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JUSTICE notes with sadness the recent death of Allan Levy QC. Allan was a long-standing member of JUSTICE Council and served on the editorial advisory board of this journal.

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Editorial

Terrorism: the correct counter

Terrorism provides a thread through a number of the following contributions. This is unavoidably so. Terrorism – in this case, violence and its threat by groups other than states ('non-state actors') – is very much a contemporary concern for the citizens and governments of all countries. Participation in the Iraq war, the legal justification of which was so severely criticised by Lord Alexander of Weedon QC in the last issue, puts the UK very much in the front line. UK politicians have, therefore, no option but to grapple with how best to counter the threats as they now evaluate them. We have, ultimately, little option but to trust their assessment of the level of threat – though the trail of Iraq's dodgy dossiers does mean that they should be put to proof as far as possible. We do need to test the structure of the scheme urgently needed to replace the current anti-terrorism legislation.

The events of 9/11, and other outrages, such as those in Madrid or Bali, were undoubtedly crimes against humanity and might, in retrospect, have been better discussed in the language of crime rather than terror. However described, they caused major loss of life and were designed to raise widespread fear of further death and destruction. This engages a human rights obligation.¹ States have an obligation to protect and promote the liberty and freedoms of their inhabitants. The right of each individual to lead an autonomous life is the basis for the duty upon states to ensure a framework in which all individuals are free to do so. Thus, the Parliamentary Joint Committee on Human Rights correctly argues that the familiar opposition between 'security and public safety on the one hand and human rights and the rule of law on the other ... is a false dichotomy'.² The state's obligation to take action is perfectly compatible with the conformity of that action itself to human rights' principles: proposed measures cannot be arbitrary and must be strictly necessary, proportionate to an identified threat and the least intrusive means to achieve a legitimate aim, attended by appropriate safeguards.

The courts were always likely to accept the government's assessment³ that the threat of terrorism from Al-Qaeda amounted to a 'public emergency threatening the life of the nation'⁴ meriting derogation from Article 5 of the European Convention and allowing restriction of liberty without trial. Indeed, the government's view has so far been upheld by both the Special Immigration Appeals Commission ('SIAC')⁵ and the Court of Appeal⁶ – though at the time of writing it awaits a decision of the House of Lords. Derogations do not, however, give governments a free hand. Any exceptional measures must be 'necessary and proportionate' to the particular situation at hand.⁷

The ability to assess either the necessity or proportionality of the government's

counter-terrorism measures following September 11 is severely limited by the fact that much of the evidence used by the government to justify its decision to derogate⁸ understandably cannot be disclosed for reasons of national security.⁹ Nevertheless, the government's claim (upheld by SIAC and the Court of Appeal)¹⁰ that disclosure of such material is not in the public interest, government secrecy remains a significant obstacle to informed public debate on counter-terrorism powers. To this extent, it is somewhat ironic that the Home Office's consultation paper is subtitled *Balancing Liberty and Security in an Open Society*. An 'open society', according to its best known proponent,¹¹ is one in which its members are able to know the reasons for any governmental decision and assess its merits for themselves. Thus, particular weight has to be given to those who have seen the evidence and had a chance to evaluate it: SIAC and the Court of Appeal, Lord Carlile of Berriew QC, appointed to review the Act under s28, and the Privy Counsellors' Review Committee chaired by Lord Newton ('the Newton Committee').¹²

By contrast, the logic of the government scheme built on the private evidence is open to public challenge. Indefinite detention applies only to foreign nationals. Yet, it is apparent from the SIAC proceedings that the threat of terrorism comes from UK and foreign nationals alike. Indeed, it was on this point that SIAC found the derogation to have breached Article 14 ECHR as discriminatory on the ground of national origin:¹³

There are many British nationals already identified – mostly in detention abroad – who fall within the definition of 'suspected international terrorists', and it was clear from the submissions made to us that in the opinion of the [Secretary of State] there are others at liberty in the United Kingdom who could be similarly defined.

Thus, if terrorist suspects who are UK nationals pose the same threat as those terrorist suspects who are foreign nationals and the government does not consider it necessary to detain the suspects who are UK nationals, it becomes difficult to see how the detention of only foreign suspects can be justified as 'strictly necessary'. It is true that the Court of Appeal disagreed on this point:¹⁴

As the [detainees] accept, the consequence of their approach is that because of the requirement not to discriminate, the Secretary of State would, presumably, have to decide on more extensive action, which applied to both nationals and non-nationals, than he would otherwise have thought necessary. Such a result would not promote human rights, it would achieve the opposite result. There would be an additional intrusion into the rights of nationals so that their position would be the same as non-nationals.

This reasoning cuts both ways: if it was *not* necessary to detain certain suspects (ie those who are UK nationals) and if they pose the same risk as suspects who were detained (ie foreign nationals), then there is somewhat of a contradiction. The Home Secretary, himself, has avoided this trap and has not conceded that UK terrorist suspects pose the same risk.¹⁵ However, it appears to be one of SIAC's findings of fact and was not in itself disputed by the Court of Appeal.

The recent release of one of the Part 4 detainees ('G') on bail¹⁶ also somewhat undermines the government's claims that indefinite detention is 'strictly required' in the circumstances. For, if it is possible effectively to address the threat of terrorism posed by G and others by way of a series of stringent bail conditions¹⁷ (including electronic tagging and house arrest without outside communication) then this suggests that indefinite detention in Belmarsh is not necessary. It may be that the surveillance required in such situations is more resource-intensive than incarceration in Belmarsh (which seems unlikely), but if it avoids the UK having to maintain a system of indefinite detention without trial then that is a price worth paying. The Home Office has objected stating that applying less restrictive measures may not prevent terrorist suspects from using telephones or computers.¹⁸ While provision could be made in the most exceptional circumstances – as in G's case – for closer regulation of communication (eg use of specified devices), it is difficult to square such objections with the Home Office's willingness to allow the voluntary removal of terrorist suspects to their home country or a safe third country where their access to telephones and computers, etc, would presumably be unimpeded and unmonitored. Two of the detainees have already made voluntary departures from the UK: Ajouaou returned to Morocco; and 'F' returned to France.

Taken together, these features of Part 4 raise the question of whether indefinite detention can be justified as strictly necessary in the circumstances. There must also be grave concerns about its long-term sustainability, given that there is no indication that the apparent terrorist threat to the UK is likely to diminish in the next several years. All of this is in addition to the obvious truth that indefinite detention without trial offends the UK's most deeply-held principles of justice. As Lord Browne-Wilkinson concluded, indefinite detention under Part 4 is 'not a tolerable system in a civilised community'.¹⁹ Thus, the Newton Committee is surely right to propose that:

- provisions for the indefinite detention of persons suspected of terrorism under Part 4 of the Act should be replaced as a matter of urgency;²⁰
- terrorism should be dealt with, as far as possible, by way of the mainstream criminal justice system;²¹
- the blanket ban on the use of intercept evidence should be lifted so that more prosecutions for terrorist offences can be brought within the mainstream criminal justice system;²²
- special counter-terrorism legislation should not be mixed with mainstream

criminal justice legislation;²³ and

- the government should seek to avoid, so far as possible, any measures that would require it to derogate under Article 15(1) of the European Convention on Human Rights ('ECHR').²⁴

The committee does not address the question of necessity directly. In one view, saying that the government should seek to avoid a derogation is contradictory. The scheme of Article 15(1) ECHR makes clear that a government can *only* derogate to the extent '*strictly required by the exigencies of the situation*' (and compatibly with its other international obligations). In such a case, if a measure were '*strictly required*' by the existence of an emergency then the government would seem logically to have little scope for choice. The committee may be doing more than stating the obvious: this looks more of an indication that it does not regard the measures under Part 4 (indefinite detention without trial) to be strictly required by the current emergency.

In this light, should parliament consider that the current threat of terrorism *is sufficiently serious to justify exceptional measures being taken*, the Newton Committee's suggestion of imposing 'restriction orders' on terrorist suspects might be considered as an appropriate way forward. The committee argued that:²⁵

It would be less damaging to an individual's civil liberties to impose restrictions on:

- a. the suspect's freedom of movement (eg curfews, tagging, daily reporting to a police station); and*
- b. the suspect's ability to use financial services, communicate, or associate freely (eg requiring them to use only certain specified phones or bank or internet accounts, which might be monitored*

subject to the proviso that if the terms of the order were broken, custodial detention would follow.

The extent to which a scheme of restriction orders could be sustained without derogation depends very much on the kinds of restrictions imposed (eg reporting requirements, electronic tagging, or full-scale house arrest) and its overall scope (ie whether it applies only to foreign nationals or to foreign nationals and UK nationals alike). Restriction orders might, in general, be imposed without derogation on those subject to immigration control. To a lesser extent, certain restrictions could be placed on UK nationals (eg movement restrictions) without derogation, on a similar basis to the use of anti-social behaviour orders – though these uneasily conflate civil orders with penal sanctions.²⁶ However, the most serious restrictions on liberty currently applied under UK law are by way of punishment for a criminal offence (eg football banning orders).²⁷ It would seem doubtful, therefore, that UK nationals not charged

with or convicted of a criminal offence should ever be subjected to the kinds of sweeping restrictions applied in the case of G without further derogation from Article 5 of the Convention being sought.

The adoption of any scheme of restriction orders would be wholly exceptional. The only circumstances in which the introduction of such orders might be justified would be if parliament was satisfied that such measures were *strictly required* by the terrorist threat facing the UK, proportionate in all the circumstances having regard to fundamental rights, and that the same aim could not reasonably be achieved by less intrusive means. Such a scheme would have to be attended by strict safeguards. As a *bare minimum*, we would suggest the following:

- *Application procedure*: a restriction order should be made by the High Court²⁸ on application by the secretary of state. This is in contrast to the current procedure under Part 4 whereby SIAC merely reviews the legality of a certificate issued by the secretary of state. The application procedure must be adversarial, allowing suspects to challenge the legality of any order sought and the evidence upon which it is based. Evidence established to have been obtained as a result of torture would not be admissible.
- *Powers of the court*: the court must have the power to dismiss any application. The court should also have the power to assess the proportionality of specific restrictions sought by the secretary of state in respect of a suspect, and substitute less restrictive measures than those sought where justified by the evidence.
- *Breach of order*: where an order is breached, the court should have the power to determine the appropriate sanction, including imprisonment. The appropriateness of the sanction should be governed only by the seriousness of the breach itself, rather than any other considerations.
- *Order time limits*: any order made by the court must be time-limited, so that its effect will lapse after a certain period unless renewed (preferably not more than 12 months). Renewal proceedings should be subject to the same procedures and safeguards as an original application.
- *Sunset clause*: the statutory scheme for any such restriction orders would itself have to be subject to regular parliamentary review and independent scrutiny, and the legislation itself subject to a sunset clause of a *maximum* of three years.

Let us be clear about the argument. It is reasonable to *consider* the idea of restriction orders to explore how they might work without necessarily supporting such a scheme as it might be presented by the government.

The absolutely essential element of the new legislation must be the end of indefinite detention without trial.

JUSTICE's position is further set out in *Counter-Terrorism Powers: reconciling security and liberty and an open society*, June 2004, available at www.justice.org.uk.

