or bluster: the achievements of Brighton?

There are many aspects of the Declaration which could have a positive impact on transparency and effectiveness at the Court and on the long-term future of the Convention. However, many of these aspects have been overlooked. In looking to enhance the effectiveness of the Court a few changes are important. Some small procedural changes are welcome and will contribute to the more effective running of the Court. For example, the Court will explore the possibility of providing embargoed judgments to the parties before they are published, a practice familiar to lawyers in the UK, but previously alien to Strasbourg. The Convention will be changed to prevent states objecting when the Court proposes to relinquish a case to the Grand Chamber, saving time in securing a more authoritative judgment on an important issue of Convention interpretation.

The Declaration again contains a renewed commitment to the importance of national implementation. It contains a number of commitments to consider new action at home, including, for example, a commitment to consider the establishment of a National Human Rights Institution, providing training to public officials on Convention standards and to provide fuller information to national Parliaments on the implementation of the Convention. However, as at Interlaken, there are few practical commitments to concrete change and no real incentive is provided for states to act. Any proposals to strengthen the enforcement mechanisms of the Convention have been removed. So, for example, no commitment is made to enhance the enforcement of judgments of the Court, but states are invited to consider how to 'refine procedures' and 'whether more effective measures are needed' to deal with states who routinely fail to respond to judgments.

However, an overarching achievement at Brighton may be the recognition – echoing the original Interlaken Declaration – that significant reform of the Court's role may only go hand in hand with evidence that states are taking Convention rights more seriously at home. The Declaration states:

> *The State Parties and the Court ... share responsibility for ensuring the viability of the Convention mechanism.*[45]

However, in addition to its agreed commitments, the Declaration sets out a road map for future discussions on reform:

> *As part of this process, it may be necessary to evaluate the fundamental role and nature of the Court. The longer term vision must secure the viability of the Court's key role in the system for protecting and promoting human rights in Europe. [...]*
>
> *Effective implementation of the Convention at national level will permit the Court in the longer term to take on a more focussed and targeted role. [...]*
>
> *In response to more effective implementation at the national level, the Court should be in a position to focus its efforts on serious or widespread violations, systemic and structural problems and important questions of interpretation and application of the Convention, and hence would need to remedy fewer violations itself and consequently deliver fewer judgments.*[46]

The Brighton Declaration reaffirms the Interlaken timetable. The effectiveness of reforms is to be considered in 2015, with further 'more profound' change to be considered before the end of 2019, if necessary. While this keeps the role of the Court on the table for some time to come, it does send a simple message about the legitimacy of the role of the Court and the associated responsibility of states to take the Convention more seriously. Without progress in national implementation, significant changes to the function of the Court are premature and would undermine the protection the Convention offers. This acknowledgement and reaffirmation of the Interlaken premise is welcome.

The future: 'what's really running through this Brighton rock?'

The commitments made at Brighton – both on reform of the Court and on national implementation – are largely contingent, either on further political horse-trading or on action at a domestic level. Diplomats met in May 2012 to agree the new timetable for work; for example, with a draft Protocol, the Optional Protocol on Advisory Opinions, to be produced in spring 2013. While a degree of crystal ball gazing is understandable, it is premature to reach a firm conclusion about the impact of the Brighton Declaration either for the future of the Court or on the domestic debate on rights. Critics of the Court continue to argue that radical change is needed now, and that a move away from the proposals in the leaked first draft Declaration signals failure for the

UK chairmanship. However, it is realistic to assume that UK diplomats never intended many of those proposals to make their way into the final agreement.

As Dominic Grieve MP, the Attorney General explained in the aftermath of Brighton, the UK never sought 'seismic' change in the role of the Court:

> *The declaration did not try to re-write how the court works, but to nudge it towards speeding up procedures and away from the excessive micromanaging of cases.*[47]

However, it is in the degree of this 'nudging' that some commentators see new danger. If the Court's role is significantly changed through unseen political pressure rather than international agreement, this is equally as damaging to the Court's value and credibility, if not more so. As Professor Helen Fenwick has commented, the Court's response to the current political debate appears to show an increasingly 'light-touch' in its scrutiny. Lord Lester of Herne Hill QC has suggested that this shift in emphasis simply reflects a healthy dialogue between states and the Court on the proper scope of the Convention.[48] This dialogue between the Court, as an international arbiter and the domestic judiciary is welcome and fitting.

However, it would be regrettable if the amendment of the Convention, or the political pressure on the Court were to shift this dialogue in a way which fundamentally changes the conversation. It is arguable that, as Professor Fenwick suggests, the Court has begun to pre-empt domestic concerns,[49] particularly in UK cases, by adopting a review more akin to a 'reasonableness' standard as opposed to a full merits assessment of the domestic judicial analysis of the Convention. Without significant changes in practice at a national level, in some countries, the Court's jurisprudence provides an essential remedy for individuals and a key lever for change. If it were to be weakened significantly by the adoption of an inappropriate degree of deference, this would damage the credibility of both the Court and the Convention in the long term.

Just as it is difficult to speculate about the long-term impact of the Brighton Declaration on the future of the Court, it is equally difficult to speculate on its impact on the domestic debate. The UK Commission on a Bill of Rights is required to report again on the Brighton process before it completes its work in December 2012. Its verdict may be too soon to take on board the full impact of the agreement. It would be regrettable if the Commission's views on the reform of the role of the Court were determined in isolation from the renewed commitment to national implementation. It is arguable that any reduction in the substantive or procedural protections offered by the HRA 1998 would be inconsistent with the commitments made – at Interlaken, Izmir and now

Brighton – to better implementation of the Convention at a national level. To decouple commitments to the Convention at home from the long-term function of the Court would be to argue in favour of not only reducing protection for individual rights within the UK, but also reducing the effectiveness of the European Convention significantly.

It is perhaps regrettable that the political narrative in the run up to Brighton – at its crudest – appeared to present a campaign for less rights protection both at home and in Strasbourg. While this debate was couched in terms of national and parliamentary sovereignty, it remained detached from the notion of national and governmental responsibility for protecting the minimum standard of rights protection envisaged by the Convention. Instead, debate in the national commentary focused on adopting a 'national' interpretation of the Convention free from the effective supervision of the Court.

The Grand Chamber decision in *Scoppola (No 3) v Italy* has highlighted the significant challenge which the domestic narrative poses.[50] Returning to the contentious issue of voting rights for prisoners has re-invigorated the critics of the Court in the UK. In that case, the Grand Chamber, as widely expected, affirmed its earlier judgment that a blanket bar on prisoners voting is unacceptable. The judgment in this case posed a significant challenge for the Court. It had been under pressure from the United Kingdom, who intervened, to abandon its analysis in *Hirst (No 2)* and in subsequent cases that the application of a generally applied and indiscriminate bar on all prisoners voting would be disproportionate and incompatible with the right to participate in free elections. If it had been 'nudged' to change its interpretation of the Convention as a result of political pressure, this would have been a significant indication that the Court had voluntarily changed its role, potentially undermining its independence and credibility. It would have sent a worrying message to the states of the Council of Europe that the jurisprudence of the Court is negotiable, and dependent on the degree of political leverage states may be able to muster.

Unfortunately, while the Court has taken the only route consistent with its existing case-law and maintaining its credibility, it has not avoided widespread allegations of impropriety by some political critics in the UK. For example, David Davis MP and Jack Straw MP joined forces to write:

> *We do not dispute the right of the Strasbourg Court to curb government excesses within the constraints of the Treaty and Convention Britain signed. However, in attempting to overrule British law on prisoner voting rights, Strasbourg judges have exceeded the limits of their proper authority. If the Court does not reflect the views of member states of the Council of Europe,*

> *there will be conflict. Where the court infringes our constitutional rights, we will not back down.*

They go on to reiterate that while the judgment of the Court on 'serious' human rights issues should not be ignored, that, in their view, the Court has stepped outside the boundaries of their interpretative role in this case.[51]

In the aftermath of *Scoppola*, critics have again bemoaned a failure at Brighton. This approach again ignores the responsibility of states to meet the minimum standards in the Convention (as interpreted by the Court) and to take national implementation of those standards seriously. Again, it suggests that 'subsidiarity' means a 'pick and choose' approach to the rights in the Convention, with states free to respect only those decisions of the Court which they subjectively deem worthy of respect. The long-term implications of this approach could be devastating for the continuation of the Convention system, the international rule of law and the UK's reputation as a rights-respecting nation.

The process of reform was legitimately designed to address the serious challenges faced by the Court and increasing demands on its extremely limited resources. The twin-track approach was designed to ensure the long-term effectiveness of the Convention system, recognising the primary responsibilities of states subject to the legitimate oversight of the Court. Perhaps the greatest achievement of Brighton is to reiterate a simple bottom line. The Court is here to stay. By their nature human rights instruments, whether in international agreements or domestic Bills of Rights, are designed to constrain the power of states and national governments. To effectively protect the rights of individuals, these limits are needed. However, they will not always be welcomed by national policy makers. Effective human rights protection will lead to politically difficult judgments that decision makers do not like. Changing the substance of the rights – or the procedure by which they are enforced – would be the political equivalent of changing the rules of the game to make it easier for your side to win. When the opposition are people seeking protection against the state, this approach seems fundamentally skewed. The message of Brighton for states is that the rules of the Convention game are essentially fair and that they need to be observed more closely before there is any case for change. Reports that the UK may now consider pulling out of the game – and the Convention – appear designed to shock. This diplomatic decision would leave the UK in the sole company of Belarus (the only state to have been suspended from participating in the activities of the Council of Europe). In any event, proposing this as a next step is premature. The debate on the future of the Court – and the most effective framework for the protection of rights both at home and across Europe – should be driven by informed evidence-based decision making, not short-term sensationalism around a few politically unpopular decisions. The real legacy

of Brighton remains to be seen and time for reflection is needed before the next round of reform.

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Notes

1 The Brighton Declaration on the Future of the European Court of Human Rights was adopted on 20 April 2012. Its full text is available online: http://www.coe.int/en/20120419-brighton-declaration/

2 The Rt Hon Dominic Grieve MP, Attorney General, *European Court: Current Challenges*, Lincoln's Inn, 24 October 2011.

3 The Committee of Ministers will next meet on 23 May 2012, when the chairmanship will transfer from the UK to Albania. During this meeting, it is expected that the Council of Europe will consider next steps for the implementation of the Brighton commitments. The chairmanship rotates on six-monthly intervals, according to alphabetical order.

4 Joshua Rosenberg, *Brighton Declaration is a breath of fresh air*, the *Guardian*, 19 April 2012.

5 Lord Lester of Herne Hill QC quoted in *Britain risks losing influence in the European Human Rights Court*, 27 April 2012.

6 The *Telegraph, Human Rights summit doomed to failure*, 18 April 2012.

7 See for example, *The Times, Europe's Court Jesters*, 18 April 2012.

8 At 1 January 2012, there were 151,600 applications awaiting determination by the Court. ECHR, *Facts and Figures,* Council of Europe, January 2012, p5.

9 ECHR, Overview 1958 – 2011, Council of Europe, February 2012, p2. Between 1958 and 1998, the Court handed down only 837 judgments. Since 2005, the Court has handed down around 1,500 cases a year. These figures should be adjusted slightly to take into account that, prior to the coming into force of Protocol 11, the European Commission on Human Rights would have heard a number of cases which would now be determined by the Court. However, the clear increase in volume is stark.

10 In 2011, 64,500 were allocated. See ECHR, Analysis of Statistics 2011, Council of Europe, p2. The analysis of earlier statistics is available in Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe, *The future of the Strasbourg Court and enforcement of ECHR standards: reflections on the Interlaken process* (Conclusions of the Chairperson, Mrs Herta Daubler-Gmelin, of the hearing held in Paris on 16 December 2009, AS/Jur (2010) 06. Full figures can be found in the Court's Annual Report for 2001. Statistics show 8,400 applications registered in 1999. See ECHR, Annual Report, Council of Europe, p73.

11 See for example, Lord Woolf et al, *Review of the Working Methods of the European Court of Human Rights, December 2005; Report of the Group of Wise Persons to the Committee of Ministers*, Council of Europe, November 2006.

12 See for example, Rec (2004) 4 on the European Convention on Human Rights in university education and professional training; Rec (2004) 5 on the verification of the compatibility of draft laws, existing laws and administrative practice with the standards laid down in the European Convention on Human Rights; Rec (2004) 6 on the improvement of domestic remedies.

13 A coalition of NGO commentators, including JUSTICE noted: 'many of the elements of the Interlaken Declaration and Plan of Action could lead to enhanced respect for human rights in the Council of Europe member states. It could also effectively address a number of the challenges faced by the European Court of Human Rights resulting from the number of applications received by the Court and its current backlog, in the light of its current resources'. See *Comments on follow-up to the Interlaken Declaration*, December 2010.

14 *Preliminary Opinion of the Plenary Court in advance of the Brighton Conference,* Council of Europe, 20 February 2012.

15 Jodie Blackstock, *The European Court of Human Rights: Time for an Overhaul*, *JUSTICE Journal*, 7(1) [2010], p115.

16 *Interlaken Declaration and Action Plan*, 19 February 2010, pp6-7 (Implementation) http://www.coe.int/t/dghl/monitoring/execution/themes/interlaken/index_EN.asp

17 See for example, para A(3), C, D, E(2).

18 Judgment dated 23 November 2010, Application nos 60041/08 and 60054/08.
19 HC Deb 10 February 2011 c493.
20 See for example, *Voting by convicted prisoners*, Political and Constitutional Reform Committee fifth report 2010-11, HC 776; The Joint Committee on Human Rights took evidence on the issue on 15 March 2011, and again in November 2011. See http://www.parliament.uk/business/committees/committees-a-z/joint-select/human-rights-committee/human-rights-judgments/
21 Each of these arguments was canvassed during the debate on the back bench motion in the House of Commons on 10 February 2011, HC Deb, 10 February 2011, c493 on. See also *Policy Exchange, Bringing Rights Home*, February 2011.
22 Issues raised during questioning by the Joint Committee on Human Rights, see evidence 15 March 2011 (Professor Phillip Leach and Lord McKay of Clashfern, QQ 32 – 37).
23 The full terms of reference for the UK Bill of Rights Commission can be found here: http://www.justice.gov.uk/about/cbr
24 *Preliminary Opinion of the Plenary Court in advance of the Brighton Conference*, Council of Europe, 20 February 2012, para 11.
25 Ibid, para 12.
26 CDDH Report of the 73rd meeting from 6-9 December 2011, CDDH (2011)R73, 13 December 2011, para 4.1.
27 Commission on a Bill of Rights, Interim Advice on the European Court of Human Rights, 8 September 2011.
28 Priorities for the UK Chairmanship of the Committee of Ministers of the Council of Europe, 27 October 2011 https://wcd.coe.int/ViewDoc.jsp?id=1859397&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383
29 Rt Hon David Cameron MP, Parliamentary Assembly of the Council of Europe, 25 January 2012.
30 The first leaked draft was published in the Guardian Online on 28 February 2011. http://www.guardian.co.uk/law/interactive/2012/feb/28/echr-reform-uk-draft
31 See for example, Adam Wagner, *The Brighton Declaration: A Damp Squib?* 25 April 2012 ('full of ballast').
32 Brighton Declaration, para 11.
33 Sir Nicolas Bratza Speech to the Brighton Conference, 19 April 2012. http://www.coe.int/20120419-nicolas-bratza
34 Sir Nicolas Bratza Speech to the Brighton Conference, 19 April 2012. http://www.coe.int/20120419-nicolas-bratza
35 Rt Hon Ken Clarke MP, Opening Remarks, Brighton Conference, 19 April 2012. http://www.justice.gov.uk/news/speeches/ken-clarke/justice-secretaru-opening-remarks-to-brighton-conference
36 A summary of the Court's existing case-law on this issue is provided by the Court in European Court of Human Rights, *Practical Guide on Admissibility Criteria*, Council of Europe, 2011, paras 354 – 361.
37 HC 873-ii, Evidence to the Joint Committee on Human Rights, 13 March 2012, Q157.
38 *Brighton Declaration*, para 15(c).
39 *Preliminary Opinion of the Plenary Court in advance of the Brighton Conference*, Council of Europe, 20 February 2012.
40 See for example, OSI, *Brighton leaves work ahead,* 20 April 2012. http://www.soros.org/initiatives/justice/news/echr-declaration-20120420
41 See for example Draft Brighton Declaration, paragraphs, 14(d), 36 http://www.guardian.co.uk/law/interactive/2012/feb/28/echr-reform-uk-draft
42 *Preliminary Opinion of the Plenary Court in advance of the Brighton Conference*, Council of Europe, 20 February 2012, paras 21 – 23.
43 *Preliminary Opinion of the Plenary Court in advance of the Brighton Conference*, Council of Europe, 20 February 2012, paras 21 – 23.
44 See for Draft Brighton Declaration, paragraphs, 28(g) http://www.guardian.co.uk/law/interactive/2012/feb/28/echr-reform-uk-draft
45 Brighton Declaration, para 4.
46 Brighton Declaration, paras 31 -33.
47 Law Society Gazette, *Brighton: we never sought seismic change says Grieve,* 20 April 2012.
48 The *Telegraph*, *Lord Lester: Britain risks losing influence in Europe*, 27 April 2012 http://

www.telegraph.co.uk/news/uknews/law-and-order/9231432/Lord-Lester-QC-Britain-risks-losing-influence-in-European-human-rights-court.html

49 Professor Helen Fenwick, *An appeasement approach to the European Court of Human Rights, UK Human Rights Blog*, 17 April 2012. http://ukhumanrightsblog.com/2012/04/17/an-appeasement-approach-in-the-european-court-of-human-rights-professor-helen-fenwick/

50 *Scoppola v Italy*, Application No 126/05, Judgment 22 May 2012. This case was heard in November 2011, after having been referred to the Grand Chamber in June 2011. After a request by the UK government, the timetable in the pilot judgment in *Greens v UK* was suspended pending the decision in *Scoppola*. Now that the decision in that case is final, the UK government has six months to introduce any necessary legislative reforms in a government bill.

51 David Davis MP and Jack Straw MP, *We must defy Strasbourg*, the *Telegraph*, 25 May 2012.

The internet and legal services for the poor

Roger Smith

This article deals with the extent to which legal service providers have used the internet to deliver legal advice and information. It was prepared for a current research project into the use of the internet, telephone hotlines and other means of delivering legal services that do not involve the traditional 'face to face' format. Feedback is welcome.

Spend a day or so trawling websites for legal advice. It puts claims for the white heat of the IT revolution in a bit of context. I took two topics: legal rights in relation to housing disrepair and road traffic offences. These are two classic sources of enquiry for, in the first case, the NGO advice sector and, in the second, traditional 'High Street' legal practitioners. Both were, to be honest, enormously disappointing in terms of moving beyond what is effectively the digital leaflet stage.

A tenant looking for advice on dealing with a leaking roof is confronted with a 4,650 word screed on the Citizens Advice website (http://www.adviceguide.org.uk); a better presented and much shorter section on specialist housing advice NGO Shelter's website (http://www.England.shelter.org.uk); a portal site that refers to both of the above and others (http://www.advicenow.org.uk); and clear information expressly transcribed from a leaflet (Coventry Law Centre - http://www.covlaw.org.uk/housing/leaflets/leaflet5.html). These are worthy but pretty dull – particularly the CAB site which it is difficult to see attracting much custom from confused members of the public. None of it is interactive. There is very little use of the visual and none of video.

Most of the road traffic offences information was much the same though there was more glitz in the presentation. The sites often had a commercial purpose so the websites made it much easier to move from getting information to emailing for advice. Sites such as http://www.lawontheweb.co.uk/ or http://www.pattersonlaw.co.uk/ had the facility to email direct from the webpage. Nick Freeman, self-proclaimed Mr Loophole, even had video: http://www.freemankeepondriving.com/.

One road traffic advice site declares itself different (http://roadtrafficrepresentation.com/) and, to be fair, is. It takes you through an interactive process of question and answer to give you advice. My test speeding enquiry seemed to be dealt with well enough. It describes itself as follows:

> *Much of this involves a process that can be streamlined and automated, which is what we offer. You are asked a series of questions and your answers produce an automated free diagnostic advice on possible outcomes and penalties if convicted. It replicates the process that a solicitor would ordinarily go through with you, but in much less time and without cost to you, all at a time of day or night that suits you. Our 'virtual office' never closes!*

This website is the creation of a solicitor, Martin Langan, who has been an expert IT commentator and blogger for the Law Society Gazette.

Going one step further are apps that use the convergence of capabilities in an iphone. There seem to be very similar products both in the US (produced by Purves Insurance and the subject of promotion at http://www.youtube.com/watch?v=jQQCklN_24E) and the UK (http://croftonsinjuryclaims.co.uk/theaccidentapp/). These allow you to be handily prepared for any road accident in which you are involved. There are standard forms and prompts; capacities to insert photographs; call the emergency services; get your exact location through gps; and email your claim details. Now this begins to look interesting and really use the possibilities of new technology to do something qualitatively different from what you could do before.

From this very practical examination of current possibilities let us shift to the thinking of the futurologists, ably represented by Richard Susskind, whose most recent book is entitled *The End of Lawyers? Rethinking the nature of legal services*.[1] Susskind's major concern is with commercially provided legal services. He likes to quote the words of Canadian sci-fi writer William Gibson, 'The future has already arrived. It's just not evenly distributed yet'. Susskind's thesis is that the technological revolution will drive legal services through five steps that he calls bespoke, standardised, systematised, packaged and commoditised. He argues that 'disruptive legal technologies' will redefine the legal market and legal business. He is specific in his definition of commodity. This is 'an online solution that is made available for direct use by the end user, often on a DIY basis'. [2] The key to arriving at this result will be the process of what he calls 'decomposition' and he asserts that 'any legal job or category of legal work can be decomposed, that is, broken down, into constituent tasks, processes and activities'.[3]

Susskind is close, as he freely admits, to the idea of 'unbundling' or 'discrete task representation' which was developed in the US in the context of facilitating DIY by breaking a case down into its component parts, for some of which legal assistance could be obtained and some be undertaken on a self-representation basis.[4] A major difference, however, is that the original advocates of unbundling, like Woody Mosten in the US, were specifically looking to carve out a role for

the lawyer within the process of what was largely self-representation. Susskind, by contrast, admits that you may need initially to capture the lawyer's specialist knowledge but then you can 'de-lawyer' the self-representation process. In this way, the technology becomes disruptive and the model of service delivery may change from the bespoke individual client-lawyer relationship to one which may more closely resemble 'commoditised' publishing than lawyering. From this he derives his provocative title – though he accords it a question mark – the end of lawyers.

The driver for change will be, in Susskind's commercially orientated universe, money. The market will force commercial clients to demand more for less. The expectation of continuing high profit margins will require the big law firms to innovate and, as can already be seen, undertake such initiatives as out-housing elements of their work. And, in all this, the race will be to the swift and the rest will go to the wall. The legal profession, under extreme pressure, will consume (most of) its young. Never again will so many make so much out of the law as they have over the last two or three decades. For lawyers, it is brutal story – for historians, a replay of the fate of artisan craftspeople in the face of Arkwright's spinning jenny.

A comparison of this plausible theorising with the practical examples with which we began rather brings us down to earth. There is little in the websites cited at the beginning of this article to suggest that we face an imminent paradigm shift in the delivery of legal services for those unable to pay for them. And yet, it seems inherently implausible that commercial legal services might change as dramatically as Susskind suggests while legal services for individuals remain untouched. Does the little flicker of light from the iphone accident lamp herald a potential wave of new development?

Governments would, of course, love new technology to provide an excuse for the cutting of costs. The world supplies plenty of examples of interest. Ontario in Canada has established a telephone hotline advice service. The Ministry of Justice in England and Wales wants to go in the same direction and is proceeding with legislation to exclude whole areas of law from subsidised legal advice. The Legal Services Research Centre in England and Wales has published research that questions just how effective telephone hotlines might be in saving time as against traditional 'face to face' legal services but there seems little about the use of the internet.[5] In the light of so little use of the net's potential, at least in the UK, this is perhaps understandable.

There are a number of questions to ask in relation to the potential of the internet to deliver legal services as an alternative to traditional face to face provision. These include those about:

(a) the technology and access to it;
(b) the programmes themselves;
(c) cost.

Before looking at these three areas in detail, we should check out what Susskind has to say about the impact of his ideas on legal services for the poor. His latest book has a chapter on 'access to law and justice'. This begins with something rather too unusual: a definition of access to justice:

> *When I speak of improving access to justice, I mean more than providing access to speedier, cheaper and less combative mechanisms for resolving disputes. I am also referring to the introduction of techniques that help all members of society to avoid disputes in the first place and, further, to have greater insight into the benefits that the law can offer.*[6]

Personally, I have a long-standing quibble at this kind of definition. For me, access to justice should mean the establishment of systems, not limited to the provision of lawyers, which allow all people in society to obtain justice in the sense of a substantively fair determination of a dispute, unaffected by the relative wealth and power of the parties to it. However, for the moment, let us not pursue this discussion.

Susskind proposes six 'building blocks' towards better access to justice and it may be worth listing them as a place to begin thinking about what might be done:

- citizens must be empowered to deal with their legal affairs;
- a streamlined legal profession needs providers that embrace the possibilities of technology;
- there must be a healthy third sector to provide assistance for those whom Susskind says 'are in need of legal assistance [and who] want a kind, empathetic ear with only a light sprinkling of legal expertise' (likely to be a somewhat contentious proposition among the NGO advice sector);
- a new wave of imaginative, entrepreneurial providers;
- easily accessible primary sources;
- an enlightened set of government policies on public sector information.

Susskind deserves considerable credit for getting a debate going. He is also full of specific ideas – such as the need for 'a web-based expert diagnostic system' which takes a person to the right adjudication procedure for his/her problem. He foresees the growth of automatic document assembly (fairly straightforward) and, more complex, 'online communities where useful materials are built up using wiki techniques [and where] citizens will record their legal experiences on blogs … and they will pose and answer questions on discussion forums'.[7]

It is time for another transition from theorisation to the practical. We should shift attention to The Netherlands. In policy-making, the Dutch present a stark contrast with the English. It takes them a bit of time; they operate much more on a consensus basis; but, in time, they undertake radical moves on a planned basis. Thus, they fearlessly disposed of their equivalents to law centres and established Legal Services Counters, small local offices based throughout the country, in the mid-1990s. With this went a conscious government policy of seeking to rely on self-help: 'citizens should have primary responsibility for resolving their own problems and conflicts'.[8] The Dutch Legal Aid Board developed a Conflict Resolution Guide to this end as an internet-based assistance tool. This, combined with the Legal Services Counters, is intended to provide 'free initial assistance and primary legal assistance'. Thereafter, with a transparent legal services market and no procedural or institutional barriers to making use of legal assistance, the individual can – or, rather, should – be able to solve his/her own problems. The guide (designed by the board in partnership with the University of Tilburg) is in the process of development – recently added is a module on divorce and online mediation. The board's own research on this reports a high degree of satisfaction with, of a total of 129 respondents in a small scale study – 81 per cent identified themselves as happy enough to come back next time. As yet, there seems no objective research on the provision. The only academic who appears to have written about the project is Jelle van Veenan of Tilburg University which has been a partner in its development.[9] Frustratingly – though reasonably – the web material is in Dutch.

The Dutch are, of course, among the most rational of peoples. Thus, officials of the Dutch Legal Aid Board have been able to report that their government has recognised that it has a role to play in the simplification of the law and that:

> *The government has decided to assess new legislation and regulations more critically in future and to apply a yardstick. The government believes that in this way only legislation which is 'really necessary and proportionate and imposes the least possible red tape' will be introduced. This yardstick is known as the Integral Assessment Framework for Policy and Legislation.*[10]

Oh, that other governments had the same commitment.

One would have expected the United States, home of Silicon Valley and the cradle of the internet, to provide good examples of what can be done through web-based materials, particularly because of the relative dearth of civil legal aid funding as compared with the UK or The Netherlands. It would be helpful to be pointed to more US websites. To an outsider on a quick look, it seems very much as if the driver for use of the net comes, to a large degree, from the courts. Judges feel swamped with unrepresented litigants and they have every interest in supporting them up to – and perhaps sometimes a little beyond – the line between providing legal information/advice and legal advice/representation. Thus there are a number of self-help court-based programmes with a supporting network of their own (http://www.SelfHelpSupport.org). The law schools are also key players in this field with the Center for Access to Justice and Technology at Chicago-Kent Law School in the fore. The Center has developed an interesting internet package, A2J, which uses a cartoon-type format to progress someone through answers to a series of questions towards an appropriate document assembly. This is how it describes itself:

> *The simple act of filling out forms raises unique challenges that the many self-represented litigants have trouble overcoming. Without a very simple front end, a user unfamiliar with web conventions would be unable to use online form systems. To be effective, guided interviews for self-represented litigants must be very simple.*
>
> *The A2J Author® tool … translated several of the conceptual models for a redesigned court system into a Web-based interface that gently leads unsophisticated users through a guided interview for determining eligibility and collects all the information needed to prepare the required court forms. Elegant, simple and powerfully effective, the A2J Author™ Web-based interface is the 'front end' needed to make court document assembly more widely accessible to self-represented litigants.*[11]

The drawn figure of a woman takes you through a series of questions, represented along a road to a courthouse through which your answers fill in a form which you can then print at the end of the process. Examples of its use include applications for fee-waiver and name change applications. This is the same sort of interactive process as lies behind the road traffic accident programme discussed above. The A2J format seems potentially useful but a little wooden – particularly to anyone familiar with the possibilities that are usually displayed on an iphone or ipad app. There may well be other examples that need to be considered in any more comprehensive review.