Notes

- 1 See eg Article 2(1) of the European Convention on Human Rights, which directs that 'everyone's right to life shall be protected by law'.
- 2 'Review of Counter-Terrorism Powers', 18th report of session 2003-2004, 4 August 2004 (HL 158, HC 713), para 7.
- 3 See Human Rights Act 1998 (Designated Derogation) Order 2001 (SI 3644).
- 4 See JUSTICE opinion on the proposed derogation from Article 5 of the European Convention on Human Rights by David Anderson QC and Jemima Stratford (November 2001). We noted that the original scope of the derogation extended to even those 'international terrorists' who did not threaten the UK (eg Tamil Tigers) and would not be lawful to that extent. However, the Attorney-General subsequently gave an undertaking that the powers under Part 4 of the Act would be only used for the emergency which was the subject of the derogation.
- 5 *A, X, Y and others v Secretary of State for the Home Department* (unreported, 30 July 2002).
- 6 *A, X, Y and others v Secretary of State for the Home Department* [2002] EWCA Civ 1502.
- 7 Article 15(1) ECHR states that a derogation is only permitted 'to the extent strictly required by the exigencies of the situation'.
- 8 As well as the subsequent decisions to detain indefinitely particular individuals as suspected terrorists under Part 4.
- 9 See eg the Chairman of the Special Immigration Appeals Commission in *A, X, Y and others v Secretary of State for the Home Department* (see n5 above), para 14: 'It is obvious that the closed material is most relevant to the issue whether there is such an emergency'.
- 10 See eg *A, X, Y and others*, n6 above, para 87 per Brooke LJ: 'if the security of the nation may be at risk from terrorist violence, and if the lives of informers may be at risk, or the flow of valuable information they represent may dry up if sources of intelligence have to be revealed, there comes a stage when judicial scrutiny can go no further'.
- 11 Popper, *The Open Society and Its Enemies*, 5th ed (Princeton: Princeton University Press, 1971).
- 12 Privy Counsellors Review Committee, *Anti-Terrorism Crime and Security Act 2001 Review: Report* (HC100: 18 December 2004) (Newton Report).
- 13 *A, X, Y and others*, n5 above, para 95.
- 14 *A, X, Y and others*, n6 above, para 49 per Woolf CJ.
- 15 See *Counter-Terrorism Powers: Reconciling Liberty and Security in an Open Society* (Cmd 6147: Home Office, February 2004), Part 1, para 7: 'International terrorists can be foreign nationals or British citizens. The Government's assessment in 2001 was that the threat came predominantly but not exclusively from foreign nationals. That remains the case'.
- 16 SIAC appeal no: SC/2/200, Bail Application SCB/10 (20 May 2004).
- 17 For a full list of conditions see *ibid* para 23. See also *G v Secretary of State for the Home Department* [2004] EWCA Civ 265.
- 18 See Consultation Paper, Part 2, para 45: 'The government does not believe that tagging or the other measures suggested offer sufficient security to address the threat posed by international terrorists. Modern technology such as pay as you go mobiles, easy access to computers and other communications technology mean that tagging by itself would not prevent these individuals from involvement in terrorism and the government cannot guarantee the success of such an approach'.
- 19 Hansard, HL Debates, 4 March 2004, col 792.
- 20 Newton Report, n12 above, para 203.
- 21 Newton Report, para 205.
- 22 Newton Report, para 208.
- 23 Newton Report, para 115.
- 24 Newton Report, para 185.
- 25 Newton Report, para 251.
- 26 See s1 Crime and Disorder Act 1998.
- 27 See s6 Football (Offences and Disorder) Act 1999.
- 28 Or specialist tribunal chaired by a High Court judge, along the lines of SIAC, and whose decisions would be subject to review by the Court of Appeal.

'Representative but not responsible': the use of special advocates in English law

Eric Metcalfe

Eric Metcalfe analyses the increasing role given to special advocates in a variety of court proceedings; reports on research of the views of special advocates themselves on their role; and cautions on too great an extension of their use.

Introduction

Special advocates are a novel feature in English law. They are advocates who owe no duty to the person whom they are appointed to represent. They are, to borrow Dicey's famous phrase, 'representative but not responsible'.¹ Despite what would seem to be an extraordinary break with the core idea of professional responsibility, the special advocate procedure was originally created not to undermine fair proceedings but to help provide them. Indeed, when first introduced in 1997 as part of the Special Immigration Appeals Commission Bill, the idea of special advocates was greeted by members of all parties as an important safeguard for the rights of persons appearing before the Commission, as well as a step forward for the protection of human rights in the UK in general. 'The Bill is a sign of things to come', declared one MP in optimistic fashion.² In addition, government ministers were at pains to emphasize that the use of such an unusual procedure was exceptional – given the national security dimension of the proceedings – and would be likely to affect only a tiny handful of persons each year.³

This prediction on numbers did not hold. Less than seven years later, the use of special advocates is permitted before no less than seven different tribunals,⁴ many of which have no obvious link to determining issues of national security, and the Court of Appeal has just approved their use before a seventh – the Parole Board.⁵ In one year alone, the Attorney-General appointed 19 special advocates for one tribunal and three for another.⁶ In addition to this, special advocates are now regularly instructed in criminal proceedings in relation to public interest immunity claims.⁷ Moreover, the use of special advocates in the UK is now being copied abroad, with proposals for their use in Hong Kong in relation to various kinds of hearings⁸ and in India in relation to witness protection measures.⁹

The use of special advocates passed without comment. In December 2003, Amnesty International described the proceedings of the Special Immigration

Appeals Commission ('SIAC') as a 'perversion of justice'. In June of this year, another international human rights organization described the same proceedings as being 'neither just nor effective'.¹⁰ And in July, the appointment of a special advocate by the Parole Board to consider secret evidence was likened to the US treatment of detainees in Guantánamo Bay.¹¹ And yet the use of special advocates in certain cases has been approved by both the House of Lords and the European Court of Human Rights. How can these divergent views of special advocates be reconciled?

This paper looks at the use of special advocates in English law. In doing so, it raises concerns that:

- the use of special advocates is an obvious interference with basic principles of procedural justice;
- even if such an interference can be justified in exceptional cases, too ready resort is made to the procedure without sufficient consideration of less restrictive measures; and
- if there is a general case for the use of special advocates as a permanent fixture of English law, it is important that it is done openly and with full democratic accountability, and not – as increasingly seems to be the case – by way of analogy under the common law by unelected officials.

The origin of special advocates

The Chahal case

The adoption of the concept of special advocates in the UK was suggested by, and in response to, the decision of the European Court of Human Rights in *Chahal v United Kingdom* in November 1996.¹² Karamjit Singh Chahal was an Indian national and a Sikh separatist who was resident in the UK and whom the Home Secretary wanted to deport because, among other reasons, of his alleged involvement in terrorist activities in support of the separatist cause. For himself, Chahal claimed that, if returned to India, he would be likely to be tortured by the Punjabi authorities because of his known (though non-violent) support for Sikh separatism.

Although the decision in *Chahal* is better known for its ruling in relation to Article 3 of the European Convention (a suspected terrorist cannot be returned to a country where that person faces a real risk of torture or ill-treatment), the ruling was equally significant for the way in which the Home Secretary determined the issue of whether Chahal was a threat to the national security of the UK (the essential grounds for his deportation). Chahal complained to Strasbourg that, although judicial review was available to challenge the Home Secretary's decision, the effective determination of his risk to national security

was made by an internal Home Office advisory panel (the so-called 'three wise men') on the basis of sensitive intelligence material which he had no opportunity to challenge.

The Strasbourg court agreed that the Home Office procedure breached Chahal's rights under Article 5(4) ECHR, because judicial review proceedings could not effectively review the grounds for his detention, and because Chahal was not represented before the internal Home Office panel.¹³

The Court recognises that the use of confidential material may be unavoidable where national security is at stake. This does not mean, however, that the national authorities can be free from effective control by the domestic courts whenever they choose to assert that national security and terrorism are involved ... [T]here are techniques which can be employed which both accommodate legitimate security concerns about the nature and sources of intelligence information and yet accord the individual a substantial measure of procedural justice.

The court gave particular weight to the submissions of Amnesty International, Liberty and other human rights NGOs that similar closed proceedings in Canada involved the use of 'a security-cleared counsel instructed by the court, who cross-examines the witnesses and generally assists the court to test the strength of the State's case'.¹⁴

The Special Immigration Appeals Commission Bill

In response to the judgment in *Chahal*, the UK government brought forward the Special Immigration Appeals Commission Bill to provide an independent judicial tribunal (SIAC) that would have the power to review sensitive intelligence material in relation to the immigration decisions of the Home Secretary.

It was proposed that SIAC would conduct both open hearings (in which the appellant and his/her legal representatives would be present and able to participate) and closed hearings (relating to intelligence material that could not be disclosed to the appellant or his/her representatives). In order to provide the appellant with the ability to challenge the evidence in closed proceedings (or 'closed material'), then, the government's original proposal introducing the bill in the House of Lords was that 'the commission will be able to appoint a person – counsel – to help it in its examination of the security evidence, and in particular to look at that evidence as if on behalf of the appellant'.¹⁵ This was closest to what was understood to be the Canadian arrangement, whereby a judge could appoint counsel to assist the *court* on an amicus basis. By the time

the bill had reached committee stage in the Lords, though, the key features of the concept of the special advocate had emerged:¹⁶

*We concluded in particular that to ensure the independence of a special advocate it would be more appropriate if the person were to be appointed by the Attorney-General or his or her equivalent. We also take the view **that the role of the special advocate should be to represent the interests of the appellant in those parts of the proceedings from which he and his legal representative are excluded.** That will probably mean that he or she will need to be present throughout the proceedings. Finally ... **we believe it important to make it clear that the special advocate will not have a client relationship with the appellant. We do not judge the situation to be workable on any other basis.***

This apparent need to remove the client relationship was made explicit in the Commons, where it was explained that, although the special advocate 'will look at the evidence as if he were doing so on behalf of the appellant ... [t]here will not be the lawyer-client relationship, *where the special advocate is required to disclose all information to the client*'.¹⁷ The government accepted that such restrictions on disclosure fell 'short of the normal demands of natural justice under the law' but referred to the 'the views expressed by the European Court of Human Rights in its judgment in *Chahal*' to support its conclusion that the restrictions were justified by considerations of national security. Explaining the role of the special advocate in debates, the Home Office twice used the analogy with lawyers appointed to represent the interests of minors and persons lacking competence:¹⁸

*[T]he special advocate is like a person who is appointed by a court to represent a minor – a child – or someone with a psychiatric or mental problem. **That person does not take instructions from the client and he is not obliged to do what the client says.***

The minister conceded, though, that the role of the special advocate went slightly further than these examples, in that the advocate 'must make a judgment about the way in which the appellant would have wanted his case argued'.¹⁹ In order to offset the 'less than ideal' position of special advocates, the government stressed that each appellant would also be represented by his own lawyers 'who will be able to represent him in most of the proceedings' (ie the open hearings) and that a summary of closed proceedings would be available 'to ensure that as much information as possible is available to the appellant'.²⁰ Again, the minister stressed the purpose of the special advocate as a means to provide fair proceedings, rather than abridge them: 'the special advocate is there

to ensure that the rights of the appellant are protected. That is what he is there for and that is what we hope he will do'.²¹

S6 Special Immigration Appeals Commission Act 1997

Section 6 of the 1997 Act is central to understanding the concept of special advocates, providing as it does a statutory basis for the advocate's role. Where provision has been made in other legislation for the use of special advocates, this has been the section upon which the other provisions have been modelled. S6(1) provides that:²²

The relevant law officer may appoint a person to represent the interests of an appellant in any proceedings before the Special Immigration Appeals Commission from which the appellant and any legal representative of his are excluded.

S6(2) defines the relevant law officer for the purposes of appointment (either the Attorney-General or Solicitor-General in England and Wales, the Lord Advocate in Scotland, or the Attorney-General for Northern Ireland). S6(3) sets out the basic criteria for appointment (a barrister, advocate, or solicitor with rights of audience). The core feature of the concept of special advocate is contained in s6(4):²³

A person appointed under subsection (1) above shall not be responsible to the person whose interests he is appointed to represent.

Principles engaged by the use of special advocates

On its face, the use of special advocates seems an obvious interference with a number of human rights standards (eg the right to a fair hearing) as well as principles of procedural fairness (eg the right to equality of arms), natural justice (eg a person's right to know the allegations against him or her) and even legality (the right to a public hearing). At the same time, the use of special advocates is also frequently *justified* by reference to many of these same standards. And behind various government arguments for non-disclosure of sensitive material, it is even possible to identify further rights-based justifications (eg protecting the right to life of a covert intelligence source).

As we will see, the nature and extent of protections afforded by relevant human rights guarantees depends, to some extent, on the kind of proceedings in which special advocates are used. One would expect, therefore, the degree of protection to be greater in criminal proceedings than in civil ones, and at a similarly higher standard in those civil proceedings in which the right to liberty is engaged. Accordingly, the use of special advocates in an employment tribunal is likely to

be regarded differently from their use before a tribunal where the indefinite detention of an appellant is at issue.

In addition to all this, it is necessary to consider the use of special advocates in the context of long-standing ideas about the nature of the lawyer-client relationship, and the importance of professional responsibility. This is not to come to any conclusions at this stage as to whether the interference with fundamental rights is justified. As argued below, this depends very much on the particular kinds of proceedings in which special advocates are used. It is sufficient at this point to set out the principles that are relevant to the subsequent analysis and discussion.