The technology and access to it

An obvious issue in considering the use of the internet for legal services to the poor is the existence of the 'digital divide'. Information on this is changing all the time and the issue of the divide is deliberately being challenged by the UK government which has a policy of 'digital by default' for services and has appointed Martha Lane Fox as its digital champion. The UK is a well wired society. According to the Boston Consulting Group, internet sales are expected to rise to 10-13 per cent of GDP by 2015 and currently account to around 7 per cent. However, a third of all households have no access to the internet, of which almost a half are in the lowest socio-economic groups (D and E), 38 per cent are unemployed; 39 per cent over 65; and 70 per cent in social housing. Although 55 per cent of the population overall used government websites sometime last year only 15 per cent were living in the most deprived areas. This has a disproportionate effect because 80 per cent of government interactions are with the bottom 25 per cent of the population. It is benefits not tax that leads to most citizen-government interaction.

Susskind takes a robust view of the argument that the digital divide impedes access for the poor: 'overstated and sometimes disingenuously so'.[12] He thinks that many who are not themselves web-users have someone else who can access it for them: 'many elderly people fall into this category'. Others can get advisers to get access for them.

Another argument might be, although Susskind does not make it, that we are at an early stage in terms of the use of the web. There will be a moment, already come for some, when the phone, TV, computer and video collapse into one and when an ability to type is not essential for communication because of voice recognition software. At that point, it would seem likely that access will explode. A critical point may well be when you can move seamlessly from information on the net to calling an adviser by video phone. That would integrate a form of face to face provision within an internet structure. If linked to easy ways by which documents could be distributed then there really would be the possibility for new forms of service delivery.

It is conventional among the advice and legal aid sector in the UK to say that there will always be types of people and cases for which internet solutions are impossible. That is, no doubt, true. But, it is undoubtedly more creative to begin with the opposite assumption and to try to build provision which could be accessible to all provided that there are ways of dealing with those who need face to face services. Administratively, this is a tough ask.

The programmes

Researching existing programmes makes you realise what an early stage we have reached in the use of the net. Existing offerings just do not represent the level of sophistication that we would expect in our own use of Apple's cutting edge technology. That will change and it may be useful to contemplate what is required. Programmes need to be much more visual and much more interactive. Advice programmes need to integrate with adjudication/mediation programmes so that you can move seamlessly from preparing your case to processing and presenting it. That requires the courts and tribunals to integrate their systems with those used for advice – probably a massive but not impossible ask. The Dutch on-line mediation programme needs to be watched carefully because it would be a tremendous boon to have a programme which was basically a digital process but where, if the parties got stuck, human intervention was possible. Such an integration of the human and the digital is surely where some very effective future developments lie.

There is an issue about how the programmes are produced. Susskind has the interesting idea of a wiki methodology where all can freely contribute. You could, presumably and for instance, see a situation where, in England and Wales, the CAB service opened up access to its information programme and was responsible for its final form rather than the whole drafting process. The idea would be to move to a Wikipedia type approach to an information system. The logical system in the perfect world would be one central information system – even perhaps run on the direct.gov website. However, the problems of a dominant provider are clear. Little Coventry Law Centre's information on employment law is miles more accessible than that on the CAB website. There needs to be a degree of innovative competitiveness. Perhaps there could be two main rival systems – one by the advice sector and the other from law centres. There certainly needs to be a drive to more interactivity; more attractive layout; more visuals. Funding could be based on some sophisticated counting of hits or satisfied customers.

There certainly needs to be a repositioning of internet-based advice. It is entirely logical for advice to be digital by default – the mantra of the UK government in relation to its own services. Those giving advice on legal services should aim to provide it self-sufficiently on the net with the express aim, as in The Netherlands, that people will self-represent. There are certain implications just from that. It will be difficult to maintain charges for information so that there should be overt acceptance that information is being provided for all and for free. Then further support should be provided as necessary. The first line of support should be through skype or telephone to someone physically present

but not in the room. Advisers in offices should be the second line of support. That requires a considerable retooling by the advice and law centre sectors.

Cost and organisation

Outside the commercial field, who will fund the costs of delivering internet based advice services? It can only be government and the current cuts are an indication of its decreasing willingness to help the poor in terms of income and direct services let alone advice. There is a one-off opportunity when cuts mean that expensive face to face services are being dismantled but, once taken, the likelihood is that the government will take some persuading that it should properly shoulder its burden. As in the US, the courts may feel some level of payoff in dealing with litigants in person but that may not release very much cash. This is a major problem and it may, from an activist's position, support the argument that use of the net is to be resisted. An inadequate investment of a decreasing sum in internet advice would just be to create a rusting and increasingly useless form of provision.

Equal justice for all

There is one political demand which must be accepted as underlying any government funded provision. The aim of the exercise in access to justice and the aim of the much abused concept of access to justice is the delivery of advice and support to all members of society so that any dispute with government or others is resolved on its basic intrinsic legal merit. In other words, we need the objective of policy to be the provision of a society which is substantively fair in the resolution of disputes. Anything less is woolly nonsense in which 'access to' justice becomes a qualifier rather than an expansion. Let us hear it for Justice Hugo Black who put the same point in *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'.[13] And, of course, it is not just trials: it is all forms of adjudication. This is the point made above.

All political parties should be able to sign up to the aim of delivering substantive justice to all. Of course, some litigation will always require legal representation. However, if this is accepted as the basis from which we judge success or failure then we could start to see what might be done.

Notes

1 OUP, 2010 (paperback).
2 Ibid, p32.
3 Ibid, p42.
4 See Forrest S Mosten 'The Unbundling of Legal Services: increasing legal access;' in R Smith (ed) *Shaping the Future: new directions in legal services*, LAG, 1995.
5 N Balmer and others 'Just a Phone Call Away: is telephone advice enough?' *Journal of Social; Welfare and Family Law* vol 33, issue 4.

6 See n1 above, p232.
7 Ibid, p242.
8 Quoted as government policy in ILAG Conference Paper, P van den Biggelaar and E Borghs, 'Self Help and Simplifying the Laws'.
9 Eg J van Veenan 'Online integrative negotiation tools for the Dutch Council for Legal Aid'.
10 P van den Biggelaar and E Borghs as n8 above, p15.
11 http://www.kentlaw.iit.edu/institutes-centers/center-for-access-to-justice-and-technology/a2j-author
12 N1 above, p245.
13 Quoted in P Edelman 'When Second Best is the Best We Can Do: improving the odds for pro se civil litigants'.

Public order, preventative action and polarisation

Alex Gask and John Halford

The authors discuss the current state of the law in relation to the policing of protest and, in particular, the police practice of 'kettling'.

> *The European Court has at all times also stressed the importance of the rights of freedom of assembly and expression and that states have positive obligations to take steps to facilitate their exercise... So, wherever possible, the focus of preventive action should, on any view, be on those about to act disruptively, not on innocent third parties.*[1]

Today, these words ring hollow for a great many demonstrators and others against whom highly intrusive or coercive police action has been taken not for what they have done but on the basis of their perceived future intentions or the perceived intentions of a group of which they form part. Perhaps the most notorious pre-emptive tactic used by the police in public order situations is 'kettling' – or the containment of demonstrators within a police cordon and not permitting them to leave.

Kettling is an increasingly common phenomenon. To take but a few examples, in April 2009, several thousand Climate Camp demonstrators were kettled in Bishopsgate for four hours,[2] action said by the police to be primarily justified on the basis that some of the people involved in another demonstration would join them and then breach the peace in an unspecified manner. Whilst the demonstrators were held, officers in full riot gear with shields and batons spontaneously drove them back 15 to 20 metres, one of three such 'pushing operations' during the course of the evening.

Kettling was also a significant feature of the policing of student protests in late 2010. Many young protesters were held in a kettle on Whitehall in Central London. Among them were a number of children, but no special arrangements were made for their release from the cordon.[3]

Early in 2011, kettling was used once again, immediately before the Royal wedding, against a group heading for an alternative event. The members of the group were then arrested for a threatened breach of the peace and held, being told that they would be released again 'after the kiss on the balcony'. Their judicial review claim is to be heard this May together with those whose homes

were raided because they were suspected of intending to disrupt the celebrations.[4] In October 2011, participants in an annual march to protest against deaths in custody were temporarily kettled before being forced to move.[5]

Incidents of this kind tend not to improve relations between the police and the public at large, let alone those with peaceful demonstrators whose actions the police have a positive obligation to facilitate. On the contrary, they tend to have a polarising effect, fostering conflict and a perception that the police are politicised.

More than a few amongst the police have recognised that action of this kind is out of step with the British tradition of policing by consent. In a report highly critical of the policing of the April 2009 G20 summit demonstrations, Her Majesty's Inspectorate of Constabulary stressed that consent 'could no longer be assumed' and 'policing, including public order policing, should be designed to win' it. This was echoed by the Home Affairs Select Committee which spoke in its report on G20[6] of the 'shift in power and control from the protesters to the police' that kettling brings about, cautioning that it should be used 'sparingly and in clearly defined circumstances'.

Despite this, limited contrition has been exhibited by those responsible for operational decisions. Under cross-examination in the case of *R (Moos and McClure) v Commissioner of Police for the Metropolis* [2011] EWHC 957 (Admin), the Bronze Commander (with operational responsibility for the incident) for the G20 demonstrations responded to the reports of the HMIC and Joint Committee on Human Rights with the comment 'some people will always criticise the police'. The Gold Commander (in strategic overall command) maintained at a parliamentary select committee hearing that the policing of the demonstrations was an overall success. While training manuals may have been altered and new guidance issued, from a demonstrator's-eye view there has been little change in police practice on the ground.

This may explain the increasing willingness of demonstrators to seek the intervention of the courts, and the Administrative Court in particular. Seeking compensation is not the primary objective in litigation of this kind: rather it is to expose police actions as unlawful and set limits on what police officers might otherwise consider matters of broad, discretionary professional judgement.

This article discusses kettling, a number of examples of legal challenges to use of the tactic, and the limited success with which they have met.

Basis of the power

Kettling is a relatively new police tactic based on a very old common law power and duty – that of every citizen to intervene to prevent breaches of the peace or bring those that are occurring to an end.

When the common law power arises, it can be used to turn people away from their intended destination, restrain or arrest them, remove provocative articles or, exceptionally, use coercive force. Arrest is the most common way the power is used. Once arrested, the person concerned must either be brought before a magistrate to be bound over to keep the peace in future or released. Kettling is an unusual use of the power because it involves dealing with a group collectively, rather than responding to the threatened or actual actions of an individual. It also entails holding the group in a particular place for a period of time, rather than arresting or dispelling them so as to remove the perceived threat altogether. The term 'kettle' seems to have been coined by demonstrators because when first used, kettles tended to have a 'spout' in the form of an exit through which small numbers in the crowd could leave at any time if they wished. These exits are now very unusual. Kettles normally take the form of an 'absolute cordon' around those being held, preventing entry and exit until the police deem it appropriate to relax the cordon.

Early challenges

Legal challenges to kettling and similar preventative detention were initially brought as civil actions for damages and declarations. The first of this type was a civil claim by anti-monarchist protestors, who had been held by police on a commandeered number 11 bus for several hours to prevent them from demonstrating.[7] The second was *Austin and Saxby v Commissioner of Police for the Metropolis* [2005] EWHC 480 (QB), a claim brought by a demonstrator and a bystander who had been kettled for several hours in Oxford Circus on May Day 2001. The anti-monarchists' case was settled. Austin and Saxby fared less well. The High Court, Court of Appeal and House of Lords rejected their claims, albeit for different reasons at each stage. Ms Austin and three other people kettled along with her then petitioned the European Court of Human Rights, but their claims were finally rejected by the Court's Grand Chamber on 15 March 2012 (*Austin and others v UK* App no 39692/09, discussed further below).

Although *Austin and Saxby* was the first claim to be issued, it was quickly overtaken by another, a judicial review claim brought by Jane Laporte. She was one of 119 antiwar protestors travelling on coaches headed for an antiwar assembly at RAF Fairford who had been stopped, searched then forcibly escorted back to London – a kind of 'mobile kettle'. The Administrative Court and Court of Appeal accepted she had been falsely imprisoned, but rejected arguments

that she and her fellow passengers ought to have been allowed to proceed to exercise their assembly and protest rights. The House of Lords disagreed, holding that both the imprisonment on the coaches and the 'turning away' from the assembly that immediately preceded it were unlawful, disproportionate and a breach of Articles 10 and 11 ECHR: *R (Laporte) v Chief Constable of Gloucestershire* [2006] UKHL 55.

No live evidence was heard in *Laporte*, so their Lordships proceeded on the basis that the good faith of the evidence given by the police could not be impugned, but that the reasonableness of their beliefs about what was likely to happen at Fairford was an objective question of law.

Their Lordships concluded that the test for taking action short of arrest to prevent a breach of the peace is no less stringent than the test for carrying out an arrest. In either case the breach must be likely and must be 'imminent'. It was not on the facts of Ms Laporte's case: the Chief Superintendent who made the decision that the coaches should be sent back to London effectively admitted that no breach of the peace was anticipated at that point. It was found that the decision to turn back the demonstrators was not merely premature but was also indiscriminate – as it treated all the coach passengers the same way even though only some were suspected of being troublemakers.

As Lord Bingham said at §55, it was:

> *entirely reasonable to suppose that some of those on board the coaches might wish to cause damage and injury to the base at RAF Fairford, and to enter the base with a view to causing further damage and injury. It was not reasonable to suppose that even these passengers simply wanted a violent confrontation with the police, which they could have had in the lay-by. Nor was it reasonable to anticipate an outburst of disorder on arrival of these passengers in the assembly area or during the procession to the base, during which time the police would be in close attendance and well able to identify and arrest those who showed a violent propensity or breached the conditions to which the assembly and procession were subject. The focus of any disorder was expected to be in the bell-mouth area outside the base, and the police could arrest trouble-makers then and there. … There was no reason (other than her refusal to give her name, which however irritating to the police was entirely lawful) to view the claimant as other than a committed, peaceful demonstrator. It was wholly disproportionate to restrict her exercise of her rights under articles 10 and 11 because she was in the company of others some of whom might, at some time in the future, breach the peace.*

Preconditions

Thanks to *Laporte* and *Austin and Saxby* a number of limits on the lawful use of preventative kettling have emerged: four preconditions will always apply and a further three will apply in particular circumstances. All seven need to be satisfied in a public order context involving a large number of people whose Articles 10 or 11 rights are engaged.

First, the intervener – whether a police officer or member of the public – must be faced with a breach of the peace involving violence. A breach is 'actual harm done either to a person or to a person's property in his presence or some other form of violent disorder or disturbance and itself necessarily involves a criminal offence': *Laporte* at §111. This must be about to occur 'in their presence': *R v Howell (Errol)* [1982] QB 416 approved in *Laporte* at §27. It is not enough to fear a situation arising that is inherently difficult to police.

Second, an anticipated breach must be likely, that is to say there must be a 'real danger' and a 'real possibility' of its occurrence: see *Laporte* at §67, approving *Piddington v Bates* [1961] 1 WLR 162 at 170 and *Foulkes v Chief Constable of the Merseyside Police* [1998] 3 All ER 705 at 711.

Third, an anticipated breach of the peace must be imminent. It must be 'about to be committed', an event 'on the point of happening', one which is 'going to happen in the near future': see *Laporte* at §§39 and 66. The power to intervene preventatively is that 'to act in an emergency': see *Laporte* at §49. Intervention must prevent a 'present threat to the peace': see *Foulkes* at 711 (approved in *Laporte* at §33).

Fourth, the steps that can be taken to prevent an anticipated breach or stop one that is happening must, in themselves, be reasonable and related to the breach. Where any less intrusive, targeted alternative step is available, that one must be taken. It will generally be unreasonable to take steps that are inherently arbitrary and indiscriminate: see *Laporte* at §§84 and 153-155.

Fifth, action to prevent a breach of the peace will normally be unlawful if it is not targeted, that is directed exclusively at the person who is committing the breach or who it is anticipated will commit the breach. This principle was emphasised by Sedley LJ in *Redmond-Bate v Director of Public Prosecutions* (1999) 163 JP 789, 791 and applied in *Bibby v Chief Constable of Essex Police* CA, 6 April 2000 unreported.

There are, however, important exceptions on which the police now frequently rely. In *Austin and Saxby* at §35 the Court of Appeal attempted to list them and their limits:

> *(i) where a breach of the peace is taking place, or is reasonably thought to be imminent, before the police can take any steps which interfere with or curtail in any way the lawful exercise of rights by innocent third parties they must ensure that they have taken all other possible steps to ensure that the breach, or imminent breach, is obviated and that the rights of innocent third parties are protected;*
>
> *(ii) the taking of all other possible steps includes (where practicable), but is not limited to, ensuring that proper and advance preparations have been made to deal with such a breach, since failure to take such steps will render interference with the rights of innocent third parties unjustified or unjustifiable; but*
>
> *(iii) where (and only where) there is a reasonable belief that there are no other means whatsoever whereby a breach or imminent breach of the peace can be obviated, the lawful exercise by third parties of their rights may be curtailed by the police;*
>
> *(iv) this is a test of necessity which it is to be expected can only be justified in truly extreme and exceptional circumstances;*[8] *and*
>
> *(v) the action taken must be both reasonably necessary and proportionate.*

This element of the judgment was endorsed by the House of Lords: [2009] UKHL 5, [2009] 1 AC 564.

Sixth, when what is done to prevent a breach of the peace wholly frustrates or otherwise interferes with the rights of free speech, receipt of information, circulation of ideas and assembly protected by Articles 10 and 11 of the Convention, it must be justified as being in accordance with the law, necessary in a democratic society and proportionate. That is a higher standard than mere 'reasonableness' (which is what the defendant unsuccessfully argued should be the test in each of the three courts that considered *Laporte*). The action taken in *Laporte* failed the Convention tests first, because it was not prescribed by law and, second, because it was 'premature and indiscriminate' in that alternative action could have been taken later and that could have been targeted at those causing or about to cause the breach rather than innocent protestors such as Ms Laporte herself: see §§45, 53 and 55.

Last, where the steps taken to prevent a breach of the peace involve a deprivation of liberty, s6 Human Rights Act 1998 requires that they be justified as being for one of the purposes identified in Article 5(1)(a)-(f).

Ketting and Article 5

As the challenge to the May Day 2001 kettle, *Austin and Saxby*, progressed through the domestic courts, the claims of deprivation of liberty in breach of Article 5 ECHR became increasingly dominant.

At first instance, Mr Justice Tugendhat dismissed this element of the claims by holding that while Ms Austin and Mr Saxby had been deprived of their liberty, the kettle fell within the exception in Article 5(1)(c) ('the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority ... when it is reasonably considered necessary to prevent his committing an offence') and the deprivation was, therefore, lawful. He further held that the cordon was lawful at common law on the basis that the police reasonably believed that *all* those within the cordon were about to commit a breach of the peace.

The Court of Appeal's approach was very different. It held that kettling the claimants had been an interference with their liberty, but had not amounted to the kind of arbitrary deprivation of liberty with which Article 5 was concerned. As to the common law claim, the court held that, on the evidence, the police were aware that there were those in the crowd who would not commit a breach of the peace and Mr Justice Tugendhat had been wrong to say that everyone in the crowd was a suspect. However, the police did what was necessary to avoid an imminent breach of the peace in very exceptional circumstances (see above) and their actions were lawful at common law, despite those who did not intend to breach the peace being directly affected. By the time that case reached the House of Lords as *Austin and Saxby v Commissioner of Police for the Metropolis* [2009] 1 AC 564, it had been accepted that any imprisonment that had occurred was justified at common law due to the extreme circumstances. The sole issue remaining for the Lords to resolve was whether or not being held in a kettle amounted to an unjustified interference with Article 5 ECHR. This was distinct from the issue of false imprisonment, because Article 5 on its face does not permit of a general justification of necessity. Instead, a deprivation of liberty is only permissible under Article 5 if it was imposed for one of the exhaustive list of purposes set out in Article 5(1). None of those purposes easily covers temporary deprivation of liberty for reasons of public order.

The House of Lords found itself in an uncomfortable position. On the one hand, there were established facts which the courts below had found left the police with no choice but to act as they did in order to protect life and limb. On the

other was established Strasbourg authority stating that a deprivation of liberty would be in breach of Article 5 if it did not fall within the 5(1) purposes. If the Lords found that the 'kettling' had involved a deprivation of liberty, they would have been forced to find that the police had acted unlawfully, despite the clear risk of harm.

The way out for the Lords was to find that Article 5 had not been engaged at all. Taking a pragmatic approach and putting into the balance 'the lives of persons affected by mob violence', and, in particular, the risks posed to the right to life guaranteed by Article 2 ECHR, measures of this kind would not even fall within Article 5 as long as they were not arbitrary – ie, as long as they were resorted to in good faith, were proportionate and were enforced for no longer than necessary.

Austin v United Kingdom

Lois Austin took her case on to the European Court of Human Rights, where it was joined with the applications of three others – all bystanders – who had been caught up in the May Day kettle despite having been in central London for reasons unconnected with the demonstration.

The ECtHR delivered its judgment on 15 March 2012, finding against all four applicants. The judgment is, in a number of senses, disappointing.

The Court's assessment of the claim began by citing a number of general principles, in the course of which appears a telling comment:

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

This passage indicates the Court's willingness to take the same course as the House of Lords and accept a hitherto forbidden 'pragmatic' approach to the engagement of Article 5.

Also of interest is the emphasis the Court placed on the principle of subsidiarity (respecting the application of the Convention by domestic courts) when applying the general principles to the facts of the case. On this basis, the factual findings made in the domestic first instance judgment were accepted – leaving the Strasbourg court in the same sticky situation that had faced the House of Lords.

The UK government argued, as it had before the House of Lords, that the purpose for which a measure was imposed was a relevant factor when considering whether there had been a deprivation of liberty such as would trigger the protection of Article 5 – thus the fact that the police's actions were necessary to prevent a serious breach of the peace and to avoid violence and injury was relevant to the question of whether the applicants could rely on Article 5. The applicants pointed out that such an approach was inconsistent with the exhaustive nature of the exceptions set out in Article 5 and would allow states 'to circumvent the protections of Article 5, detaining people for a wide range of reasons beyond the scope of Article 5 § 1(a)-(f), provided that necessity was shown'.

The Court essentially fudged this hugely important issue. It confirmed that 'an underlying public interest motive, for example to protect the community against a perceived threat emanating from an individual, has no bearing on the question whether that person has been deprived of his liberty'. The Court also confirmed that the Article 5(1) exceptions remain exhaustive.

Nevertheless, the Court allowed the government's argument in through the back door. It accepted that the requirement to take account of the 'type' and 'manner of implementation' of the measure in question (see *Engel*, § 59 and *Guzzardi*, § 92, both cited above) enables it to have regard to the specific context and circumstances surrounding types of restriction other than the paradigm of confinement in a cell. This allowed the Court to go on to note that the 2001 kettle 'was imposed to isolate and contain a large crowd, in volatile and dangerous conditions' and that 'in the circumstances the imposition of an absolute cordon was the least intrusive and most effective means to be applied' (para 66). Furthermore, the police had intended to release the applicants from the kettle as soon as they could and:

> *67...In these circumstances, where the police kept the situation constantly under close review, but where substantially the same dangerous conditions which necessitated the imposition of the cordon at 2 p.m. continued to exist throughout the afternoon and early evening, the Court does not consider that those within the cordon can be said to have been deprived of their liberty within the meaning of Article 5 § 1. Since there was no deprivation of liberty, it is unnecessary for the Court to examine whether the measure in question was justified in accordance with subparagraphs (b) or (c) of Article 5 § 1.*

Just as the House of Lords did before it, the ECtHR evaded the strict standards of Article 5 by focusing on the meaning of 'deprivation of liberty' and construing the term in a narrow and somewhat artificial way. Despite accepting that 'the coercive nature of the containment within the cordon; its duration; and its

effect on the applicants, in terms of physical discomfort and inability to leave Oxford Circus' all 'point towards a deprivation of liberty' the kettle fell short of a deprivation because it was a measure that was deemed to be absolutely necessary.

The Court made efforts to emphasise that this conclusion was 'based on the specific and exceptional facts of this case' and that kettling should not be used to suppress protest but, as was noted in the minority judgment, this was not an approach supported by principle or past authority.

Context

The decision in *Austin v United Kingdom* must be seen in its political context. Against the backdrop of a Europe that is riven by public debt and wracked by 'austerity measures' which give rise to the prospect of social unrest on an unprecedented level, a conclusion that would have limited the police, and possibly forced them to take more intrusive, albeit more targeted measures, when faced with public disorder was perhaps unattractive.

Alternatives to kettling

In *Austin and Saxby* the Court of Appeal had stressed that the rights of innocent third parties could only be compromised by kettling if there were 'no other means whatsoever whereby a breach or imminent breach of the peace can be obviated'. What this means in practice was tested in the next domestic kettling case, *Moos and McClure*.

The main focus in *Moos and McClure* was a decision to kettle about 5,000 Climate Camp demonstrators in Bishopsgate just after 7 pm on 1 April 2009. Prior to that, kettling had been considered a number of times but had not been thought justified. The triggering event was the decision to release demonstrators from another kettle outside the Royal Exchange where they had been for several hours (this was not challenged by anyone and the *Moos and McClure* court assumed it was lawful). The dispersal of the Royal Exchange demonstrators was said by the police to present an imminent risk of breach of the peace because the two groups could end up mixing, creating disorder (the nature of which was never clear) which the police could not control. The peaceful Climate Camp group were, therefore, kettled to prevent that happening, although the kettle was kept in place until long after the Royal Exchange demonstrators had been dispersed.

Kettling was a tactical option considered as part of the extensive planning for G20. But little thought, if any, was given to the preconditions for its use. Instead, a briefing document simply recorded:

> *This is an approved tactic and has been found to be legal. There is case law (Austin and Saxby v MPS) where Law Lords found in favour of the police and dismissed the appeal. The value of a properly executed containment option cannot be under estimated. It can be an extremely valuable tool in preventing injury and damage. The containment tactic will only be used where we have to protect vulnerable locations or people. Each containment will be assessed by the Bronze commander as to it's [sic] viability and continued need. It must be assessed on a regular basis as to the necessity of the containment, the need to inform those contained, and facilities that need to be offered / given…*

The Divisional Court's analysis was that two of the necessary preconditions for coercive action were absent, just as they had been absent in *Laporte* (as the court noted at §7 of the judgment). First, a breach of the peace was not likely to occur. Second, an anticipated breach of the peace was not imminent. Even taking a flexible approach to the concept of imminence, it was not satisfied on the facts of the case. The court therefore held at §§59 and 60:

> *There was at 7.07pm no reasonably apprehended breach of the peace, imminent or otherwise, within the Climate Camp itself sufficient to justify containment. The Commissioner's main case depends entirely on the risk that there would be breaches of the peace at or associated with the Climate Camp resulting from the arrival of protestors from the Royal Exchange. There was such a risk, but it was at that stage only a risk; and it was not, in our judgment, a risk of imminent breaches of the peace sufficient to justify full containment at the Climate Camp. Such flexibility as the concept of imminence bears does not extend that far on the facts of this case.*
>
> *… Accepting, as we do, that the police were right to take steps to guard against the risk, we have to consider other possibilities. These, we think, included being prepared to implement some form of absolute cordon or cordons, if that became later necessary to deal with an imminent risk, and, it may be, sealing off some side roads. An absolute cordon at the north of the Climate Camp may well have become necessary and proportionate at or around 9.30pm when some Royal Exchange protestors did eventually arrive there. That may not have justified an absolute cordon at the south, since the need was, not so much to keep the Climate Camp protestors in, as to keep the Royal Exchange protestors out.*

The court's key conclusion was, thus, that, at the point in time when the kettle was imposed upon the Climate Camp, there was no justification for containment based on the actions of the demonstrators there, merely a possibility that a justification for action might arise in the future based on the conduct of the

dispersing Royal Exchange protestors. Alternative steps could have been taken to guard against that risk materializing.

However, the Divisional Court's judgment was successfully appealed by the Metropolitan Police – see *R (Moos) v Metropolitan Police Commissioner* [2012] EWCA Civ 12.

The Met claimed that the Divisional Court had applied the wrong test when considering whether the police had reasonably apprehended an imminent breach of the peace. Rather than questioning whether it was reasonable for Chief Superintendent Johnson (the officer who ordered the kettle) to have feared an imminent breach of the peace, the Divisional Court had instead, improperly, come to its own view on whether there was indeed an imminent breach.