The right to fair proceedings

Most of the relevant principles of procedural fairness and natural justice are incorporated in the right to fair proceedings.²⁴ The extent to which interference with these principles can be justified, however, depends on the kind of proceedings. Thus, more stringent protections attach to criminal proceedings than to civil proceedings.²⁵ Similarly, at least as far as the ECHR is concerned, the protections of Article 6 do not apply to all civil proceedings (notably immigration hearings). Nonetheless, it is possible to identify the following general principles that are engaged by the use of special advocates: the right of an appellant:

- to know the case against him/her;²⁶
- to be present at an adversarial hearing;²⁷
- to examine or have examined witnesses against him/her;²⁸
- to be represented in proceedings by counsel of his/her own choosing;²⁹
- and
- to equality of arms.³⁰

Even having regard to the different levels of protection as between civil and criminal cases *mutatis mutandi*, it should be clear that the appointment of a special advocate involves serious limitations on an appellant's right to fair proceedings.

As regards the notion of 'equality of arms', it is plain that the appellant does not enjoy anything remotely close to an equal footing with the respondent: not only is the respondent able to withhold relevant material from the appellant, but the respondent is entitled to be present at all times. Nor does the respondent suffer any of the kinds of restrictions upon communication with counsel that are imposed on the appellant.

The appellant, by contrast, is not entitled to be present throughout the proceedings. S/he is also prevented from knowing all the evidence against him/her, as the special advocate who represents him/her in closed session is forbidden to discuss the closed material with him/her. Although the special advocate is able to cross-examine witnesses on the appellant's behalf, the appellant is denied the full benefit of this right. Without knowing the closed evidence against him/her, s/he cannot indicate to counsel the points upon which witnesses should be challenged. As such, even if the relationship between the special advocate and appellant *were* one of lawyer and client, the appellant would be unable in any event to provide meaningful instructions in relation to the closed evidence. In the same way, the entitlement of the appellant to his/her own counsel throughout the proceedings is useless to the extent that his/her own counsel is similarly prohibited from attending the closed hearings and knowing the closed evidence against him/her. The fact that a special advocate is appointed by a government official and that the appellant has no say in the choice of advocate is another plain interference with the appellant's right to counsel 'of his or her own choosing'.³¹ This lack of choice is significant, not least because choice of counsel is an important factor in promoting the confidence of persons subject to proceedings in their legal representatives. Such choice is even more important in proceedings where the government is the respondent.

The issue of confidence has a direct bearing on the right of an appellant to communicate freely with his/her own counsel. To some extent, the ability of an appellant in SIAC proceedings to communicate with an appellant (and vice versa) appears to have been widely misunderstood. Although a special advocate is not permitted to have direct contact with the appellant once s/he has begun to view the closed material, the advocate is free to consult with the appellant prior to doing so and it remains open to the appellant to continue to pass information to the special counsel even after the closed hearing has begun. The Parliamentary Joint Committee on Human Rights (JCHR) has complained that the lack of communication between an appellant and special advocate once a special advocate has viewed closed material in a case is a severe restriction on fair proceedings.³²

The rule that there can be no contact whatsoever between the detainee and the special advocate as soon as the advocate sees the closed material also means that there is little meaningful contact between the detainee and the representative of their interests in the closed proceedings.

The JCHR has given its view that 'there is a strong case for considering the scope for relaxing the rigid rule that prohibits any contact between the detainee and their special advocate once the advocate has seen the closed material'.³³

Communications between special advocates and detainees in SIAC cases are governed by rule 36 of the 2003 SIAC procedure rules.³⁴ In fact, rule 36 does not prohibit all communication between appellants and special advocates once the special advocate has seen the closed material. Rule 36(4) allows special advocates to apply to SIAC for directions allowing communication with a detainee in such circumstances, although rule 36(5) allows the secretary of state to object to either the form or content of that communication. Similarly, rule 36(6) allows detainees to write to the special advocate via their lawyer, but the special advocate is not permitted to reply save as directed by SIAC.

As noted above, the ability of the special advocate to communicate with an appellant is of little weight in circumstances where the most pressing issue – the closed evidence – is the one thing that cannot be discussed. Moreover, the courts have repeatedly stressed the importance of free, confidential and uninhibited communication between lawyer and client.³⁵ By contrast, the rule 36 procedure (which allows inter alia the secretary of state to object to the communication) would be likely to have a serious chilling effect on an appellant's willingness to discuss matters in confidence with the special advocate. The fact that the appellant has no say in the appointment of the advocate, and that the appointment moreover is made by a government official, seems likely only to further diminish his/her candour.

The right to a public hearing

The right to a public hearing is part of the right to a fair hearing under both the ICCPR and the ECHR.³⁶ However, the importance of the right lies not just in an appellant's interest in making his/her plight known, but the public interest in the open and transparent administration of justice. Specifically, participants in a democracy have a clear interest in seeing that the laws that they make are applied fairly by the courts. In addition, leaving aside this argument from democracy, there is a more basic argument from legality that laws must not only be impartially applied but be *seen* to be done so. As Chief Justice Burger observed in *Richmond Newspapers Inc. v. Virginia*,³⁷ 'people in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing'. It follows from this that closed hearings can only be justified on the ground of strict necessity, where it could not be shown that less restrictive measures would be able to achieve the same end.³⁸ Even if closed hearings could be shown to meet this requirement of strict necessity, it would nonetheless be incumbent upon the state to consider alternative means of affording the public appropriate scrutiny of the proceedings.

The right to liberty

Not every case in which special advocates are used will engage the right to

liberty, eg employment tribunal hearings involving employees whose work involves sensitive intelligence material.³⁹ Nonetheless, it is important to mention the additional safeguards that are provided under the heading in Article 5 of the European Convention of 'relevant judicial guarantees'. Although the Strasbourg court has held that proceedings under Article 5 'need not always be attended by the same guarantees as those required under Article 6' nonetheless 'it is essential that the person concerned should have access to a court and the opportunity to be heard either in person or, where necessary, through some form of representation'.⁴⁰ These include rights to:

- full disclosure of adverse material;⁴¹
- provision for the examination of witnesses;⁴² and
- the assistance of counsel responsible to the appellant.⁴³

The right to life

Although it is not often articulated as such, the right to life is the most plausible justification for the non-disclosure of relevant evidence to an appellant or his/her lawyers. Specifically, the refusal to disclose evidence to an appellant's lawyers on national security grounds is typically justified by reference to the risk that inadvertent disclosure by counsel to an appellant would either allow a specific source to be identified and killed, or allow the appellant to otherwise frustrate intelligence-gathering activities and thereby increase the risk of an attack against the UK.⁴⁴

Framed in this way, it becomes easier to understand how the special advocate procedure has been extended by analogy to all kinds of proceedings, both civil and criminal.⁴⁵ Indeed, the use of special advocates is in principle applicable to *any* proceedings in which the respondent can point to a real risk that disclosure of evidence to an appellant would lead to a witness being identified and killed or seriously harmed. As is well-established by the Strasbourg case-law, the executive and judicial branches have a responsibility not only to safeguard the rights of an accused but also to take measures to safeguard the rights of other participants in proceedings, including witnesses.⁴⁶ As the Strasbourg court noted in the 2003 case of *Edwards and Lewis v United Kingdom*:⁴⁷

There may be competing interests, such as national security or the need to protect witnesses at risk of reprisals or keep secret police methods of investigation of crime which must be weighed against the rights of the accused. In some cases it may be necessary to withhold certain evidence from the defence so as to preserve the fundamental rights of another individual or to safeguard an important public interest.

Whether non-disclosure of evidence to an appellant and the use of a special advocate procedure is a *proportionate* restriction in the circumstances – ie whether there are not less intrusive but equally effective measures that could be adopted to safeguard witnesses – is likely to be the central issue in any proceedings. The principal difficulty, of course, is that it will not normally be possible for the proportionality of such to be assessed without disclosure of the material in question. The danger, then, is that government officials will increasingly request courts and tribunals to adopt the special advocate procedure in cases where it is not warranted (whether out of a misapprehension of harm or, worse, a desire to avoid the inconvenience that disclosure might cause to the respondent's case), secure in the knowledge that the appellant and his/her lawyers will not be able to adequately challenge the evidence on which the request is based. Thus, the final section of this article argues that strict judicial and democratic controls on the use of special advocates must be implemented in order to avoid such an outcome.

The link between representation and responsibility

Not only does the use of special advocates engage fundamental rights and principles of procedural justice, the idea also represents a significant break in the long-standing conception of an advocate as a person who owes a duty to the person whose interests he or she represents. As the role of special advocates is a developing one in English law, it is important to identify the underlying moral interests that are at stake so that a clearer understanding might be had of the implications of various policy choices in future.

The concept of a lawyer's responsibility to his or her client is most often discussed in the contexts of professional ethics, contractual and tortious liability. The source of these obligations in law is clear enough: lawyers (whether barristers or solicitors) are members of a self-regulating profession and obliged to hold to certain standards; in tort, the lawyer-client relationship is recognized as entailing a duty of care because of the role that the lawyer plays in representing the interests of the client. Ironically enough, it is only in the past four years that a barrister has been liable in tort for his or her conduct of a case in court.⁴⁸ Even prior to this immunity being lifted, though, the courts had little difficulty with the proposition that – absent public policy considerations – the role of a barrister was of a kind that a duty of care towards the person being represented would otherwise normally obtain.⁴⁹ As Lord Steyn noted, 'the basic premise [is] that there should be a remedy for a wrong'.⁵⁰

Underlying these various legal schemes for professional responsibility is a set of deontological claims about persons who plead or act on another's behalf. These claims obviously run far broader than the job performed by courtroom

advocates or even lawyers in general, but the core notion can be stated very briefly as follows: a representative owes a duty to the person whose interests he or she represents. This core notion of responsibility⁵¹ nonetheless allows room for different conceptions of what constitutes a person's 'interests'.⁵² On an objectivist account of someone's interests, it may be possible for a representative to identify what those interests are without ever determining the person's own understanding of them. On a subjectivist account, by contrast, a person's interests are indistinguishable from his/her wants. On such an account, it would be impossible for a representative to act without taking account of what the person being represented actually wants.

To a certain extent, English law recognizes both kinds of interests. A litigation friend, for instance, appointed to act for a child or a patient who lacks capacity would be required to have some minimal conception of what the person's interests are, regardless of whether the person is able to express any preferences or wishes. However, in Commons debates on the 1997 Special Immigration Appeals Commission Bill, the Home Office Minister erred in suggesting that a litigation friend is not professionally responsible to the persons whom s/he represents. In fact, the relevant practice direction makes clear that:⁵³

It is the duty of a litigation friend fairly and competently to conduct proceedings on behalf of a child or patient. He must have no interest in the proceedings adverse to that of the child or patient and all steps and decisions he takes in the proceedings must be taken for the benefit of the child or patient.

More generally, it seems undeniable that the basic conception of representation in English law requires the representative to follow the instructions of the person being represented (and that the cases of the mentally ill or children or persons in comas, etc, are necessary departures from this). This is consistent with the liberal ideal of individual autonomy – the notion that people (absent mental incapacity) are first and foremost the best judges of their own good. As we will see below, this analysis has particular importance for an issue that has arisen in SIAC proceedings concerning the role of special advocates.

The use of special advocates in civil proceedings

The Special Immigration Appeals Commission

As noted above, the conduct of special advocates in SIAC proceedings is further governed by Part 7 of the Special Immigration Appeals Commission (Procedure) Rules 2003.⁵⁴ In particular, rule 35 provides that:

The functions of a special advocate are to represent the interests of the appellant by –

(a) making submissions to the Commission at any hearings from which the appellant and his representatives are excluded;

(b) cross-examining witnesses at any such hearings; and

(c) making written submissions to the Commission.