The Court of Appeal agreed:

> *72. In this case, each of the four paragraphs which encapsulate the Court's reasoning contain at least one sentence suggesting that the Court applied the wrong test, namely proceeding on the basis of its own view of imminence rather than on its assessment of the reasonableness of Mr Johnson's view of imminence. On the other hand, there is not a single sentence in those four paragraphs which expressly indicates that the Court considered the reasonableness of Mr Johnson's apprehension.*

The court went on to reconsider whether the police had reasonably apprehended an imminent breach of the peace, applying what they considered was the correct test derived from *Redmond-Bate* (1999) 163 JP 789 at 791:

> *to decide not whether the view taken by [Mr Johnson] fell within the broad band of rational decisions but whether in the light of what he knew and perceived at the time the court is satisfied that it was reasonable to fear an imminent breach of the peace.*

Applying this test the court came to the following view:

> *86… it is hard to see how a perception that there was an imminent risk of the Royal Exchange demonstrators joining the Climate Camp and importing their violence could be characterised as unreasonable on the undisputed facts of this case. There were two very large crowds in close proximity to each other, with a number of possible routes between them, in circumstances where, as the Court accepted, Mr Johnson 'did not have the resources to seal off all roads and this would have been physically impossible' - [2011] HRLR 24, para 34, and where one of the crowds, which*

> *was being dispersed, included many demonstrators who had committed serious breaches of the peace.*

As a result the court concluded:

> *92… that a decision to contain a substantial crowd of demonstrators, whose behaviour, though at times unruly and somewhat violent, did not of itself justify containment, was justifiable on the ground that containment was the least drastic way of preventing what the police officer responsible for the decision reasonably apprehended would otherwise be imminent and serious breaches of the peace, as a result of what he reasonably regarded as the immediate risk of the crowd being joined by dispersing demonstrators from another substantial crowd, which had itself been contained, as its behaviour had been seriously violent and disorderly.*

The Court of Appeal's judgment seriously undermines the value of one of the limits on kettling set down by the Court of Appeal in *Austin*:

> *96. … At [2011] HRLR 24, para 56, the Divisional Court also said that '[t]he test of necessity is met only in truly extreme and exceptional circumstances'. This is no doubt true, but we doubt whether it gives any assistance over and above the requirements discussed in Laporte [2007] 2 AC 105 and summarised so clearly by the Divisional Court at [2011] HRLR 24, para 12 (and set out at para 36 above). Almost by definition, a decision to contain will only be made, or even considered, in extreme and exceptional circumstances: the Divisional Court made it clear that they thought the circumstances appertaining in the City of London on 1 April 2009 were extreme and exceptional (see for instance what they said at [2011] HRLR 24, para 57, cited at para 51 above). But an argument as to whether, in a particular case, the circumstances were extreme or exceptional enough, or 'truly' extreme and exceptional, is scarcely likely to assist those deciding at the time whether to contain, or those subsequently deciding whether the containment was justified.*

The claimants in *Moos and McClure* are seeking permission to appeal to the Supreme Court. At the time of writing the outcome of that application has not yet been decided.

In the aftermath of *Austin v United Kingdom* and *Moos and McClure* in the Court of Appeal, there remain, in principle, restrictions on the use of kettling to control protests and demonstrations. However, significant deference to police decision making in public order situations has been demonstrated by both the domestic court and by Strasbourg, making the practical value of these

restrictions questionable. For now, the courts have given a green light to the continuing use of this controversial tactic.

The special position of children

Those involved in demonstrations are not always adults, as recent events have made clear. The involvement of children has given rise to a different type of legal attack on the use of kettling.

In *Castle and others v Commissioner of Police for the Metropolis* [2011] EWHC 2317 (Admin) a narrowly focused challenge was brought against the use of 'kettling' or 'containment' at the student 'anti-cuts' demonstration in central London on 24 November 2010. The claimants were three children who argued that the defendant Commissioner's decision to use containment, and the failure to release them for several hours, constituted a breach of the s11 Children Act 2004 duty on the police to:

> *make arrangements for ensuring that ... their functions are discharged having regard to the need to safeguard and promote the welfare of children.*

The significance of this had been discussed in the leading immigration case, *ZH (Tanzania) v SSHD* [2011] UKSC 4, in which Baroness Hale explained that s11 was 'clearly inspired' by Article 3.1 of the UN Convention on the Rights of the Child:

> *In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.*

The defendant argued that the duty under s11 was merely to make arrangements to bring to the attention of officers the need to safeguard and protect the welfare of children – and thus that this had been satisfied by training presentations given to officers on the Children Act and on dealing with vulnerable persons in public order situations. The Divisional Court did not accept that the duty was so limited (§51):

> *The chief officer's statutory obligation is not confined to training and dissemination of information. It is to ensure that decisions affecting children have regard to the need to safeguard them and to promote their welfare.*

However, the court went on to note that this duty did not override the essential function of the police:

> *This does not mean that the duties and functions of the police have been re-defined by section 11. Chapter 2.4 of the statutory guidance, to which the chief must also have regard, makes that explicit. In our view the guidance accurately states the obligation of chief officers of police 'to carry out their existing functions in a way that takes into account the need to safeguard and promote the welfare of children'. The impact which the duty will have upon the performance of a function will depend to a significant degree upon the function being performed and the circumstances in which it is being performed. The responsibility will take on its sharpest focus when a police officer encounters a child who needs protection, for example in circumstances such as those anticipated by the statutory guidance concerning police investigations during which an unprotected child or a child at risk comes to their attention. A police officer will not be deterred from performing his public duty to detect or prevent crime just because a child is affected but when he does perform that duty he must, as the circumstances require, have regard to the statutory need.*

On the facts of the case, it was held that the police had given due regard to the welfare of children involved in the demonstration.

Further, while accepting that the s11 duty was of relevance, the Divisional Court in *Castle* did not accept the claimants' submission that a failure to have regard to the need to safeguard and promote the welfare of children would render a decision unlawful. The court distinguished cases involving the making of immigration decisions in this way at §53:

> *The reason we reach this conclusion is that it will be in rare circumstances that the failure to have regard to the statutory need will have any relevant impact upon or will qualify the ambit of the power he is exercising. He is not in the position of an immigration caseworker, making a decision affecting the future life prospects of a child, or a housing officer assessing the applicant for allocation of housing.*

The claimants in *Castle* have sought leave to appeal.

Release arrangements

As set out above, in *Austin and Saxby* it was established that before the containment of innocent demonstrators along with those likely to cause a breach of the peace would be found to be lawful, the police 'must ensure that they have taken all other possible steps to ensure that the breach, or imminent breach, is obviated and that the rights of innocent third parties are protected'

The Court of Appeal in *Austin and Saxby* went on to explain that 'the taking of all other possible steps includes (where practicable), but is not limited to, ensuring that proper and advance preparations have been made to deal with such a breach, since failure to take such steps will render interference with the rights of innocent third parties unjustified or unjustifiable'

In *Castle* the Divisional Court noted the above requirement for proper advance preparations in the context of children (§60):

> *interference with freedom of movement must be fully justified. The obligation upon the defendant was to avoid such action if he could. That duty required, where practicable, planning for alternatives to containment and, in any event, to minimise its impact on innocent third parties. The section 11 statutory duty required that planning, either in advance or at the time the decision to contain was made, should, where appropriate, have embraced the need to safeguard children and promote their welfare. If the decision maker is unable to show that he could not, by taking reasonable steps, have avoided the need to use containment, or have mitigated the consequences to innocent third parties, in particular children, then he will have acted unlawfully towards them in breach of his public duty.*

It follows that a lawfully made and rational release plan for individuals where it is no longer necessary to hold them is an essential element of the proportionality and lawfulness of any containment. It will not be a lawful justification to simply say: 'because we could not release all we could not release any'. In principle, *anybody* who is no longer necessary to be contained is entitled to be released under the principles of necessity and least interference. But to date the courts have accepted that there may be practical reasons why a plan involving assessment of the intentions of each person who wants to be released cannot be put in place (that was held to be the position in *Austin*). But this will not always be the case – particularly where vulnerable persons, including children, are involved.

Conclusion

While the use of kettling remains controversial, and threatens a deterioration of already difficult relations between police and many demonstrators, attempts to restrict its use through the courts have so far met with limited success. That does not mean the law is settled, or satisfactory, however. There is no other power to restrict liberty in such a drastic fashion that has not been debated, sanctioned and subject to safeguards imposed by Parliament. Nor do the guidelines in *Austin* fill that void. As the radically different approach of the two courts that dealt with *Moos and McClure* illustrates, they lend themselves to radically differing interpretations – hardly appropriate for an emergency

power to be used only where danger is imminent. That such a power should be so commonly used against those who will often be entirely innocent and exercising their fundamental democratic rights to free assembly and expression is deeply troubling.

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Notes

1 Lord Bingham, *R (Laporte) v Chief Constable of Gloucestershire Police* [2006] UKHL 55, §149.
2 *R (Moos and McClure) v Commissioner of Police for the Metropolis* [2011] EWHC 957 (Admin).
3 *Castle and others v Commissioner of Police for the Metropolis* [2011] EWHC 2317 (Admin).
4 http://www.statewatch.org/analyses/no-150-wedding-protests.pdf
5 http://www.voice-online.co.uk/article/families-outraged-over-%E2%80%98police-manhandling%E2%80%99-during-march
6 *'Policing of the G20 Protests'* (HC 418, Eighth Report of Session 2008-09, 23 June 2009.
7 http://www.guardian.co.uk/uk/2004/feb/05/ukcrime.monarchy
8 See the questioning of this 'principle' in *R (Moos) v Metropolitan Police Commissioner* [2012] EWCA Civ 12, discussed below.

The scope and structure of legal services regulation: thoughts of an outsider

Roger Smith

This article is taken from a speech to a conference held by the Solicitors Regulation Authority in April 2012.

The subject of regulation of the legal profession gives rise to continuing unrest. The professional bodies are restless under the yoke of the Legal Services Act 2007 (LSA) and its creature, the Legal Services Board (LSB), the super-regulator that it creates. Existing practitioners are irked by any requirements which they see as disproportionately imposing on them. Criminal solicitors have recently rebelled against a proposal from the Law Society that they be re-accredited for a further five years. Meanwhile, waiting in the wings are a range of new players itching to get into the legal market as rules on third-party ownership are relaxed. No surprise, therefore, that the Bar Standards Board, the Solicitors Regulation Authority and the Legal Services Board are jockeying for position. This creates a situation where, unsurprisingly, the provisions of the LSA and the role of the LSB are still being debated and where there may remain some purpose in asking fundamental questions about whether they should be reformed. There may be limited political value in questioning the LSB because, having survived the much hyped 'bonfire of the quangos' (probably because it is funded by the legal profession and not government), government is unlikely to move now for its departure. However, it may be worth looking at the LSA itself now that it has begun to bite. There may be need for reform.

I should begin with a personal note. I have an emotional engagement with regulation that comes from experience over what is now almost precisely 40 years of practice. I was secretary to the Law Centres Working Party in the early 1970s when the Law Society attempted to misuse Practice Rules to restrict where centres might open even when funding was available (which came to head over an attempt to close Hillingdon Community Law Centre): this was successfully opposed with the assistance of the then Lord Chancellor who threatened legislation equivalent to the Legal Services Act. A little earlier, the Law Society had jumped on a threat that I made to pursue someone for contempt of court to launch a full investigation as an excuse to further its campaign against law centres. I was exonerated: the complainant terminated both her complaint and her contempt. As director of the Legal Action Group, I observed the Law Society

closely in the 1980s and 90s. I saw Presidents lead the Law Society council into resisting prior disclosure of fees to clients; opposing restrictions on referral fees and devaluing complaints handling. For a short time, I was myself a Law Society regulator as Director of Legal Education and Training.

JUSTICE has done little work on regulation of legal services – leaving that for the profession itself. But JUSTICE does have a core concern with legal services for the poor – those traditionally funded by legal aid and through funding to organisations such as the CABx. It is through this prism that JUSTICE tends to see legal regulation and, in particular, it is concerned with the regulation of legal advice – something which for reasons of technology, government policy and cuts is likely to shift to an internet base; civil litigation of the kind undertaken by people with low incomes; criminal justice – particularly from a defence perspective.

Preliminary point: access to justice

There are a number of preliminary points to be made. These include the meaning of the phrase 'access to justice' – JUSTICE's core concern and listed in s1(1)(c) Legal Services Act 2007 as among the 'regulatory objectives' of the Act and, thereby, the Board. This phrase is widely used. It was, for example, the title of Lord Woolf's major review of civil justice. But, it is left almost universally undefined. As a Canadian academic once pointedly remarked, 'Before access to justice there was just justice', thereby raising the issue of whether 'access' qualifies or expands. It should, in my view, have a precise meaning – access to justice requires the use of all available measures to ensure that all persons are aware of their legal rights and obligations and any dispute is determined by substantive merit rather than disparities of income or other resources between the parties.

The attainment of access to justice is an essential of any democracy (as the Lord Chancellor put it, 'access to justice is the hallmark of a civilised society'), albeit that it may remain – at least to some extent – an aspiration rather than an attainment in most countries, particularly those – like England and Wales – facing draconian cuts to legal aid.

Access to justice requires the application of all measures. That was the point being made by those who devised the phrase in the 1970s – not just the state funding of legal aid. Those measures include and require appropriate and adequate regulation – something which the Law Society resisted in the early 1970s by seeking to abuse its powers. But, the phrase 'access to justice' is just too vague to be used in legislation.

It is difficult not to see current provision for the regulation of the legal profession in England and Wales as a mess. S1 Legal Services Act is little short of a dog's dinner – as JUSTICE pointed out in the consultation on the draft bill. The section lists a series of objectives without according any priority between them. Thus, for example, the promotion of competition[1] is given equal weight to 'supporting the constitutional principle of the rule of law'[2] as if the two could be traded against each other. There are eight potentially competing objectives – many vague in the extreme. What, for example, does 'protecting and promoting the public interest mean'? It is differentiated from protecting the rule of law, the interests of consumers, professional principles and access to justice, but why? The Act is silent and, thus, the statutory scene is set for the regulator established by the Act effectively to choose its own remit without parliamentary guidance. The Act needs replacement: the drafting is awful.

If there were to be any redrafting of the bill, the main interest of the state (and thereby the main regulatory objective in relation to the legal profession) must surely be 'supporting the constitutional principle of the rule of law'. That is the one thing which, above all, a democratic state must deliver. Again, definition is necessary. Lord Bingham defined the rule of law as meaning that: 'all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts'.[3] The merit of this definition is its closeness with the concept of access to justice discussed above. Upholding the rule of law (which necessarily includes access to justice) is what the state has to do – over a wider field, of course, than legal regulation – and it is why s1 was inserted into the Constitutional Reform Act 2005 by the House of Lords to emphasise that:

> *This Act does not adversely affect:*
> *(a) the existing principle of the rule of law, or*
> *(b) the Lord Chancellor's existing constitutional role in relation to that principle.*

Such a perspective on legal regulation brings to light an issue which is often hidden. The origin in recent times of greater state interference in regulation of the legal profession derives from sensitivity to a clash between the consumer and professional interest. However, states, like the US, where the equivalent of legal aid has been much less well funded have been very aware of a different conflict – that between a lawyer's duty to his/her client and the restriction of what a lawyer might be able to do for that client due to limited funding from the state. Thus, the American Bar Association has, for example, struggled to establish maximum caseload standards beyond which a lawyer undertaking an appropriate professional job could not deliver an acceptable level of service to

his/her client. Cuts to legal aid are likely to make this a problem for us as well – remuneration rates have been sufficiently high so far for this to arise only in a muted way.

In criminal justice, this regulatory issue can become very clear. To what extent should a lawyer preparing a defence for a client go, for example, to seek witnesses to what allegedly happened? To what extent would it be acceptable to proceed with the defence of a client for whom forensic evidence has not been sought for financial reasons? There is a danger in eliding the interest of consumers and government: a proper regulatory role may require the defence of professional standards against the government. Yesterday's problem was the strength of the professional bodies; tomorrow's may be their weakness.

One major lesson – which must not get lost – emerges from this analysis. If the main role of the Lord Chancellor is to maintain the rule of law then legal regulation is only one of the levers available. As far as access to justice is concerned, regulation cannot be separated from the issue of funding and a host of other related policies. The government needs a transparent set of policies – particularly so as funding gets squeezed.