Rule 36 further provides a special procedure whereby a special advocate who has seen the closed material may communicate with the appellant by way of application to SIAC.⁵⁵

While the SIAC procedural rules have served as a model for the adoption of special advocate procedures elsewhere,⁵⁶ SIAC itself has become well-known for a quite different reason. For several years following its creation, SIAC was a little-known tribunal hearing a handful of immigration cases a year. Following the September 11 attacks, however, the government brought forward the Anti-Terrorism Crime and Security Act 2001 ('ATCSA'), including provision for the indefinite detention of foreign nationals certified by the Home Secretary under Part 4 of the Act as suspected international terrorists. Under Part 4, SIAC became the tribunal under which the legality of the Home Secretary's certification of a detainee, and the evidence supporting it, could be subject to judicial scrutiny. Some 15 foreign nationals have been detained since 2001, with special advocates appointed in each of their appeals.⁵⁷ In October 2002, the Court of Appeal considered the appeals of 11 of the detainees, in respect of which Brooke LJ noted as follows:⁵⁸

On this appeal we are concerned not only with matters of personal liberty but with matters of life and death for possibly thousands of people. In these circumstances it appears to me that the arrangements that have been made for judicial supervision of the decision of Parliament, imperfect as they are, are the best that can be devised for a situation like this. Although the point did not really arise for decision on the appeal, since SIAC was able to reach their conclusion on the open material, it appears to me to be desirable that they should also have access to the closed material, and that the special advocate procedure is a better way of dealing with this than any procedure devised in this country in the past.

As noted at the outset of this article, the proceedings of SIAC under Part 4 of ATCSA have attracted less than favourable comment elsewhere. In addition to

the public criticisms of Amnesty International, Human Rights Watch and others, the Parliamentary Joint Committee on Human Rights referred to the use of special advocates as a matter of 'questionable fairness'.⁵⁹ The Committee noted:

*the inequality of arms between the State and the detainee can be justified, if at all, only by an overwhelming need to protect national security in circumstances falling within a valid derogation under ECHR Article 15.*⁶⁰

The final section of this article discusses various issues that have arisen with regard to the use of special advocates, most of which have arisen (unsurprisingly enough) in the context of SIAC proceedings.

Other administrative tribunals

In addition to SIAC, the use of special advocates has now been authorised by parliament in respect of five other administrative tribunals: the Proscribed Organisations Appeal Commission ('POAC'),⁶¹ the Pathogens Access Appeal Commission ('PAAC'),⁶² the Employment Tribunal (when hearing race discrimination claims from government employees in fields relating to national security)⁶³ and three specialist Northern Ireland Tribunals – the Life Sentences Review Commissioners,⁶⁴ the Life Sentences Review Board,⁶⁵ and the tribunal set up under the Northern Ireland Act 1998 to deal with National Security Certificates.⁶⁶ According to the Attorney-General's Review for 2001/2002, three special advocates have been appointed in respect of proceedings before POAC. There is no indication that special advocates have yet been used before any of the other tribunals mentioned.

The Parole Board

The judgment in July 2004 of the Court of Appeal in *Roberts v Parole Board* marked a new development in the use of special advocates.⁶⁷ Prior to the judgment, the only tribunals that had used special advocates were those which had been explicitly authorised to do so by primary and secondary legislation. In *Roberts*, the Parole Board was considering the parole of a 68-year old mandatory life prisoner who, until recently, had been housed in an open prison. In the course of its deliberations, the Board received secret evidence from the secretary of state on the basis that the evidence would not be disclosed to Mr Roberts or his lawyers. It was at this point that the Parole Board sought to appoint a special advocate who would act on Mr Robert's behalf in respect of the secret evidence but who would not be directly responsible to him. An earlier High Court ruling upheld the Parole Board's decision as lawful.

The main issue on appeal was whether the Parole Board had the statutory power to adopt a special advocate procedure in this case. The Court of Appeal found

that the vague language of the 1991 Criminal Justice Act afforded the Board sufficient scope to appoint an advocate. In doing so, the Court of Appeal was apparently untroubled by the lack of any specific democratic sanction for an inferior tribunal adopting such an exceptional procedure. It is also apparent that the court paid considerable attention to the approval given by the House of Lords and the European Court of Human Rights to the use of special advocates in criminal proceedings,⁶⁸ and did not accept the submission of the appellants and JUSTICE as intervener that there was an important distinction between the use of special advocates by the higher courts to help determine preliminary matters, and using them to assist in determining the core issues in proceedings.

The higher courts

The first use of a special advocate by the higher courts in civil proceedings arose in the case of *Secretary of State for the Home Department v Rehman*,⁶⁹ when the Court of Appeal heard an appeal from SIAC. Similar provision has been made by the court in several subsequent SIAC appeals. In *R v Shayler*,⁷⁰ the House of Lords commented obiter that the special advocate procedure might be adopted there 'if it were necessary to examine very sensitive material on an application for judicial review by a member or former member of a security service'.⁷¹

The use of special advocates in criminal proceedings

It is striking to consider the very different path of special advocates in criminal proceedings from that taken in civil proceedings. Until the decision of *Roberts* in July 2004, the use of special advocates in civil proceedings was very much a formalised procedure and closely governed by regulation. In criminal proceedings, by contrast, the adoption of the special advocate procedure appears to have developed on a wholly ad hoc basis by way of the higher courts' inherent jurisdiction. The possibility of using special advocates in criminal proceedings was first recommended by Auld LJ in his Review of the Criminal Courts in England and Wales in 2001 as a way of overcoming the problem of ex parte prosecution applications for non-disclosure of relevant material on the ground of public interest immunity:⁷²

the exclusion of the defendant from the procedure should be counterbalanced by the introduction of a 'special independent counsel'. He would represent the interest of the defendant at first instance and, where necessary, on appeal on a number of issues: first, as to the relevance of the undisclosed material if and to the extent that it has not already been resolved in favour of disclosure but for a public interest immunity claim; second, on the strength of the claim to public interest immunity; third, on how helpful the material might be to the defence; and fourth, generally to safeguard against the risk of judicial error or bias.

Such a procedure, the Lord Justice said, 'would restore some adversarial testing of the issues presently absent in the determination of these often critical and finely balanced applications'.⁷³ In 2003, this recommendation was noted by the Strasbourg court in *Edwards and Lewis v United Kingdom*⁷⁴ in which the court ruled that the ex parte procedure in the particular case did not otherwise meet 'the requirements to provide adversarial proceedings and equality of arms and incorporated adequate safeguards to protect the interests of the accused' under Article 6(1) ECHR.⁷⁵ Before the UK government's appeal to the Grand Chamber against the judgment in *Edwards and Lewis* could be heard, though, the House of Lords handed down its decision in *R v H and C* in February 2004 approving the use of special advocates in such cases.⁷⁶

There is as yet little express sanction in domestic legislation or domestic legal authority for the appointment of a special advocate or special counsel to represent, as an advocate in [public interest immunity] matters, a defendant in an ordinary criminal trial ... But novelty is not of itself an objection, and cases will arise in which the appointment of an approved advocate as special counsel is necessary, in the interests of justice, to secure protection of a criminal defendant's right to a fair trial.

The House of Lords also noted, however:⁷⁷

[The appointment of a special advocate] does however raise ethical problems, since a lawyer who cannot take full instructions from his client, nor report to his client, who is not responsible to his client and whose relationship with the client lacks the quality of confidence inherent in any ordinary lawyer-client relationship, is acting in a way hitherto unknown to the legal profession. While not insuperable, these problems should not be ignored, since neither the defendant nor the public will be fully aware of what is being done ... None of these problems should deter the court from appointing special counsel where the interests of justice are shown to require it. But the need must be shown. Such an appointment will always be exceptional, never automatic; a course of last and never first resort. It should not be ordered unless and until the trial judge is satisfied that no other course will adequately meet the overriding requirement of fairness to the defendant.

The most obvious distinction between the use of special advocates in criminal proceedings is that their use relates to the applications for non-disclosure of evidence that might otherwise be relevant to a defendant's case. In this sense, the special advocate procedure is used to enhance the fairness of the proceedings in respect of an accused (who would otherwise be unrepresented in public

interest immunity hearings). The contrast in the case of *Roberts* is that the special advocate procedure was there introduced by the Parole Board to exclude the appellant from proceedings at which he would, in the normal course of events, be entitled to be present.

Issues raised by the use of special advocates

Compatibility with human rights and principles of procedural fairness

Having considered the various settings in which special advocates are now used and the principles involved, it seems possible to arrive at the following conclusions: (1) the use of special advocates is intrinsically unfair to the appellant; and (2) there are certain exceptional cases in which the unfairness to an appellant can be justified.

The most compelling case for the use of special advocates are those proceedings in which appellants have previously been excluded altogether, eg *ex parte* applications in criminal cases involving public interest immunity claims, deportation hearings on the ground of national security prior to *Chahal*. In such cases, although the use of a special advocate is clearly second-best to the actual participation of the appellant and/or representatives of his or her own choosing who are directly responsible to him or her, the use of special advocates is nonetheless a significant improvement over the status quo. The use of special advocates in other kinds of proceedings, those in which appellants have always been entitled to be present and/or those which concern an applicant's liberty, is much more problematic.

Whether the special advocate procedure is ultimately compatible with fundamental rights depends not on the status quo but on whether the unfairness to the appellant is justified in the circumstances of the particular case. Hence, it cannot be said that the use of special advocates in Parole Board cases will always be incompatible nor that their use in a public interest immunity hearing is always a good thing. The simple and obvious test is whether their use is necessary and proportionate. 'Necessity' in this context means, as the Strasbourg court indicated in *Edwards and Lewis*, that it will be 'necessary to withhold certain evidence from the defence so as to preserve the fundamental rights of another individual or to safeguard an important public interest'.⁷⁸

There would still be a balance to be struck, however, against the unfairness to the appellant. If the subject of proceedings is an employment claim, for instance, then arguably the need to protect the life of a source from a real risk of harm might well outweigh the (partial) unfairness to the appellant. If, on the other hand, the proceedings were criminal (or otherwise related directly to the appellant's liberty) and it was suggested that the appellant be excluded, not only

from an application hearing for non-disclosure, but from the substance of the trial itself, then it is arguable that the unfairness to the appellant could not be justified. For this reason, I consider that it would be very unlikely that the use of special advocates could ever be justified in criminal proceedings, other than in relation to public interest immunity claims.

The kinds of proceedings, then, and the potential consequences of unfairness to an applicant will be relevant to the issue of necessity. Whether, on the other hand, the use of special advocates is a *proportionate* measure will be a fact-sensitive inquiry, depending on the evidence in each case supporting the existence of a real risk.

In addition to these questions, though, there are a series of structural issues that arise in relation to the special advocate procedure irrespective of the kind of proceedings in which it is adopted. These are: (1) appointment; (2) training; (3) resources; (4) accountability; (5) representation of an appellant's interests; and (6) democratic scrutiny.

Appointment

The fact that special advocates are appointed by the Attorney-General in proceedings where the respondent is the government is surely a controversial one. Indeed, the Joint Committee on Human Rights has expressed concern that responsibility for the appointment of special advocates in SIAC proceedings and elsewhere lies with the Attorney-General, who is not only a government minister but, as the Joint Committee noted, has personally appeared for the government in proceedings before SIAC.⁷⁹

On the one hand, the Joint Committee is correct to express concern at the appearance of the Attorney-General appointing special advocates on behalf of those he is personally arguing should be detained under Part 4. It is undoubtedly the case that, where an appellant has no choice over the counsel appointed to represent him or her in closed proceedings and where that counsel is not directly responsible to the appellant for the conduct of his or her case, there is an apparent conflict of interest where the choice is made by a government minister who is himself involved in proceedings for the other side. As a matter of transparency and impartiality, it is important that justice should not only be done, 'but should manifestly and undoubtedly be seen to be done'.⁸⁰

On the other hand, it should be noted that, as a consequence of the Attorney-General's personal involvement in SIAC proceedings, the actual appointment of special advocates in those cases has been made by the Solicitor-General, also a government minister but not herself otherwise professionally interested in SIAC

cases. Moreover, where the same issue was raised concerning the appointment of special advocates in criminal proceedings (where the Director of Public Prosecutions is also appointed by the Attorney-General), the House of Lords recently ruled that:⁸¹

It is very well-established that when exercising a range of functions the Attorney-General acts not as a minister of the Crown (although he is of course such) and not as the public officer with overall responsibility for the conduct of prosecutions, but as an independent, unpartisan guardian of the public interest in the administration of justice ... It is in that capacity alone that he approves the list of counsel judged suitable to act as special advocates or, now, special counsel, as when, at the invitation of a court, he appoints an amicus curiae.

In light of the above, it seems difficult to regard the current procedures for appointment as wholly unsound. However, given the increasing use of special advocates in UK law in general,⁸² there may be a case for establishing an independent 'Office of Special Advocates',⁸³ either within the Legal Secretariat to the Law Officers or elsewhere, that would have direct responsibility for their appointment and allay broader concerns about transparency and impartiality of the appointment procedure.⁸⁴

In a separate note, it has been suggested by Lord Carlile of Berriew QC, the independent statutory reviewer of Part 4 of ATCSA, that the pool of special advocates in SIAC cases should be 'widened well beyond those with detailed knowledge of administrative law'.⁸⁵ This is partly because, in Lord Carlile's view, SIAC proceedings are typically fact-intensive⁸⁶ and future cases are unlikely to raise fresh issues of administrative law,⁸⁷ and also because, as the Newton Report also noted, 'each [SIAC] appeal requires a fresh security-cleared special advocate who has not been exposed to the closed material ... The supply of such advocates is limited'.⁸⁸ Indeed, it seems self-evident that special advocates should have experience appropriate to the kinds of proceedings in which they are engaged. Accordingly, if special advocates are to become an established feature of English law, it seems prudent to consider developing open and transparent procedures for their appointment.

Training

Another recommendation made by Lord Carlile is the suggestion that special advocates working on SIAC cases should receive 'organised training' at which advocates 'can discuss and share common problems, resolve their approach to procedural and formidable ethical issues, and receive the kind of help typically given in courses run by the Judicial Studies Board for full and part-time judges'.⁸⁹

In principle, this seems a sensible suggestion: the role of special advocate is a novel one and in the absence of established principles for their conduct, it is in an appellant's interest that special advocates are fully aware of their role and responsibilities. For the same reason, it is important for the sake of transparency that the content of any official guidance should be subject to public and professional scrutiny. The establishment of a formal office to oversee the appointment of special advocates would help ensure consistency and transparency in this regard.

Assistance

A consistent concern raised by those who have served as special advocates⁹⁰ has been the lack of adequate assistance to perform their task effectively. In the SIAC context, Lord Carlile has noted problems with the amount of material received by special advocates and suggested that advocates be assigned a 'security-cleared case assistant, who could categorize all the papers in consultation with the special advocate and provide some degree of assistance and act as a conduit of information to deal with queries by the advocate'.⁹¹ Special advocates have also expressed concern at the lack of administrative and technical assistance.⁹² In particular, it was suggested that special advocates would benefit greatly from having access to someone with expertise in intelligence matters 'who can provide the sort of help that, in technical civil litigation, one gets from an expert'.⁹³ It was suggested that former (rather than currently-serving) members of the intelligence services might be appropriate persons to provide such independent advice and explanation to special advocates.⁹⁴

Related to this, it also appears that the government solicitors responsible for instructing special advocates in SIAC cases are apparently not themselves security-cleared. Special advocates have expressed concerns over the adequacy of these arrangements, including:

- the risk of inadvertent disclosure of closed material in corresponding with a non-security cleared instructing solicitor;
- the absence of a central mechanism for obtaining relevant material (eg submissions from previous SIAC cases, transcripts, etc); and
- special counsel having to undertake without assistance factual research of a type normally carried out by solicitors.

While it is correct that the relationship between government solicitors who brief special counsel and the special counsel themselves is not directly analogous to that of a barrister and an instructing solicitor (because the special advocates do not receive 'instructions' per se),⁹⁵ it is plainly in an appellant's interest that the special advocate representing him/her should have full benefit of a solicitor who

is fully conversant with the case at hand, in the same way that a barrister in normal proceedings would have. If it is deemed acceptable for an appellant's interests to be represented by counsel not of his/her choosing and who is not professionally responsible to him/her for the conduct of his/her case, at the very least that special counsel should be sufficiently well-equipped to represent his/her interests in his/her absence. Two special advocates suggested that the problems of lack of assistance:⁹⁶

could be ameliorated to some extent by the establishment of an independent 'Office of Special Advocates' staffed by security-cleared personnel (some of whom should be legally qualified), responsible for dealing with correspondence, collating relevant documents and carrying out the factual research normally undertaken by solicitors.

In light of the fact that the special advocate procedure has already been extended beyond the sphere of national security, there would seem to be a strong case for the establishment of an independent office along the above lines to ensure transparency, and to provide advocates with the appropriate legal, technical and administrative support.

Accountability

The responsibility owed by a representative to those s/he represents is more than just a legal duty but a moral obligation as well. While there may be prudent policy grounds for suspending the legal duty, that suspension creates an evident accountability gap between the conduct of a special advocate and the appellant s/he represents.

While there is no evidence to suggest that the performance of any of those appointed as special advocates has been in any way inadequate (on the contrary, the evidence in SIAC cases suggests that they have performed well),⁹⁷ the right of persons detained under counter-terrorism legislation to fair proceedings should not be left to the professionalism of particular individuals to conduct themselves appropriately. Nor does there appear to have been any attempt by the government to put in place any alternative formal safeguards to ensure that special advocates act effectively to represent the interests of those detained.

It has been suggested that, in SIAC proceedings, the duty owed by special advocates to the court may be sufficient to ensure that advocates do not act negligently.⁹⁸ Although it seems likely that a judge in closed proceedings is likely in most cases to provide an effective check against any obvious misconduct by an advocate, it seems doubtful that the duty to the court alone would be enough of a safeguard in *every* case. Although the calibre of special advocates is currently

high, it is possible to frame a hypothetical case of a special advocate whose negligent mishandling of a case goes unnoticed by the court or the other parties. In such a case, negligence would go unchecked under current arrangements: first, because a detainee and his/her lawyers are precluded from knowing the substance of the closed material justifying the case against him/her; and secondly, because those instructing the special advocate are not themselves security-cleared and so unable to second-guess his or her decisions in an effective manner.

The most practical solution to this accountability gap would be to allow for increased professional regulation of advocates: if the special advocate cannot be liable in tort for misconduct on the basis that s/he is not responsible to the appellant, there does not seem to be any problem in principle with retaining accountability to his/her profession. A significant practical hurdle would be overcome by the provision of the security-cleared solicitor, who would be able to monitor the conduct of the advocate throughout the proceedings. More generally, an Office of Special Advocates would have the benefit of being able to provide appropriate standards and supervision. The most obvious difficulty would be holding a disciplinary hearing of an advocate without disclosure of closed material, but perhaps one benefit of the increasing usage of special advocates is an increasing pool of potential disciplinary tribunal members who are security-cleared.

Representation of an appellant's interests

Related to the accountability of advocates is an even more fundamental point about the role that special advocates play in representing the interests of the appellant. This issue arose in the SIAC case of *Abu Qatada v Secretary of State for the Home Department*,⁹⁹ in which the appellant indicated that he would not attend the open hearings or otherwise participate in the proceedings in any way because:¹⁰⁰

he considered that the decision on his appeal had, in effect, already been taken. He had chosen not to play any part precisely because he has no faith in the ability of the system to get at the truth. He considered that the SIAC procedure had deliberately been established to avoid open and public scrutiny of the respondent's case, which deprived individuals of a fair opportunity to challenge the case against them.

When the closed hearings began, the two special advocates appointed to represent the appellant notified SIAC 'that after careful consideration they had decided that it would not be in the appellant's interests for them to take any part in the proceedings'.¹⁰¹ For itself, SIAC found that the evidence against the

appellant was so strong 'that no special advocate however brilliant' could have persuaded it otherwise and '[t]hus the absence of the special advocates has not prejudiced the appellant'.¹⁰² Nonetheless, SIAC recorded its concerns as follows:

We are conscious that the absence of a special advocate makes our task even more difficult than it normally is and that the potential unfairness to the appellant is the more apparent. We do not doubt that the special advocates believed they had good reasons for adopting the stance that they did and we are equally sure that they thought long and hard about whether they were doing the right thing. But we are bound to record our clear view that they were wrong and that there could be no good reason for not continuing to take part in an appeal which was still being pursued. To do so could not conceivably compromise the appellant's desire not to appear to add any credence to the system which he regarded as inherently unfair. And any concerns about particular matters would be and should have been dealt with by the exercise of discretion in deciding what to challenge, what to elicit and what submissions to make.

Delivering his annual review of the operation of Part 4 of ATCSA in 2004, Lord Carlile addressed the case and came to the conclusion that it would be an 'unacceptable result' for SIAC to ever be left 'with an unrepresented appellant in open session and the absence of partisan scrutineers of evidence given in closed session'.¹⁰³ He recommended that, whether by statutory amendment or otherwise:¹⁰⁴

it should be made clear that the role of the special advocate excludes the conclusion that 'the interests of the appellant' can be served by a withdrawal from any part in the closed proceedings before SIAC. In many cases, the silence of an advocate may be judicious and even a welcome relief at times – but the unusual role of the special advocate should require attendance and the willingness to act at all times.

It would be a startling turn, however, for parliament or ministers or, indeed, anyone else to determine by way of regulation what an appellant's interests are in the face of an appellant's own express wishes. Not only would such a direction undercut the independence of the lawyers involved, but it would undermine one of the core assumptions of the ideal of individual autonomy – that each person is the best judge of his or her own interests.¹⁰⁵ It would also run counter to what was originally presented to parliament, the Home Office Minister having made clear that 'the special advocate must make a judgment about the way in which the appellant would have wanted his case to be argued'.¹⁰⁶ It can many times be the case that an individual's wishes run contrary

to his/her apparent interests, but so long as an appellant is mentally competent and informed as to the consequences then the principle should be clear – a special advocate should follow, so far as practicable, an appellant's instructions even though he or she is statutorily enjoined from being professionally responsible to that appellant.

An appellant who is subject to the special advocate procedure is deprived of many things: physical attendance throughout the course of proceedings; full disclosure of evidence adverse to his/her case; the right to cross-examine witnesses; choice of counsel and the ability to communicate with them in confidence. The basic freedom to determine one's own interests should not be among the things sacrificed in the name of security.

Democratic scrutiny

Whatever the merits for introducing exceptional procedures might be, the use of special advocates is a serious restriction on the right of individuals to know the case against them and a clear interference with the right to fair proceedings in general. While the use of special advocates may enhance fairness in some cases, it would seem a dangerous development to allow their extension to go unchecked into all areas without full democratic scrutiny. For this reason, the decision of the Court of Appeal in *Roberts* to allow an inferior tribunal to adopt the special advocate procedure without explicit parliamentary authorisation is deeply unwelcome. If it would be permissible for the Parole Board to use special advocates in relation to parole hearings on an ad hoc basis, then it is not hard to envisage situations where other tribunals faced with claims of sensitive evidence might seek to invent similar procedures – a revenue hearing considering material from a covert source, for instance. While *Roberts* is likely to be appealed to the House of Lords, there would seem to be a compelling case for putting the common law use of special advocates on a statutory basis, so that there can be full democratic scrutiny of arrangements for their use, as well as further elucidation of the principles and procedures involved.

Conclusion

The gradual extension of the use of special advocates in English law is an excellent indication of both the strength and the weakness of the common law as a process of reasoning by analogy. Originally intended for a mere handful of deportation cases a year, they are now applicable in proceedings concerning everything from Parole Board reviews, race discrimination claims at GCHQ, life sentences in Northern Ireland, public interest immunity claims in criminal cases, and even the indefinite detention of foreign nationals under counter-terrorism legislation. In some of these cases, their use has proved an important safeguard in proceedings where an appellant might otherwise never have had

the opportunity to challenge all the evidence against him/her. In other cases, their use has signalled an unwelcome and possibly unnecessary interference with basic rights and principles of procedural fairness.

Since it seems likely that special advocates are to become, in one form or another, a permanent fixture in English law, it seems appropriate to end with the note of caution sounded by the House of Lords: the use of special advocates, they warned, must always be 'a course of last and never first resort'.¹⁰⁷ This cautious approach of the Lords in *R v H and C* contrasts with the apparent lack of concern shown by the Court of Appeal in *Roberts* that an inferior tribunal could adopt such a procedure with explicit authorisation from parliament. For, if there is a case for using special advocates in such cases, then it does not help that that case is being made by unelected officials on the basis of undisclosed evidence. On the contrary, the more exceptional the procedure, the greater the need for express parliamentary approval. For if a democratic society has a need for special procedures, it should at least ensure that they are adopted openly and not by stealth.