Preliminary point: too many cooks, too many implements

The structure of regulation of the legal profession certainly appears to a relative outsider as incoherent, bureaucratic and somewhat old-fashioned. It will be interesting to see where the debate on press regulation ends up. Exactly the same issues of government interference arise and the ideal result would appear to be some form of reconstituted self-regulatory body with more genuine concern for the public interest working within a clear statutory framework that privileges correct behaviour. Ideas of a super-regulator or an extended role for OFCOM seem to be falling by the wayside.

The current list of reserved activities inherited from history and retained in the LSA seems unjustifiable. Why is conveyancing in but wills out? The reason actually goes back to what was perceived necessary to protect solicitors' commercial position. However, a Ferrari may cost as much as a house and amount to the whole of an estate: why can you buy and sell one without having to be a lawyer? The transfer of a major commercial undertaking may dwarf in value that of almost all estates and houses. There needs to be new thinking of what is regulation and why.

Regulation: of what and to what end?

The LSB has recently issued a consultation paper on its future.[4] It proposes three somewhat unimaginative themes to underlie its regulatory role:

- Consumer protection and redress should be appropriate for the particular market.

- Regulatory obligations should be at the minimum level to deliver regulatory objectives.

- Regulation should live up to the better regulation principles in practice.

This all seems a bit motherhood and apple pie without saying very much. Without claiming to be any expert, it would seem that the relevant principles (at least as concerns those on low incomes) might be better expressed as:

- Regulation will be focused on preserving the integrity of the judicial process and, thereby, the rule of law.

- Regulation will assist consumers and clients to accessible redress in the event of an unacceptable failure delivery of service by a provider.

- Regulation will seek to encourage innovation by being at the minimum level to cover essentials.

- Regulation will be transparent: its principles will be set out in statute and, thereby, agreed by Parliament.

The structure of regulation of the legal profession is, of course, bedevilled by the historical battle between the Law Society and the Bar – which continues unabated even while really major threats to both emerge from the sidelines in the form of major conglomerates owned by non-lawyer entities. In the traditional 'High Street' area of general solicitor practice, this turns out not to be from much hyped Tesco's but from the Co-op which is investing hard to become a player in many areas of standard High Street activity – wills and probate, conveyancing and matrimonial proceedings. Given the Co-op's strong presence in funeral services and groceries, it is likely to prove a hard competitor to beat.

Seen other than through the eye of history, it is logical for the state to be fundamentally concerned for the integrity of the court process. The rule of law needs dependable courts, tribunals and lawyers – both in criminal and civil cases. In John Grisham's 'The Firm', Bendini, Lambert & Locke turned out to be owned by the mafia. The fictional consequences were bad enough but the consequences in reality would be worse. Any number of ethical issues can arise in the handling of a criminal or even a civil case. Contrary to our domestic history, there would appear to be no particular distinction between preparation and presentation of a case – the same requirement for integrity applies.

Personally, I would not allow non-lawyer control of any business carrying out this function but I understand that we are probably beyond that point. The creation of combined firms of lawyers and funders is unavoidable and may make the prospective banning of referral fees effectively irrelevant. The Legal Services Act was, of course, drafted at the high point of de-regulation before the financial crash which exposed conflicts of interest otherwise hidden.

In addition, to regulation of court-based litigation, I think that the regulation of title should remain. Any organisation, such as the Law Society, Bar or ILEX, may wish to regulate the use of their 'brand' or name. It is in the public interest that this be allowed, provided that core activities are otherwise regulated, eg, advocacy rights. There would, of course, be no problem in a regulator of advocacy and litigation rights passporting certain categories of advocates and litigators so that they can undertake court work.

That leaves a whole tranche of legal activity – from servicing the legal needs of corporations to wills and conveyancing. On basic principle, it seems open to question whether any legal business activity – such as will-drafting and land conveyancing – needs to be regulated beyond a requirement for insurance and adequate complaint procedures, including powers to order compensation. These conditions could be imposed by statute; competence would be covered by the need for insurance and the regime could be supervised with a relatively light touch by some regulatory body. There might be a stronger case for regulation of the holding of client moneys – though again this might be dealt with by requiring insurance. Clearly, however, the LSB intends to extend regulation on the ground of consumer protection to wills, if not the very act of giving legal advice.

Such an approach would leave a case for:

- A regulator for court advocacy and preparation – regarded as different functions within the one activity and with certain common requirements and some specific. There might be 'passporting' by virtue of membership of certain self-regulating professions. This would include protection of standards where there might be pressure from low remuneration. The principles for regulation should be clearly stated in legislation so that Parliament takes direct responsibility for them.

- Any number of self-regulating professions controlling use of their own names but not automatically the functions undertaken by virtue of the name. This would primarily be the Law Society and the Bar Council but would include others.

- A regulator of the holding of client money and specified business activity.

This would make a coherent three levels of regulation. In the meantime and in the practical world, the squabbling will, no doubt, continue.

Notes

1 S1(1)(e) LSA 2007.
2 S1(1)(b) LSA 2007.
3 The Sixth Sir David Williams Lecture 'The Rule of Law', p7.
4 Legal Services Board Enhancing Consumer Protection, Reducing Regulatory Restrictions, 2011.

Developing best practice amongst defence lawyers and access to justice in European arrest warrant cases

Jodie Blackstock

This article is the interim report of an innovative project funded by the European Commission involving JUSTICE in partnership with the European Criminal Bar Association and International Commission of Jurists European sections.

Introduction

The European arrest warrant (EAW) has been in force since 2003. Much research has been carried out into whether the framework decision that established the EAW was implemented correctly and whether member states are able to use the instrument efficiently and co-operate with each other effectively. There has, however, been an absence of research on effective representation of persons in the EAW scheme. This two-year project aims to provide some idea of how effective defence cases are from the particular perspective of the defence lawyer. This is an interim report. It is published here for the general interest it may provide on how the EAW is being implemented. It has also been used by JUSTICE in lobbying on the legislative initiative of the proposal for a directive of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest, Measure C on the Swedish road map on procedural safeguards.

The project is a joint one between JUSTICE, the International Commission of Jurists (ICJ) and the European Criminal Bar Association (ECBA). It is funded by the European Commission's criminal justice funding programme and indicative of the pan-European work EU funding can support. It also showcases the comparative nature of JUSTICE's EU justice programme. We are also currently engaged on a four-jurisdiction empirical study of suspects' rights in police detention jointly with the University of Maastricht, University of the West of England, University of Warwick and supported by the Open Society Justice Initiative and Avon and Somerset Constabulary. This resulted from an earlier ten-country study *Effective Criminal Defence in Europe* published by Intersentia (2010).

The EAW project commenced in September 2010 with six member states. It expanded in the summer of 2011 to ten. The ten EU member states involved

in the project are the UK (England and Scotland), Denmark, The Netherlands, Sweden, Italy, Germany, Greece, Ireland, Poland and Portugal.

Whilst the Framework Decision on surrender proceedings (FD) provides for legal representation in the executing member state in order that the requested person might consider whether to surrender, and to assist the requested person with challenging surrender, there is no provision for legal assistance in the issuing member state during surrender proceedings. This could be a fundamental flaw in the scheme. Our starting presumption for the project was that the provision of legal assistance in the issuing member state should be explored to consider whether more effective representations might be made in the executing state concerning the reasons for refusal to surrender. It will not always be possible to obtain information through the prosecutor about the issues the requested person may raise because the prosecutor may not be willing or able to find accurate information of the nature required. Nevertheless defence lawyers must be able to ascertain whether the correct procedure has been followed in the issuing state when a criminal prosecution and EAW are sought by that state, particularly where the requested person queries the basis of a warrant, and whether the treatment the requested person is likely to receive upon surrender will meet the standards of the European Convention on Human Rights (ECHR). Currently there is a strong possibility that equality of arms is being undermined in the EAW scheme by the failure to afford some form of dual representation.

Furthermore, whilst Eurojust and the European Judicial Network exist to enable communication of information between prosecution and judicial authorities on cross border crime, there is no similar formalised network of criminal defence lawyers. The project seeks to identify whether this must be addressed if mutual trust is to be effective in the EU.

The original Commission proposal on Measure C contained an article (Article 11(3) to (5)) which would allow for legal representation in the issuing member state. It provided as follows:

> *3. Member States shall ensure that any person subject to proceedings pursuant to Council Framework Decision 2002/584/JHA, upon request, also has the right of access to a lawyer promptly upon arrest pursuant to a European Arrest Warrant in the issuing Member State, in order to assist the lawyer in the executing Member State in accordance with § 4. This person shall be informed of that right.*
>
> *4. The lawyer of this person in the issuing Member State shall have the right to carry out activities limited to what is needed to assist the lawyer in the executing Member State, with a view to the effective exercise of the person's*

rights in the executing Member State under that Council Framework Decision, in particular under its Articles 3 and 4.

5. Promptly upon arrest pursuant to a European Arrest Warrant, the executing judicial authority shall notify the issuing judicial authority of the arrest and of the request by the person to have access to a lawyer also in the issuing Member State.

However, the progress report issued at the end of the Polish Presidency in December 2011 and the subsequent general approach confirmed by the ministers of justice of the member states meeting in the Council on Justice and Home Affairs in June 2012 made clear that the member states did not wish to include this right in the directive. As such, the current draft no longer affords the right to legal assistance in the issuing state. Attention then turned to the European Parliament which considered the original draft proposal itself and made its own recommendations for amendments. At the time of writing the votes on the text are still pending and it is hoped that the possibility of support for dual representation will remain in its version of the directive as the three law making institutions (the Commission, Council and Parliament) enter into negotiations to find a final version. Whilst the absence of a codified right does not prevent a requested person accessing assistance, without an enshrined right, the provision of assistance is on an ad hoc basis, often unfunded and dependent upon the connections that either the requested person or his/her lawyer in the executing state have in the issuing state, rather than upon any uniform network of accredited or quality assured defence lawyers.

Methodology

The project will attempt to ascertain whether EAW cases are, in practice, restricted without the use of dual representation. By linking EAW practitioners in different member states, and where possible providing assistance in both countries, it is hoped to demonstrate that having the assistance of lawyers in the issuing state during surrender proceedings will improve the ability of the lawyers engaged in the executing state to fairly represent their clients. It will demonstrate whether there are any omissions when only a lawyer in the executing state is engaged. This process will increase knowledge amongst defence practitioners of other member states' legal systems and allow critical evaluation of the EAW scheme through practical examples.

Results are being gathered through information provided by defence lawyers on their representation in EAW cases, thereby affording an evaluation of the effectiveness of the EAW scheme in practice from the defence perspective. Practitioners are asked to fill out a uniform questionnaire that captures information about each stage of an EAW case and how the defence is pursued.

Particular questions are included about whether information is gained through the assistance of a lawyer in the issuing state.

The information received from the practitioners is then critically evaluated to identify the problems in defending these types of actions. The exchange of best practice on how to effectively represent the interests of suspects and accused persons from the results will help improve representation in EAW cases.

The project involves at least two lawyers and one reviewer in each participating country. The team has met twice in London to discuss concerns and suggestions about the EAW. In addition the teams will meet every six months in their respective countries to discuss their specific problems.

The countries involved are exchanging knowledge with each other and utilising this in the EAW cases engaged with during the course of the two-year pilot project. Where possible, they are utilising each other's services in their cases as issuing state lawyers. Through this process the project is developing a network of defence practitioners through which it is possible to identify a model upon which an EU-wide network of expert lawyers can be based.

The final report and conference are due in September 2012. It is hoped that the published report will assist defence lawyers and educate judges and prosecutors across the member states in ensuring the best defence and in developing a network of assistance for defence lawyers in EAW cases.

Results so far

Below is a summary of the main concerns that the participants in the project have raised so far, generally in relation to the system in their country, and particularly in examples of cases where they have tried to argue against surrender or made arrangements in the interests of their clients. These demonstrate the difficulties in providing an effective defence in EAW cases, but also show how expertise, diligence and co-operation can result in far better outcomes for the requested person and invariably for the issuing state, from a cost-benefit analysis, as well.

Summary

- All lawyers involved in the project have expressed the importance of having assistance from lawyers in the issuing state.

- This assistance allows lawyers to verify relevant law against the instructions they have received from their clients; advise as to any human rights complaints the client has raised; assist with obtaining evidence to support arguments against surrender; liaise with prosecuting and judicial authorities

in the issuing state where appropriate to negotiate the withdrawal of the EAW, or voluntary surrender upon suitable conditions.

- All lawyers have had difficulties obtaining assistance from a lawyer in the issuing state and have only found lawyers through ad hoc arrangements. There is no way of knowing in advance the standard of the lawyer. Assistance is usually gained through 'word of mouth' arrangements.

- In no country, save for the UK, is legal aid provided to cover the assistance of a lawyer in the issuing state (where it can be used to obtain expert evidence in this regard).

- In most countries legal aid is very limited and does not cover the amount of work necessary for an EAW case.

- In no country are lawyers required to be specifically trained in how to conduct EAW cases, though some operate a duty scheme which requests that lawyers undertake courses. Few countries provide any training at all.

- Most lawyers are permitted to undertake all types of cases including EAWs.

- All courts impose a high evidential burden to overcome the presumption that the issuing state protects the rights of the requested person in accordance with its status as a contracting party to the European Convention on Human Rights.

- In all cases the EAW was likely to have a substantial impact upon the established life of the requested person in the executing state.

- Where cases are fully defended, it is impossible to comply with the time limits set out in the FD.

- In the rare cases where surrender is refused, the alert is not removed from the Schengen Information System or Interpol red notice system, thus preventing the requested person from leaving the executing state.

- Requested persons being returned to Poland are transported in a decommissioned military plane, which is below standard. It can travel to a number of countries in one trip in order to collect people, which can mean some people spending long periods of time on the plane. There are no facilities and the people are handcuffed to chairs set out in the cabin space.

Ireland

1. The procedure in three of the four cases (where consent to surrender was not given) exceeded the time limit set by the FD.

2. The requested person is entitled to a lawyer immediately following his/her arrest. Legal representation is available in police custody.

3. It is common practice for the Irish courts to release the requested person on bail pending the surrender decision being made.

4. The legal aid mechanism creates problems in affording effective legal representation of the requested person as not enough funds are allocated to the defence lawyers to cover the time spent on the case. Conscientious lawyers spend many hours in preparation for these cases which cannot be covered by legal aid. It can be assumed that lawyers less able to incur pro bono hours will not conduct more than the minimum work on these cases. The Irish Supreme Court has held that the FD at Article 11(2) only provides a right to legal representation not to legal aid.

5. Irish courts are not sympathetic towards ECHR based arguments in EAW hearings, though they have acknowledged some standards, see *MJELR v Rettinger* [2010] IEHC 206 (concerning the level of inhuman and degrading treatment required to prevent a surrender).

6. It is very unlikely for an EAW challenge to be successful in the Irish courts. Even if it is, the requested person remains on the alert system and as a consequence he/she can not leave the country without being rearrested. Dual representation is extremely valuable to the process.

7. There is no accreditation scheme for lawyers handling EAW cases, which means there is a lack of training/expertise in these cases.