Eric Metcalfe is JUSTICE's director of human rights.

Appendix

JUSTICE study on the use of special advocates in SIAC proceedings

In June 2004, JUSTICE wrote to 19 barristers who had been confirmed by the Treasury Solicitor's Department as having been appointed to act as special advocates in Special Immigration Appeal Commission ('SIAC') cases, both in respect of persons detained under Part 4 of the Anti-Terrorism Crime and Security Act 2001 and under the general jurisdiction of SIAC in deportation cases on the ground of national security.

The aim of the letter was to invite those who had been appointed as special advocates to give their views on the operation of the system in general (as opposed to their experience of particular cases), what problems (if any) might occur, and whether the system could be improved or should be replaced. It was agreed that special advocates who participated in the study would not be identified, and that any views they expressed would not be published without their prior consent. In addition it was indicated that JUSTICE might use some of the comments as part of its own response to the then ongoing Home Office consultation on counter-terrorism powers.¹⁰⁸

Of the 19 special advocates written to, 10 responded – four by way of written reply, four by telephone interview, and two in face-to-face interviews.

Q1. Appointment procedures

(a) Do you think the present arrangements for appointment of special advocates are satisfactory? How do you think they may be improved?

None of the special advocates thought that the current arrangements for appointment were especially unsatisfactory. While several acknowledged the appearance of the Attorney-General making the appointment was problematic, they drew attention to the fact that the actual appointment of special advocates for those proceedings had been made by the Solicitor-General precisely to avoid any conflict.¹⁰⁹ The view of the House of Lords in *R v H and C* – that the Attorney-General has certain functions as an 'independent, unpartisan guardian of the public interest in the administration of justice' and that the appointment of special advocates is one of them – was also referred to.

(b) Do you agree with Lord Carlisle's suggestion that the current pool of special advocates in SIAC should be 'widened well beyond those with

detailed knowledge of administrative law'?

Almost all special advocates we spoke to agreed with this suggestion, noting that SIAC proceedings were more fact-intensive and involved greater cross-examination than most administrative law proceedings. One advocate in particular warned that 'all those involved in SIAC proceedings need to deal with facts' and that there was a danger of lawyers becoming 'excited by the legal and human rights issues to the detriment of getting buried in the facts'.¹¹⁰ Another noted that:¹¹¹

given that many cases before SIAC no longer require much legal analysis but depend on a painstaking analysis of the facts and (preferably) good cross-examination skills, consideration should now be given to appointing some first-rate criminal barristers.

Another special advocate agreed with the need to widen the pool but cautioned that 'a permanent panel runs the risk of inbuilding the system'.¹¹²

Q2. Training

Do you agree that such training would be useful? Are there any particular issues on which you think it would be helpful to receive training or assistance?

Almost all the special advocates thought that some kind of training would be a good idea, given the novel role being performed and the practical difficulties involved. However, several questioned whether Lord Carlile's analogy with judicial training was the right one,¹¹³ and some of the more senior advocates were concerned about taking an overly-formal approach. Nonetheless, almost all agreed that those appointed as special advocates ought to receive some kind of training to highlight the practical, ethical and legal problems they were likely to face. Most thought that it would be especially useful to share (without disclosing closed material) information on common approaches to particular issues.¹¹⁴ Two advocates indicated that the content of any official guidance should be made known to the detainees, for the sake of transparency.¹¹⁵

Q3. Instructions from solicitors/appointing body

Do you consider the current procedure for instructing special advocates to be adequate? How do you think the procedure could be improved?

One of the most consistent concerns expressed by all the special advocates was the lack of administrative and technical assistance.¹¹⁶ This was seen as particularly problematic, given the often technical nature of the closed

intelligence material. In particular, it was suggested that special advocates would benefit greatly from having access to someone with expertise in intelligence matters 'who can provide the sort of help that, in technical civil litigation, one gets from an expert'.¹¹⁷ It was suggested that former (rather than currently-serving) members of the intelligence services might be appropriate persons to provide such independent advice and explanation to special advocates.¹¹⁸ Still another proposal was that advocates should be able to have recourse to a 'library of closed judgments'.¹¹⁹

On the issue of the lack of adequate instructions from the Treasury Solicitors, some special advocates were keen to clarify that they are not instructed per se.¹²⁰ Most special advocates nonetheless expressed concern that they did not have the benefit of an instructing solicitor who would, in the normal course of events, assist the barrister with the preparation of the case.¹²¹ Particular problems identified included:

- the risk of inadvertent disclosure of closed material in corresponding with a non-security cleared instructing solicitor;
- the absence of a central mechanism for obtaining relevant material (eg submissions from previous SIAC cases, transcripts, etc); and
- special counsel having to undertake without assistance factual research of a type normally carried out by solicitors.

Two special advocates suggested to us that the problems of lack of assistance:¹²²

could be ameliorated to some extent by the establishment of an independent 'Office of Special Advocates' staffed by security-cleared personnel (some of whom should be legally qualified), responsible for dealing with correspondence, collating relevant documents and carrying out the factual research normally undertaken by solicitors.

Alternatively, they suggested that 'an independent firm of solicitors could be appointed (subject to the usual vetting requirements) to carry out this work'. Other special advocates to whom this was put agreed that that might be an appropriate way forward.¹²³

Q4. Dealings with the appellant

What kinds of problems may potentially arise from the restrictions on communication between special advocates and the subject of proceedings?

All the special advocates spoken to acknowledged the profound difficulty of representing an appellant whom one could not communicate with. At the same

time, several special advocates were at pains to point out that the SIAC rules do not prohibit *all* communication between detainees and special advocates: advocates can discuss matters with an appellant before the closed hearing, the appellant can continue to pass information on a one-way basis even during the closed hearing, and there is a vetting procedure that allows an advocate who has seen the closed evidence to send written communications to an appellant, albeit subject to vetting by SIAC and any objections of the Home Office.¹²⁴ Nonetheless, they saw no obvious solution to the basic problem. As one advocate said:¹²⁵

The obvious problem is that instructions from the detainee cannot be taken on the closed material. If instructions have been obtained on the open material ... then they are not really of much use. The open material is so anodyne that it gives no clue to the nature of the real case against the detainee.

A number of special advocates indicated that they encountered particular problems with this aspect of proceedings, but were unable to comment further.

Q5. Accountability and professional ethics

Do you see any problems with special advocates not being answerable to the individuals whom they represent? Do you have any suggestions for different ways in which such accountability might be secured?

Most special advocates either did not see this as a problem or thought that any problem was more theoretical than real. In practice, they noted that the selection procedures and vetting would make it highly unlikely that a special advocate would be appointed who would fall below the standard expected. Others noted that the duty owed by special advocates to the court might be sufficient to ensure effective accountability. At least one advocate thought that it was correct that advocates were not professionally responsible to the appellants:¹²⁶

On the contrary, to inject accountability to the client into the relationship, the same as or similar to that owed to clients properly so-called, would make the special advocates' task more difficult. My approach to being a special advocate was to do everything I could for the appellant as if he were a client.

Notes

1 Dicey, *An Introduction to the Study of the Law of the Constitution*, p55. Dicey was speaking of the colonial governments of the Bahamas, Barbados and Bermuda, in the sense that their governments were representative (in the sense that the executive was drawn from

those elected to the legislature) but not responsible (the executive was not accountable to the legislature).

2 Hansard, HC Debates, 26 November 1997, col 1034, Richard Allan MP: 'The Bill represents a most sensible response to the judgment of the European Court of Human Rights in the *Chahal* case and we look forward to a process whereby human rights will be placed at the heart of all our immigration and asylum legislation ... The Bill is a sign of things to come.'

3 Introducing the bill in the Lords, Lord Williams of Mostyn said that 'the numbers likely to be involved are very small indeed. The panel which advised the Home Secretary in the past has in the past six years dealt with only six cases which were not Gulf War related' (HL Debates, 5 June 1997, col 751) and at Commons second reading, the Home Office minister, Mike O'Brien, said 'about five cases a year would be the most that we would think likely, in the normal course of events, to come before the commission' (HC Debates, 30 October 1997, col 1054).

4 See below p23.

5 *Roberts v Parole Board* [2004] EWCA Civ 301. For discussion of this case see below pp23-24.

6 Attorney-General's Review of the Year 2001/2002, p28: 'During the last 12 months the Attorney-General appointed a total of 19 Special Advocates for the purpose of hearings before SIAC and a total of three Special Advocates for the purpose of hearings before POAC'.

7 See *R v H and C* [2004] UKHL3. For fuller discussion see below pp24-26.

8 See eg Hong Kong's National Security (Legislative Provisions) Bill 2003.

9 See Law Commission of India, *Consultation Paper on Witness Identity Protection and Witness Protection Programmes* (August 2004).

10 Human Rights Watch briefing paper, *Neither Just nor Effective: Indefinite Detention without Trial in the United Kingdom under Part 4 of the Anti-Terrorism Crime and Security Act 2001* (24 June 2004).

11 See eg Joshua Rozenberg, 'Killer's case 'just like Guantánamo Bay'', *Daily Telegraph*, 15 June 2004. Concerning criticism of SIAC, a former member of the Commission has commented that, the comparison with the Guantánamo obscenity is not entirely fair: 'our detainees can walk free the moment they can find a safe country willing to take them and they have access to lawyers. But there is enough force in the comparison to make one uneasy', Sir Brian Barber, *On SIAC*, London Review of Books, Vol 26, 18 March 2004.

12 23 EHRR 413.

13 *Ibid*, paras 130-131. Emphasis added.

14 *Ibid*, para 144. The Canadian procedure referred to by the court was governed by the Immigration Act 1976, which provided for review of removal certificates issued by ministers on grounds of national security by a senior judge sitting in camera, who could have regard to all relevant material including sensitive intelligence. The 1976 Act has now been replaced in Canada by the Immigration and Refugee Protection Act 2002, section 78 of which provides for judge-only hearings as before. Section 78(h) and (i) further provide appellants with the right to a summary of the closed material as well as the right to be heard on the issue of inadmissibility. In fact, there does not appear ever to have been explicit provision in either the 1976 Act or the 2002 Act for the use of security-cleared counsel to assist the court in Canadian immigration proceedings involving issues of national security, although there appears to be nothing that would prevent a judge sitting alone exercising common law powers to appoint an amicus in such circumstances either.

15 Lord Williams of Mostyn, 2nd reading, HL Debates 5 June 1997, col 736.

16 *Ibid*, HL Committee 23 June 1997, col 1437. Emphasis added. Lord Lester of Herne Hill QC said that the amendments to the original proposal 'would not satisfy a purist. It would not satisfy someone who believed that nothing less than a full trial with full natural justice would suffice. However, I believe that the amendment is a fair compromise' (*ibid*, col 1438).

17 Home Office Minister Mike O'Brien, 2nd reading, HC Debates, 30 October 1997, col 1056. He later explained that: 'a special advocate is not obliged to disclose information that he may become privy to. He does not have the lawyer-client relationship that one commonly expects, so the special advocate will not take any instructions from the appellant' (*ibid*, col 1071).

18 Ibid, col 1070-1071, emphasis added. Whether the minister's analogy is sound is something I consider below at p21. See also 3rd reading, HC debates, 26 November 1997, col 1039: 'the special advocate has an obligation to seek to represent the appellant's interests without taking instructions from him. As I have mentioned in previous debates, that is not completely unprecedented. Perhaps it has never been done on this scale and in this way, but it happens in cases involving people with psychiatric problems and with minors. Their lawyer sometimes has to exercise independent judgment in the way in which he represents that person'.

19 HC debates, 3rd reading, 26 November 1997, col 1039.

20 Ibid, col 1070.

21 Ibid, col 1071.

22 Emphasis added.

23 Emphasis added.

24 See eg Article 14 of the International Covenant on Civil and Political Rights ('ICCPR'), Article 6 ECHR.

25 Article 6(1) applies to both civil and criminal proceedings whereas Article 6(2) and (3) applies only to criminal proceedings.

26 See Article 14(3)(a), the right 'to be informed ... of the nature and cause of the charge against him'; Article 6(3)(a). See eg *Nielsen v Denmark* (1959) 2 YB 412 (Commission).