8. There is no accreditation scheme for interpretation and translation, which makes it difficult to know whether the service provided is of sufficient quality.

9. The first instance court for EAW cases is now the High Court. The automatic right to appeal has been abolished and is now dependent upon permission from the High Court.

10. Ireland tends not to issue EAWs for non-serious cases.

Cases

- Request from Sweden. The requested person refused to surrender because the warrant had been issued to continue an investigation and not to prosecute an offence, in accordance with Article 1 FD. Additionally, bail would not be available on the requested person's return. A lawyer in Sweden was engaged to advise on the procedure in Sweden. The case was appealed to the Supreme Court which held that interviewing the requested person without having filed charges fell within the ambit of 'conducting a criminal prosecution' under Article 1 FD. Whilst there was not bail as such available, there were provisions for pre-trial release. The case took 154 hours of the Irish lawyer's time alone and four years, six months from arrest until surrender. Without the assistance of the Swedish lawyer it would not have been possible to ascertain whether the EAW accorded with Article 1 FD and the right to pre-trial release.

- Request from Lithuania. The requested person refused to surrender on account of prison conditions. A lawyer was instructed pro bono in the issuing state to advise upon conditions and the Committee for the Prevention of Torture report. The warrant was withdrawn because the requested person was released pending the decision and returned to Northern Ireland where he was arrested on the warrant. The case was then dealt with by the UK.

- Request from Northern Ireland. The requested person refused to surrender because there were no adequate review mechanisms of life sentences pursuant to Article 19 FD, passage of time and that other less coercive mechanisms should have been employed. A lawyer was instructed pro bono to advise on life terms in the UK, whether there had been delay and on less coercive measures to return. The challenge failed.

Poland

1. Although legal aid exists, it is not easily accessed in Poland and is at a very low rate, despite there being a requirement of mandatory defence in EAW cases. Legal aid covers only the proceedings in Poland as executing state and will not provide for the assistance of a lawyer in the issuing state or where Poland is the issuing state prior to the return of the requested person.

2. Lawyers appointed through legal aid generally do not have sufficient knowledge or expertise about EAW cases to effectively defend them. There is no specialism in criminal law in Poland, and especially not in extradition. All lawyers can take these cases.

3. There is evidence in some cases that agreement between an issuing state defence lawyer, the court and the public prosecutor could be made to the benefit of the requested person. This is entirely dependent upon the reputation and diligence of the lawyer rather than any pre-arranged system. It also is subject to the executing state lawyer being able to access this assistance.

4. The requested person is informed of his/her right to a lawyer on the first interview before the public prosecutor as opposed to during police custody. It does not seem that there is an effective right to a lawyer during police custody.

5. Appointed interpreters can assist only in formal hearings and not in conferences between the lawyer and the client, where the lawyers often do not have the language skills to communicate with their clients who do not speak Polish.

6. Poland does not use a proportionality test when issuing an EAW. Polish courts issue EAWs without initially exploring other, less coercive measures. Guidance has been issued to the courts about considering alternative measures prior to issuing EAWs. The number of requests last year was approximately 1,000 fewer than the previous year. This could be for a number of reasons, not least that there are now fewer people to return on historical warrants.

7. There is no centralised system for issuing warrants, therefore there is no communication between courts about the issue of warrants and multiple warrants may be issued concerning the same person, which may not be addressed by issuing states at the same time. This means that, despite one warrant being addressed through the EAW system, another will remain pending after the first. There are current attempts to co-ordinate warrants between the different court districts.

8. There is no legal remedy against the issuing of a warrant by the issuing state.

9. Once returned to Poland, courts seek written authorities from the executing state to revoke specialty (the immunity from subsequent prosecution for offences not sought in the extradition proceedings) without the knowledge of the accused.

10. Executing courts in Poland rarely check the correctness of the warrant. Therefore, it is almost impossible to challenge an EAW request that comes to Poland.

Cases

- Return from the UK to Poland. The Polish lawyer was contacted by the client in the UK who did not consent to surrender. The UK lawyer was difficult to contact and did not provide sufficient information to enable the Polish lawyer to assist. The UK lawyer was not an extradition lawyer yet did not pass the case to someone more experienced. The Polish lawyer could not, therefore, assist.

- Return from The Netherlands to Poland. The requested person consented to surrender but in circumstances where the Dutch lawyer had contacted the Polish lawyer to arrange for a speedy initial hearing and quick return to The Netherlands. He was Dutch and had health concerns. The Polish lawyer was paid privately and was able to arrange for a hearing within four days of the person's arrival in Poland, following which the court accepted his return to The Netherlands pending the trial. This would not have been possible without the assistance of the Polish lawyer. It is an example of how less coercive measures may be used, and of how the European Supervision Order could operate. It is also a case which could have been heard through a video link, removing the need for the person to attend the court hearing in Poland.

- Return from the UK to Poland. The requested person was informed that the warrant had been sent to the UK whilst he was in Ireland. He contacted a lawyer in the UK who was unable to assist due to lack of expertise. A lawyer in Ireland was able to contact a Polish lawyer who reached an agreement with the Polish authorities that the warrant would be withdrawn in the UK and he then returned to Poland voluntarily to address the matter for which he was wanted.

- Return to Austria. The requested person refused to surrender because seven offences were listed and no information was given about whether cumulative sentences could amount to a life sentence. The Polish court refused to seek further information about this issue. The Polish lawyer was unable to obtain information about the law in Austria. Return to Austria was ordered.

Italy

1. There is no accreditation or training provision for lawyers who handle EAW cases and no central court handling cases, which means that general practitioners can take these cases despite having no expertise in them. This results in most persons consenting to surrender because they do not fully understand the consequences of doing so.

2. There is no proper examination of the type of offence and the sentences attached to the offence by the Italian courts. Double criminality is automatically assumed.

3. There is limited provision of interpreters and translators who cannot be assessed for quality because there is no requirement for accreditation.

4. There is no right of re-hearing if a person is tried in absentia, this has to be applied for. Often people are convicted in their absence and then an EAW is requested. Executing states will return the requested person, despite there being no guarantee of a re-hearing.

5. It is not possible to have a defence of good quality within the short time limits provided because lawyers are either not skilled in extradition law or are unfamiliar with the law in the issuing country. Adjournments will only be granted if lawyers can demonstrate a good reason for requiring one and often they do not do so.

Cases

- Return from the UK to Italy. The EAW was for the execution of a sentence. However this sentence was revoked on appeal. The first instance court did not withdraw the warrant because there was another offence for which the requested person was wanted. In relation to the second offence, the requested person argued that he had been wrongly identified as the culprit, but this defence had not been raised in the executing state. The lawyer in Italy who appealed the sentence was not contacted by the lawyer in the UK, despite the requested person refusing to surrender because of the pending appeal. His return was ordered by the UK but he absconded from custody. In the meantime, the appeal was successful, and the Court of Cassation has ordered the first instance court to review its decision not to withdraw the warrant. The requested person has since been rearrested in the UK and is awaiting extradition. His UK lawyer did not appeal or do any further work on the case since he was no longer instructed by the requested person. Had the UK lawyer been trained in extradition law and been in contact with the Italian lawyer he could have argued that the warrant be stayed pending

the outcome in Italy and could have arranged for pre-trial release of the requested person.

The Netherlands

1. The requested person is entitled to a lawyer immediately after his/her arrest, but is unlikely to see a legal aid appointed lawyer until his/her appearance in court. There is, however, a duty scheme in place and the lawyers on the scheme must have undertaken some training in EAW cases. Nevertheless, whilst a case must initially be given to a lawyer on the duty scheme, there is nothing to prevent another lawyer taking over the case. There is also a very long waiting list of experienced extradition lawyers who are not being placed on the duty scheme.

2. There are specific provisions for legal aid in EAW cases and all work appears to be properly remunerated.

3. There do not appear to be problems with interpretation.

4. Cases are heard only by the high court in Amsterdam but there is no provision for appeal against a surrender decision of the court.

5. The procedure is much quicker than in other countries and within the FD time limits, attributed to the lack of appeal but also the lawyers seem to spend much less time on these cases than in Ireland and the UK, for example.

6. Dual representation has brought successful and impressive results to cases where it is possible to obtain the assistance of a lawyer in the issuing state.

Cases

- Request from Belgium. The requested person refused to surrender because of his medical condition and that the crime had been committed in The Netherlands. He was released pending the hearing. There was no contact with a lawyer in Belgium. Under Dutch law it is necessary to indicate upon the return of a requested person that, should he/she be convicted, the sentence can be served in The Netherlands, though this remains a matter for the issuing state. The surrender was ordered because the victims of the crime were located in Belgium.

- Request from Germany. The requested person refused to surrender as he did not wish to return to Germany because of a lack of detail in the request. The court ordered surrender as there were no grounds to oppose. A German

lawyer could have assisted with clarifying the details and advising on whether there were any grounds for refusal.

- Request from Belgium. The requested person refused to surrender because it was not clear how he had participated in the offence. A lawyer's assistance was engaged in Belgium who conversed about the case via email. The Dutch court sought further information from Belgium as to the participation of the requested person, setting a time limit of three weeks for a response. There was more than one offence itemised in the EAW and the court ordered surrender only in respect of the properly particularised offence.

- Request from Hungary. The requested person refused to surrender because of prison conditions in Hungary and also that the sentence had been passed whilst she was a juvenile, but she was now 32 years old. Assistance was obtained from a lawyer in Hungary who was paid but not directly through legal aid. The court ordered that the sentence be served in The Netherlands because of the prison conditions in Hungary.

- Request from Poland (see assistance of lawyer under 'Poland'). The requested person refused to surrender as he challenged his involvement in the offences. He also wanted to prepare for the case in The Netherlands rather than being in Poland, due to his age and health difficulties and his life being established in The Netherlands. The court accepted that three of the four offences fell foul of the statute of limitations and requested further information about whether he would receive sufficient medical assistance in Poland. The lawyer in Poland provided information about the offences, limitation periods and medical assistance. He then arranged for voluntary surrender and return to The Netherlands after the initial hearing before the Polish court through an agreement with the prosecutor and court (see entry under Poland).

United Kingdom

1. There is no training requirement for duty lawyers, who are retained in cases at the first appearance at court, on procedure and on how to appeal, though optional training courses are available. Equally the judiciary should be provided with more training on human rights issues in the EU and how to approach mutual recognition.

2. The time limit for entering an appeal is extremely short and makes it very difficult to put in an appeal in time, which can shut out deserving cases.

3. Nevertheless, cases invariably exceed the time limits set out in the FD, due to adjournments to investigate instructions and seek further information.

4. Courts will not entertain human rights arguments without evidence to show a real risk of harm (in relation to inhuman and degrading treatment and prison conditions), a flagrant breach of the right to a fair trial or that the impact upon family life will be oppressive (which is only likely to occur in exceptional circumstances). The human rights threshold tests that are applied are far too high and impossible to meet.

5. Dual representation can bring successful results in cases which are not otherwise achieved. Lawyers in the issuing state can provide the necessary evidence to satisfy the courts. Legal aid can be applied for to cover fees of a lawyer in the issuing state as an expert witness.

6. Legal aid is available and a duty scheme applies for lawyers but there is a limit on how much can be spent.

7. Pre-hearing release is available and usually awarded.

8. It has not been determined whether the EAW procedure is criminal or civil. Therefore, it is not clear which standards and balance of proof apply to proceedings.

9. The prosecution is not collaborative in providing answers to queries made by the defence.

10. The UK does not issue many EAWs as it operates a public interest test which effectively considers proportionality.

Cases

- Request from Lithuania. The requested person refused to surrender because the offence was not sufficiently particularised and a long time had passed since the alleged offence took place. Information was requested from the issuing state about the circumstances of the offence. Assistance was obtained from a Lithuanian lawyer about passage of time and the alleged offence. This caused delay. The court would not allow the defence lawyer to raise all the arguments against surrender because they had been previously argued in other cases. Surrender was ordered as there was sufficient information to ensure that the EAW was valid and the time that had passed was not such as to result in oppression or hardship to

the defendant in relation to their family life in the UK or their ability to defend the trial in Lithuania.

- Request from Latvia. The requested person refused to surrender due to passage of time, prison conditions in Latvia (in particular the cell size) and likely discrimination due to involvement in a nationalist organisation. Surrender was ordered. Upheld on appeal (taken only on passage of time).

- Request from Poland. The requested person refused to surrender due to passage of time, remand conditions (expert report available on conditions; repeated findings of Article 3 ECHR violations in Strasbourg), impact on family life. Surrender was ordered.

- Request from Poland. The requested person again refused to surrender due to passage of time and prison conditions. Surrender was ordered. Upheld on appeal.

- Request from Latvia. The requested person refused to surrender because the offences were not extraditable, the prison conditions and due to specialty. The warrant was dismissed as the offences were not extraditable. The court would not hear argument in relation to prison conditions as this ground had been dismissed in a previous Latvian case.

- Request from Austria. The requested person originally refused to consent because pre-trial release arrangements were not clear and there would be an adverse impact upon her child. She agreed to surrender following assurances from Austria that she would not be held in pre-trial detention.

- Request from the Czech Republic. The requested person refused to surrender due to the passage of time. Family members in Austria produced affidavits. Surrender was ordered at first instance. The lawyer ceased to act on appeal.

- Request from Poland. The requested person refused to surrender due to prison conditions and specialty. The case was adjourned pending another case relating to prison conditions in Poland.

- Request from Poland. Assistance was gained through a Polish lawyer in relation to the length of time spent on remand and conditions. The warrant was withdrawn because it was possible to arrange safe passage.

- Request from Poland. The requested person was wanted for the non-payment of a fine, which resulted in a custodial sentence for the offence. The warrant was withdrawn because the fine was paid.

Germany

1. The rules relating to requesting a warrant are the same as with domestic cases. There needs to be a high suspicion based upon several grounds that an offence has been committed. There is a proportionality principle. There would need to be serious doubt, however, that a request was not made on good grounds to challenge the issue of a warrant.

2. As an executing state, Germany is extremely efficient. There is hardly any possibility to challenge the warrant. There has been some success by invoking the proportionality principle, but this has been in relation to very minor offences resulting in severe impact upon the life of the requested person in order to succeed. It is unlikely that the court will hear witness evidence about the case. It is possible to challenge the validity of the warrant on formal standards.

3. There are 23 courts dealing with EAWs. This is a very small number in comparison to the population. There are very few skilled lawyers working on these cases. Legal aid is not linked to income and preparing a defence is essential, so legal aid will always be available, although this is a fixed sum, regardless of the amount of work done.

4. There are sufficient interpreters and translators available.

5. Dual representation is an essential part of the defence. There is almost nothing defence lawyers can do in Germany so they will arrange for a lawyer in the issuing state to take the case over immediately upon a person being surrendered. Requested persons say that if it is not possible to fight the EAW then they wish to be returned as soon as possible. However, people are not returned quickly. If the requested person is not a German national he/she is unlikely to be released pending the return and will spend two to five weeks in prison.