27 Article 14(3)(d) ICCPR; Article 6(1) ECHR. See eg *Brandstetter v Austria* (1991) 15 EHRR 378, para 66; *Mantovanelli v France* (1997) 24 EHRR.

28 Article 14(3)(e) ICCPR; Article 6(1) and 6(3)(d) ECHR. See eg *Unterpertinger v Austria* (1986) 13 EHRR 175.

29 Article 14(3)(c) ICCPR; Article 6(1) and 6(3)(c) ECHR. See eg *Pakelli v United Kingdom* (1983) 6 EHRR 1; *Goddi v Italy* (1982) 6 EHRR 457.

30 Article 14(1) ICCPR: 'all persons shall be equal before the courts and tribunals'; Article 6(1) has been interpreted as providing an implied right to each party to a 'reasonable opportunity of presenting his case to the court under conditions which do not place him at a substantial disadvantage vis-à-vis his opponent', *De Haes and Gijssels v Belgium* (1997) EHRR 1 at para 53.

31 The right to a counsel of one's own choice is not absolute under Article 6 but the general rule is that the appellant's choice should be respected. See n30 above.

32 JCHR, *Review of Counter-Terrorism Powers*, 18th report of session 2003-2004, 4 August 2004 (HL 158, HC 713), para 40.

33 Ibid, para 41.

34 Special Immigration Appeals Commission (Procedure) Rules 2003 (SI 2003/1034).

35 See eg *R v Daly* [2001] 2 AC 532; *Campbell and Fell v United Kingdom* (1984) 7 EHRR 165.

36 Articles 14 and 6(1) respectively.

37 448 US 555 (1980).

38 See Clayton and Tomlinson, *The Law of Human Rights*, Vol 1 (1st ed), para 11.190: 'The test for assessing the acceptability of limitation on the right of access [to the courts under Article 6] is to a large extent similar to the basic requirements when justifying restrictions on interferences with the qualified rights defined under Articles 8 to 11'.

39 See below p23 for a list of the administrative tribunals in which special advocates are explicitly permitted.

40 *Megyeri v Germany* (1993) 15 EHRR 584, para 22(c). The applicant was detained for treatment in a psychiatric institution. The applicant sought to challenge his detention but was not represented by counsel, having previously been told at an earlier review hearing that counsel did not have to be provided for such proceedings.

41 See eg *Weeks v United Kingdom* (1989) 10 EHRR 293: the court held the Parole Board's procedures breached Article 5(4) as they did not allow 'proper participation of the individual adversely affected by the contested decision, this being one of the principal guarantees of a judicial procedure for the purposes of the Convention, and cannot therefore be regarded as judicial in character'. See also *Thynne, Wilson and Gunnell v United Kingdom* (1991) 13 EHRR 666, in which the court upheld at para 80 a breach of Article 5(4) on the same grounds as *Weeks* in respect of three discretionary life prisoners.

42 See *Singh and Hussain v United Kingdom* (1996) 22 EHRR 1. The court ruled that 'where a substantial term of imprisonment may be at stake and where characteristics pertaining

to his personality and level of maturity are of importance in deciding on his dangerousness' Article 5(4) 'requires an oral hearing in the context of an adversarial procedure involving legal representation and the possibility of calling and questioning witnesses' (*Singh*, para 68; *Hussain*, para 60).

43 See *Bouamar v Belgium* (1986) 11 EHRR 1: the applicant complained of being unable effectively to challenge his detention in a juvenile court, the applicant himself being present but his lawyers not having been given notice of any of the court's inter partes hearings nor being permitted to comment on the prosecution's ex parte applications. The Strasbourg court held that although the obligation on state parties under Article 5(4) 'is not identical in all circumstances or for every kind of deprivation of liberty' it was nonetheless essential that the applicant in this case 'should have the effective assistance of his lawyer' (para 60).

44 See eg *R v H and C* [2004] UKHL 3, at para 18: 'The public interest most regularly engaged is that in the effective investigation and prosecution of serious crime, which may involve resort to informers and under-cover agents, or the use of scientific or operational techniques (such as surveillance) which cannot be disclosed without exposing individuals to the risk of personal injury or jeopardising the success of future operations'.

45 See below pp21-26.

46 See eg *Doorson v Netherlands* (1996) 22 EHRR 330; *X v UK*, Appln 20657/92, 15 EHRR CD 113.

47 Application Nos 39647/98 and 40461/98, 22 July 2003, para 53.

48 *Barratt v Ansell and others* [2000] 3 All ER 673.

49 See eg *Rondel v Worsley* [1969] 1 AC 191. Lord Reid noted, at p 227B-C, that public policy was 'not immutable'.

50 *Barratt v Ansell*, para 16.

51 'Responsibility' is a large concept, with a number of competing conceptions and it is not possible to offer an exhaustive account of them here. See eg John Gardner, 'The Mark of Responsibility' *Oxford Journal of Legal Studies* 23(2): pp157-171; Nicola Lacy 'Responsibility and Modernity in Criminal Law' *Journal of Political Philosophy* 9 (2001), pp249-277.

52 For an analytical account of the relationship between interests and preferences or wishes, see Jeremy Waldron, *Liberal Rights* (1988) at pp87-89.

53 CPR Part 21, Practice Direction 2.1. See also *Rhodes v Swithenbank* (1889) 22 QBD 577 at 578; *Re Whittall*, *Whittall v Faulkner* [1973] 3 All ER 38; *Re L (An Infant)* [1968] 1 All ER 20 at 26, CA, per Lord Denning MR.

54 SI 2003/1034.

55 See p17 above.

56 See below p23.

57 A database of all open judgments in SIAC cases is available at <http://www.courtservice.gov.uk/judgments/siac/outcomes.htm>

58 *A, X, Y and Others v Secretary of State for the Home Department* [2002] EWCA Civ 1502, para 89.

59 JCHR, 5th Report, February 2003, HC 462, HL 59, para 51.

60 Para 53.

61 Established under Schedule 3 of the Terrorism Act 2000.

62 Established by Schedule 6 of the Anti-Terrorism Crime and Security Act 2001 ('ATCSA 2001') and further regulated by the Pathogens Access Appeal Commission (Procedure) Rules 2002 (SI 2002/1845).

63 Established by the Employment Tribunals Act 1996 and with specific provision for the use of special advocates in hearings of race discrimination claims involving matters of national security made by s67A(2) Race Relations Act 1976 (as amended by s8 Race Relations (Amendment) Act 2000) and further regulated by the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2001 (SI 2001/1171) and rule 39.8 of the Civil Procedure Rules.

64 Established by the Life Sentences (Northern Ireland) Order 2001 (SI 2001/2564) pursuant to s85 Northern Ireland Act 1998.

65 *Ibid*.

66 Established under s91 Northern Ireland Act 1998 to review certificates issued by the secretary of state in respect of acts done for the purpose of safeguarding national security

or protecting public safety or public order.

67 see n6 above.

68 See below p25.

69 [2003] 1 AC 153, paras 31-32.

70 [2002] UKHL 11, para 34.

71 *R v H and C* [2004] UKHL3, para 21.

72 *A Review of the Criminal Courts of England and Wales* (September 2001), para 193. For further analysis of the use of special advocates in PII cases, see Morag Rea, 'Golden rules' by Morag Rea, *Solicitor's Journal*, 19 March 2004; Andrew Keogh, 'The Disclosure Revolution' *New Law Journal*, 26 September 2003.

73 Auld report, *ibid*, para 194.

74 See n48 above.

75 *Ibid*, para 59.

76 [2004] UKHL 3, para 22.

77 *Ibid*.

78 See n48 above.

79 See n33 above, para 39. The Attorney-General appeared for the secretary of state before SIAC in *A, X, Y and others*, n53 above.

80 *R v Sussex Justices ex parte McCarthy* [1924] 1 KB 256 at 259 per Lord Hewart.

81 See n76 above para 46.

82 Cf *ibid* and *Roberts v Parole Board*, above.

83 JUSTICE is grateful to Special Advocates I and O for their suggestion of this development (see JUSTICE study on the use of special advocates as an appendix to this article).

84 The House of Lords also suggested that 'it would perhaps allay any conceivable ground of doubt, however ill-founded, if the Attorney-General were to seek external approval of his list of eligible advocates by an appropriate professional body or bodies, but such approval is not in current circumstances essential to the acceptability of the procedure', *R v H and C*, n76 above, para 46.

85 *Anti-Terrorism, Crime and Security Act 2001 Part IV Section 28 Review 2003*, para 75.

86 This view was strongly endorsed by Special Advocate D who said that 'all those involved in SIAC proceedings need to deal with facts' and that there was a danger of lawyers becoming 'excited by the legal and human rights issues to the detriment of getting buried in the facts'.

87 Lord Carlile, n85 above, para 75: 'many if not most of the issues of human rights and administrative law have been fully argued and adjudicated upon. The examination of cases by special advocates in future cases is likely to be more akin to the everyday work of many criminal advocates who appear routinely in difficult cases'.

88 Report of the Privy Counsellors Review Committee chaired by Lord Newton, *Anti-Terrorism Crime and Security Act 2001 Review: Report* (HC100: 18 December 2004), para 198.

89 Lord Carlile, n85 above, para 73.

90 See JUSTICE study in appendix following this article.

91 Lord Carlile, n85 above, para 74.

92 eg Special Advocates C, D, I and O.

93 Special Advocate D.

94 *Ibid*. The special advocate suggested that 'such assistance would enable the special advocates more effectively to test the Security Service case'.

95 I am grateful to Special Advocate D for elucidating this point.

96 Special Advocates I and O.

97 Lord Carlile has stated that 'the effectiveness of special advocates to date has been significant', n85 above, para 70. More recently, in the case of *M v Secretary of State for the Home Department*, file no SC/17/2002, 8 March 2004, SIAC held that as a result of the special advocate's 'rigorous cross-examination in the closed session, we are satisfied that the assertions made in the statements provided by the respondent are not supported by the evidence put before us' (para 10) and quashed the Home Secretary's certification of the appellant as a suspected terrorist.

98 It is interesting to note that similar arguments were advanced in support of barristers having immunity from liability for negligent conduct of a case, and dismissed by the House of Lords. See *Barratt v Ansell and others* [2000] 3 All ER 673 per Lord Steyn:

'[although] it is essential that nothing should be done which might undermine the overriding duty of an advocate to the court ... the question is ... whether the immunity is needed to ensure that barristers will respect their duty to the court. The view of the House in 1967 was that assertions of negligence would tend to erode this duty. In the world of today there are substantial grounds for questioning this ground of public policy'.

99 SC/15/2002, 8 March 2004.

100 Ibid, para 5.

101 Ibid, para 8.

102 Ibid, para 9.

103 Lord Carlile, n85 above, para 78.

104 Ibid, para 80.

105 See eg *Re MB (Caesarean)* (1998) BMLR 175.

106 Mike O'Brien, 3rd reading, HC debates, 26 November 1997, col 1039.

107 *R v H and C*, n76 above, para 22.

108 See *Counter-Terrorism Powers: Reconciling Liberty and Security in an Open Society* (Cmd 6147: Home Office, February 2004).

109 Special Advocate D.

110 Ibid.

111 Special Advocate B.

112 Special Advocate A.

113 eg Special Advocates C, D and E.

114 Special Advocate D said 'It is pointless (and wasteful of time and money) for Special Advocate B to start from scratch working out an approach to an issue which Special Advocate A has already done and could pass on'.

115 Special Advocates I and O.

116 eg Special Advocates A, C, D, F, G, I and O.

117 Special Advocate D.

118 Ibid. The special advocate suggested that 'such assistance would enable the special advocates more effectively to test the Security Service case'.

119 Special Advocate A.

120 Special Advocates B and D.

121 Special Advocate A noted that: 'Much time is spent in sorting out and updating papers. And techniques for supply of closed documents are rudimentary, time-consuming and unsatisfactory'.

122 Special Advocates I and O.

123 Special Advocates N and P.

124 Special Advocate D described the restriction on communication as 'widely misunderstood'. Of the vetted procedure, Special Advocate D noted that 'such requests have been made and allowed. But great care has to be taken and, to my mind, such communication should only ever be in writing'.