6. There is a veneer of mutual recognition. Because it needs to be a judicial authority that authorises the warrant, there is a presumption that all member states correctly issue the warrant and give proper scrutiny to the decision to issue the warrant.

7. Waiver of specialty – if a person is badly represented it is likely that specialty will be waived as the lawyer will not appreciate the consequences of this.

8. It is not really possible to argue human rights points because there is an assumption that all countries in the EU comply with the ECHR. The requested person would need to prove there was a threat to life or something very serious before a court would refuse a warrant. Even so, a case might need to be taken to the constitutional court.

Portugal

1. The situation in Portugal is similar to Italy. Legal aid does not work effectively at all; there are many problems with fraud, for example.

2. There is no training for lawyers. The lawyers who provide legal aid work tend to be those who don't have many clients. They are unlikely to know much about the EAW scheme, they miss deadlines and cannot communicate because of language differences. There is a case currently on appeal concerning a British person who received poor representation.

3. There is a general problem with translators and interpreters because they are provided by the prosecution. There is no accreditation scheme. There are no separate funds to pay for interpretation and translation for conferences between client and defence lawyer so improving quality is difficult.

4. Proportionality is a problem with respect to detention. People are arrested to further an investigation without any grounds for arrest. This problem is difficult to change and extends to the issuing of EAWs in addition to domestic warrants.

Denmark

1. Legal aid is offered because EAWs are treated as criminal proceedings. There is no limit on costs. The court will order what is necessary in the circumstances.

2. Interpretation and translation are common, of sufficient quality and there are many ways to obtain these services.

3. There are no problems in principle with raising human rights arguments but in the Danish system the defence does not investigate. The police identify what evidence they have and the defence then requests what evidence it requires, or further investigation. There is a risk with this

as the defence obviously might want to know what a witness is going to say before the police do. The police may say the evidence requested is irrelevant, which requires the court to then decide whether it will be obtained. This also means that the defence cannot call its own independent experts; the appointed list has to be used. These are of high quality but are outside the control of the defence.

4. Dual representation is less relevant because any issue is submitted to the prosecutor or court and they will initiate the request with the issuing state to find the information. Because courts wish to be in control it is likely that the court would raise the issue of its own motion.

Cases

- Request from Poland. The conviction was many years old, the requested person had received a suspended sentence and moved to Denmark. He failed to report and an EAW was issued. Poland decided to execute the original sentence. The requested person refused to surrender because the case was tried in absentia and, therefore, there should be a re-trial. Further information was sought from Poland as to whether the trial had in fact been held in absentia. Poland said the notification for the trial had been sent to the last known address so it was not certain if the requested person was aware of the trial. However, the trial could be re-heard at the court's discretion. The Ministry of Justice then argued that the in absentia test did not apply in the circumstances of this case. The case is pending in the Supreme Court.

Greece

1. EAWs are issued against people whom it would have been possible to simply examine prior to the EAW through mutual legal assistance (MLA). If someone has never been before the examining magistrate, he/she will be requested on an EAW to do so and then spend time in pre-trial detention pending a decision to proceed to trial. Existing channels should be used prior to issuing the EAW. Even where the requested person volunteers to return to Greece the authorities will not withdraw the warrant. The EAW is used because it is more efficient than using MLA.

2. If a person is returned under an EAW he/she is treated as a fugitive and will most likely be detained. Cases show how easily warrants are issued, without proper scrutiny by the issuing judicial authority and the consequences of these – see Andrew Symeou.[1]

3. Cases are handled by judges and lawyers usually undertaking criminal cases. However, more training is needed in how the system works. Some

lawyers are not competent to deal with EAW cases due to their lack of knowledge.

4. Because the country is in such a poor financial state, the government cannot pay lawyers or provide training. Some legal aid is available. However, lawyers have not been paid for over a year and are reluctant to take cases. Any lawyer can do legal aid work, there is no accreditation procedure.

5. Dual representation would be a positive step forward. It is practically impossible to properly defend a case without the assistance of a lawyer in the issuing state to advise on the law and culture in that country.

6. Because of the speed of the system there is no time to obtain translations. The court will, however, grant time if this is properly argued. There is no body of court interpreters but there are increasing numbers of foreign people being prosecuted, some of whom do not speak Greek or speak different Greek dialects. English can sometimes be used but often suspects do not have a good understanding of what is happening. During the summer tourist season, an island population of 500 can rise to 5,000. There are no resources for interpreters. The European Legal Interpreters and Translators Association EULITA will help but there are no accredited translators. Most will suggest they speak the language concerned but the quality of their work is very poor. They can deal with minor legal cases, but where there are complex matters they are not capable of adequately interpreting the proceedings. Courts will not accept translators unless they are on the court approved list, even if they are clearly competent. The daily fee is only around €14 so good interpreters will refuse the work because they would be required to attend court all the time for very little remuneration.

6. Greek legislation provides that breach of human rights should prevent surrender. There have been some cases but these are rare.

7. There is no automatic system of surrender in Greece, but it depends on the lawyers. If they are active on behalf of their clients, the court will listen. However, because extradition should be facilitated between EU member states, it is difficult to convince the court to refuse surrender.

The way forward for the project

We are expanding the remit of the project to obtain as much information as possible. By sending our questionnaires to the bar associations in each participating country and getting in touch with more lawyers conducting

these EAW cases, we hope to obtain more examples of best practice and areas of concern. We are meeting with the ministries of justice in each participating country to raise our concerns and discuss possible reform. We have already held meetings in the UK, Poland and The Netherlands which have been productive and have demonstrated that the member states share a similar goal of improving the quality of the system and ensuring it is only used where necessary and proportionate.

It appears to us from the information we have received that it is critical to improve the quality of defence in EAW cases, through training and some form of dual representation. To this end we are exploring the development of a quality mark and a database of peer recommended criminal lawyers across the EU that can be maintained by the European Criminal Bar Association and can be readily accessible on its website. We are also exploring how dual representation can be developed so that the member states see an enhancement to the system rather than a mechanism to subvert its efficiency. Our final report will be published in September.

Notes

1 For details on this case please consult media reports such as http://www.telegraph.co.uk/expat/expatnews/8864518/Andrew-Symeou-criticises-extradition-laws.html

Reviews

EU Law for UK Lawyers (Second Edition)

Aidan O'Neill QC

Hart Publishing, 2011

1,122pp £75

The law of the European Union is deeply embedded in the national legal order of member states. The doctrines of supremacy and direct effect of European legislation that have been long now introduced by the Court of Justice of the European Union (CJEU) and the wide range of areas that the EU regulates have made EU law an important part of every national legal order in Europe. Aidan O'Neill, an experienced practitioner in the UK with expertise in EU law is well aware of that. Nonetheless, as he observes at the beginning of his book 'a still not uncommon misapprehension among lawyers in the UK is that EU law is a set of regulations which apply only in certain areas of specialised practice, like competition law and international trade. In fact its impact is so much wider than this and is ever-increasing'. The purpose of this book is to correct this misapprehension by presenting the expansive legal areas that EU law regulates and to describe the relevance of EU law in the everyday practice of UK lawyers.

This is the second edition of a book first published in 1994 and the author has restructured the book in order to take account of the fundamental changes and developments in the European legal order since then. More specifically, O'Neill examines the new competences of the EU that the Lisbon Treaty has introduced. Since this Treaty came into force, the EU has played an active role in regulating areas such as criminal law that were hitherto reserved for the member states. Another important addition to this book is the focus on the Charter of Fundamental Rights of the EU, which 'now has the same legal value as the EU treaties'.

The book is divided into two parts. In the first part, which comprises six chapters, the author presents and analyses the fundamental principles and basic doctrines of the European legal order, as well as the functioning of the CJEU. These chapters are essential for any practitioner with little knowledge of EU law who wishes to come to grips with the way that EU law, as interpreted by the CJEU, influences and interrelates with the UK legal order. The author describes doctrines such as direct effect in an accessible yet accurate way with plenty of references to the jurisprudence of both the CJEU and the UK courts. An important contribution of this book is the chapter on the role of fundamental rights in the EU. The now binding force of the human rights Charter as well as the potential accession to the European Convention on Human Rights creates complex questions as to what the practical implications are for the UK legal order. O'Neill sufficiently clarifies these questions by presenting the relationship between the two treaties and by analysing the impact that the Charter has on decisions of the UK courts.

The second part of the book is subject-specific and examines a wide range of legal areas ranging from Agriculture

and Fisheries law to Immigration and Asylum in the EU. The strength of these chapters is their focus on practice and their clear structure, which permit a practising lawyer to gain a comprehensive overview of the fundamental primary and secondary EU legislation as well as the main CJEU case-law in each area. It is in these chapters that the author's experience as a practitioner pays off, since he understands what information to include in order for a lawyer to quickly and sufficiently familiarize him/herself with a specific legal area.

This book achieves its purpose in accurately describing the impact that EU law has on the UK legal order. Although, as the author himself acknowledges, it can not stand as a comprehensive account of EU law it is a great introduction to the field and an essential reference book for every practitioner in the UK.

Vasileios Fragkos, criminal and EU intern, JUSTICE, spring 2012

Nuremberg: Its Lesson For Today

'A landmark in the history of civilisation' is how Sir Hartley Shawcross, British Prosecutor, described the Nuremberg Trials. This defining moment in international justice established principles laying the groundwork for all subsequent prosecutions for crimes against the peace, war crimes and crimes against humanity. NUREMBERG: ITS LESSON FOR TODAY, commissioned by the US War Department in 1948 was widely screened in Germany as part of the Allies' de-Nazification programme. However, due to shifting cold war sensitivities it was never shown to American and British audiences. Written and directed by Stuart Schulberg, a US Marine Corps Sergeant, this 78-minute film has been meticulously restored by his daughter Sandra Schulberg and Josh Waletzky.

The film opens with a woman climbing out of a hole in the ground, carrying a naked child; scenes of war-ravaged cities razed to the ground and images of ruin and despair; a civilization destroyed. 'How did it happen?' the narrator asks, 'What were the forces?' In the Palace of Justice in Nuremberg we hear the US prosecutor, Robert H Jackson, giving his celebrated opening presentation:

'That four great nations, flushed with victory and stung with injury, stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of law is one of the most significant tributes that Power has ever paid to Reason.'

Courtroom scenes filmed during the ten and a half month major trial are woven along with extensive footage from *The Nazi Plan and Nazi Concentration Camps,* films created for evidential purposes from the Nazi's own recordings. The 21 defendants present including Göring, Hess and Speer sit in the dock, listening to translations through headphones as their deeds are catalogued and detailed. The bland ordinariness of the Nazi leaders gives no hint of the evil and brutality of the regime. The horror then unfolds. We see – just as they did in Nuremberg – the footage of military invasions, dictatorial speeches, regimented marching armies, starved hollow faces, brutal medical experiments, murderous gas chambers and mountains of emaciated corpses. The devastating, haunting images of human evil and cruelty that appear in Schulberg's film, though familiar to us now, understandably retain a terrible and disturbing power.

We hear and see the testimony of the defendants comprised, virtually entirely, of denial and talk of 'idealism betrayed'; typical is Field Marshal Keitel's insistence that Hitler 'deceived the world, Germany and me'. 'To escape the implications of their positions and the inference of guilt from their activities they are almost unanimous in one defence. The refrain is heard time and time again: These men were without authority, without knowledge, without influence, without importance'. The classic 'Nuremberg Defence' set to echo down the years: that they were just following orders.

Jackson demonstrates the absurdity of their version which presents the Third Reich as an incoherent, incompetent and shambolic regime. He details the brilliantly organised and choreographed military and civil machine designed to 'last a thousand years'.

Particularly affecting are the shots of the defendants on receiving the guilty verdicts from the court. Many cover their faces and, at least in part, acknowledge their guilt. The cells of the condemned prisoners are shown and finally the statue of The Crucifixion situated outside the Palace of Justice and as this remains in shot we hear prosecutor Jackson's closing words:

'This trial is part of the great effort to make the peace more secure. It constitutes judicial action of a kind to ensure that those who start a war will pay for it personally. Nuremberg stands as a warning to all those who plan and wage aggressive war'.

These are honest and noble words. Instead of taking revenge the Allies acted through law and, for the first time in history, individuals were held responsible for atrocities in war. However, they undertook no evaluation of their own actions; there was no moral weighing of the killing of scores of thousands at Hiroshima and Nagasaki and even as the trial continued and for years afterwards Stalin was grievously oppressing his own people and those of The Soviet Union's satellites.

It is a great pity Schulberg's film will not be screened more widely in the UK as it not only provides a thought provoking reminder of the acts of evil humans are capable of, but also documents a trial sincerely committed to due process and the rule of law. The precedent set at Nuremberg has led on to an acceptance of the right

of the international community to call to account those who transgress the rules of war, such as in Rwanda and the former Yugoslavia. The work of the ICC and others committed to responding to atrocities is helping to end impunity for the perpetrators of the most serious crimes. Sadly, harrowing acts such as those documented at Nuremberg continue to occur. There is currently enormous concern at the genocidal actions of the Syrian government and daily demands that its leaders must step down and be brought to justice. Will this happen?

Kate Helliwell, criminal and EU intern, JUSTICE, summer 2012

JUSTICE briefings and submissions

1 November 2011 – 30 April 2012

Available at *www.justice.org.uk*

1. Protection of Freedoms Bill, Second Reading Briefing, House of Lords, November 2011;
2. UPR, JUSTICE Submission to UN Human Rights Council, November 2011;
3. TPIMS Bill, Briefing, Report Stage, House of Lords, November 2011;
4. Bill of Rights Commission Response, November 2011;
5. Legal Aid and Punishment of Offenders Bill, Second Reading debate, November 2011;
6. Joint response with ICJ, Response to EU Commission Green Paper on detention, November 2011;
7. Initial Response to the Carloway Report, November 2011;
8. Protection of Freedoms Bill, Grand Committee, December 2011;
9. Legal Aid and Punishment of Offenders Bill, Lords Committee Stage, proposed amendments, December 2011;
10. Legal Aid and Punishment of Offenders Bill, Lords Committee Stage, amendments for first day of committee, December 2011;
11. Joint NGO Briefing on the Reform of the European Court of Human Rights (contributed section on domestic implementation), December 2011;
12. Scotland Bill, briefing and amendments on the role of the Supreme Court, December 2011;
13. Written and oral evidence on EU criminal procedure to HL EU Justice sub-committee, December 2011;
14. Written and oral evidence on the Carloway Review to the Justice Committee, Maggie Scott QC, December 2011;
15. Response to Government consultation on protest and police powers, January 2012;
16. JUSTICE submission to the JCHR Inquiry on the Justice and Security Green Paper, January 2012;
17. Briefings for second day of Committee Stage, House of Lords, on Legal Aid Sentencing and Punishment of Offenders Bill, Director of Legal Aid Casework and Scope, January 2012;

18. Scotland Bill, House of Lords Committee Stage briefing on role of the Supreme Court, January 2012;
19. Third Reading briefing, Legal Aid, Sentencing and Punishment of Offenders Bill, February 2012.

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