125 Special Advocate B.

126 Special Advocate D.

Legal aid: a way forward

Roger Smith

Roger Smith argues for a more accessible debate on the future of legal aid; analyses the current state of provision by reference both to developments in this country and around the world; proposes an approach to defining the fundamental purpose of legal aid; considers some of the issues to be resolved specifically around the evolution of the Community Legal Service established in 2000; and sets out elements of a clear long-term strategy.

Legal aid now faces a 'fundamental review' that will report by the end of the year. Already in progress are three consultations: one on a new Criminal Defence Service Bill; one on the earlier recommendations of an earlier 'independent' review of the Community Legal Service; and a further one on 'a new focus' for that service. We have just had two reviews of the economics of the practices of solicitors and barristers. Clearly, legal aid is in trouble. The government passed comprehensive legislation only five years ago, the Access to Justice Act 1999. This deluge of reviews began well before the 1997 election. We had *Legal aid – targeting need: the future of publicly funded help in solving legal problems in England and Wales*¹ in 1995, followed by *Striking the Balance: the future of legal aid in England and Wales*² in 1996. So much reviewing, yet still the government is dissatisfied. It continues to search for what it considers an adequate answer. In responding to such a quest, this paper seeks, albeit briefly, to identify some of the context and, from that, to develop a set of principles that should provide a framework for future policy. This may seem too discursive and general an approach. Nevertheless, the evidence suggests that policy-making may have been operating on too ad hoc a basis – without consideration of such context or such principles.

Political debate on the current state of legal aid in England and Wales faces at least two enormous hurdles. First, legal aid providers have an obvious individual interest in high spending. For them, legal aid is big business. For 2000-1, the Law Society estimated that legal aid provided 13.2 per cent of all solicitors' turnover.³ The equivalent for the Bar was 27 per cent for the only year disclosed, 1989.⁴ Despite recent falls, over one-third of all solicitors' offices have a contract to undertake some element of work⁵ and just under a quarter have a contract for criminal work.⁶ The vast majority of barristers will continue to undertake a legal aid case at some time in their career. This gives the legal profession a manifest stake in maintaining high levels of expenditure to the pre-existing form of provision – private practice. Overall, this has provided strong institutional protection for legal aid from the legal profession but it has also had the weakness

of equating the interest of clients with those of their lawyers. Defence or attack of, or on, legal aid can become confused by conflation with defence or attack on lawyers, or visa-versa.⁷

Secondly, the provisions governing key elements of legal aid are no longer transparent. Opacity derives from the Access to Justice Act 1999. Any legal aid scheme is a combination of only three variables – scope (what is covered); eligibility (financial conditions); and delivery (who or what provides services; at what cost and on what conditions). Previous legal aid Acts, deriving from that passed in 1949, set out a clear structure, with only the detail relegated to secondary legislation. The Access to Justice Act deprives legal aid of its name – establishing a Community Legal and Criminal Defence Service to replace criminal and civil legal aid; replaces the well-established terms like ‘legal advice’ with the vaguer ‘legal help’; removes all financial provisions, including structural issues as well as detailed figures, from the primary legislation to a Funding Code; allows the Lord Chancellor/secretary of state to set priorities by way of administrative direction; and restates the purpose of what was formerly civil legal aid in five criteria, none of which reveal that more than two-thirds of the gross cost of the Community Legal Service (CLS) is actually spent on litigation. The Act itself suggests that the services to be delivered by the CLS would appear to be virtually everything else:

- (a) the provision of general information about the law and the legal system ...;*
- (b) the provision of help by the giving of advice ...;*
- (c) the provision of help in preventing, or settling or otherwise resolving, disputes about legal rights and duties;*
- (d) the provision of help in enforcing decisions ...;*
- (e) the provision of help in relation to legal proceedings not relating to disputes.⁸*

In 2003-4, £8111m of gross expenditure depended on five opaque words in (c), a triumph of reality over aspiration.

The lack of an adequate statutory structure encourages policy-makers to devise policy on the hoof, without having to work within a principled statutory framework. Thus, faced with the usual overrun on expenditure on estimated legal aid expenditure in the current year, both the Department of Constitutional Affairs (DCA) and the Legal Services Commission (LSC) have published consultations on cuts which confuse principle and expediency.⁹ Of the former, the House of Commons Select Committee on Constitutional Affairs observed that it:

Leaves a number of key questions unanswered and we are concerned that reintroducing means testing in the ways proposed could give rise to practical difficulties which outweigh any cost savings likely to be achieved.¹⁰

The Committee considered that the DCA, despite being the lead department for human rights, had not considered the implications of the Human Rights Act for its proposals. It was left to the chair of the Joint Parliamentary Committee on Human Rights to assert their relevance.¹¹

Open political debate of legal aid is further obscured by the way in which rationing was introduced in civil cases. Legislation in 1972 made available legal advice 'on any matter of English law'.¹² Ironically, Lord Irvine had warned of the consequences of the capping of civil expenditure while the Labour Party was still in opposition. He observed that:

Legal aid will cease to be a benefit to which the individual who qualifies is entitled. It will in practice become a discretionary benefit, available at bureaucratic disposal ...¹³

Actually, it was worse. The disposal was not only bureaucratic: so was the language. It is no longer possible to respond immediately if asked whether, say, a woman in Hastings could get advice on an employment matter. The long answer would require consideration of priorities in any relevant directions from the secretary of state; subsequent priorities in the LSC's Funding Code and of the local Community Legal Service Partnership; the vagaries of 'bid zones' and 'matter starts' – both as originally allocated and as still available at the point of enquiry. The short answer is 'No': the local citizens advice bureau reports daily difficulty in finding a CLS solicitor to deal with employment matters in Hastings.¹⁴ By contrast, bureaux report no difficulty at all in nearby Thanet, Canterbury and Faversham. Thus, we have had the development of 'advice deserts' – areas where no provision exists either because there is no coverage or because a contracted provider has used its ration of approved cases. Rationing has, thus, been largely hidden and devolved to the decisions of individual deliverers of service.

The Legal Services Commission itself does not assist comprehension. The annual legal aid reports of the Law Society and, later, the Legal Aid Board allowed the reader to understand who was getting what for doing which cases. By contrast, the Legal Services Commission focuses on its own bureaucratic concerns. It gives little information about what is actually provided for its money. The section on the Criminal Defence Service in its 2003-4 report proudly sets out the objectives that it is proud to have achieved. The following is typical:

Ensure no suppliers with a category 3 rating in their cost compliance audit are operating under the General Criminal Contract unless they are operating under a contract rectification notice.¹⁵

This is important, both that this was set as an objective and achieved: it relates to the imposition of quality requirements. But, the information is not balanced by what those funded by the commission is actually doing, except by way of occasional example, and how that might fit within the criminal justice system as a whole. Revealingly, the House of Commons Constitutional Affairs Committee had specifically to ask the commission to reveal what types of criminal cases it is funding. The commission has this information and was able to reveal what lies behind its bald statistics on funded representation orders at lower, higher and non-standard rates.¹⁶ Such data facilitates open comparison with other statistics on the criminal justice system, particularly for the courts. The figures also prompt questions to be answered. For example, no reader of the commission's annual report would know that about £44m was paid out in 2003-4 in relation to driving offences, the majority at the lower standard fee rate – where they accounted for about a sixth of total expenditure. Prima facie, it would seem that considerable expenditure is being incurred on what appear to be minor matters. There will, no doubt, be an explanation. Some expenditure will be on serious driving offences but it seems as if some may not be. If this is so, there may be scope for more logical, and less destructive, cuts than were proposed by the DCA. Information that raises these sorts of questions should be in the public domain – as it used to be.

In modern politics, the price of obscurity is invisibility and the price of invisibility is death. There are jurisdictions where legal aid has been hacked back to the bone and beyond, both as a matter of deliberate political policy – for example, British Columbia, certain states in Australia – and as the result of slow strangulation of resources – as in Quebec. In the United States, federal funding for civil legal services was only maintained through the hostile Reagan years by very public campaigning in Congress.¹⁷ Debate on legal aid needs to be conducted in a language which is understandable to a wide public and with clear concepts that manifestly stretch beyond professional interest. As the Prime Minister has himself said:

Legally enforceable rights and duties underpin a democratic society, and access to justice is essential to make these rights and duties real.¹⁸

This is not to deny that, in taking over control of legal aid, the Legal Services Commission has not been responsible for research, consultancy and analysis that allows for consideration of some of these issues – particularly scope¹⁹ and

delivery²⁰ – at unprecedented levels of detail and sophistication. However, to defend itself, legal aid needs to be seen as a visible and defensible programme of government policy.

Understanding where we are now

Statistics on legal aid spending over the last five years are set out in the appendix. Expenditure rose, overall, by eight per cent over the last year (2003-4) and 25 per cent over the last three but shifts can be seen even within these broad figures. Civil funding is being switched from representation to advice. Within criminal work, magistrates court work is being contained, while that at the Crown Court is expanding disproportionately. The changing patterns of expenditure give rise to tensions that would be anticipated from the figures. The increasing expenditure on advice is benefiting the advice sector and, for example, 21 per cent of the funding of Citizens Advice (formerly the National Association of Citizens Advice Bureaux) now comes from the Legal Services Commission. However, even this new kid on the legal services block is not without concerns. Citizens advice bureaux face the challenge of delivering legal services following standstill funding from the LSC for two years running. Thus laments its director in the introduction of a publication, *Justice matters: Citizens Advice Service and publicly funded legal services*²¹ designed to press its case.

The Law Society too is concerned with the fate of its members:

*Publicly funded legal services are at a crossroad, with both funder and suppliers frustrated at the mechanisms for delivering services and for accounting to Government for expenditure from the public purse. This has resulted in a lack of trust between funder and supplier.*²²

The Bar has, somewhat characteristically, not only complained at its members' remuneration but was so concerned at the LSC's proposals for very high cost criminal cases that it bypassed negotiation with the commission; went directly to the secretary of state; told him that the future of the Bar was at stake; and successfully got an additional £17m.²³

There is no doubt of a severe sense of disillusion and alienation among providers. An outside and informed assessment comes from the Parliamentary Committee on Constitutional Affairs:

Too much has been squeezed out of the CLS budget ... Civil legal aid has become the Cinderella of the Government's services to address social exclusion and poverty. The highly desirable extension of provision and services has been possible only at the expense of cutting back on eligibility,

*scope and remuneration. This process has now gone too far.*²⁴

The position is not helped by spin, smoke and mirrors from the Legal Services Commission or confusing statements from ministers and the DCA. Anyone reading its latest annual report would take the local Community Legal Service Partnerships (CLSPs) of local providers as one of the great achievements of the commission and the new arrangements. After all, the commission states:

*Partnerships are key to our strategy for developing the CLS. Through forging new partnerships, we aim to increase the public's awareness of their legal rights and the advice and assistance to them.*²⁵

The whole first substantive section of the report is headed 'Tackling social exclusion through partnership'. Alas, truth does not live up to the hype. An analysis from the Advice Services Alliance laments:

*Several CLSPs just seem to consist of advice agencies, the LSC, the local authority and at most one solicitor ... There have been major problems with the main tasks undertaken by CLSPs. The process has been tortuous and gruelling ... There seems to have been a tendency for many CLSPs to perform tasks for their own sake. Too often, the main tasks have failed to produce results, with strategic plans not being implemented and referral protocols not working.*²⁶

Such confusion results from the fact that legal aid must be understood as in transition from the model taken from the Rushcliffe Report in 1945. This developed in a fairly straight line until a turning point that can be identified in 1986 – a good 40 years of success for the Law Society which saw off competition from alternative forms of provision to private practice, from Poor Man's Lawyer Associations in the 1940s and the law centres that flourished briefly in the 1970s. The Law Society wanted, and got, a scheme that was, in essence, focused on litigation; using public funding for private practitioners to provide access to the poor and those of middling income to the courts. The purpose was, as explained to parliament in 1948:

To provide legal advice for those of slender means and resources so that no one will be financially unable to prosecute a just and reasonable claim or defend a legal right, and to allow counsel and solicitors to be paid.

Let it be noted that, critical of this though we might be, it is easily comprehensible. Financial eligibility was set so that about 80 per cent of households were eligible (albeit with payment of contributions) in 1950, a figure

that was approached again in 1979 just before the Labour Government lost the election. By contrast, eligibility for civil legal aid had dropped to 47 per cent by 2001 and will since have declined further.²⁷ More important than percentages is the extent to which eligibility stretches above the qualifying levels for minimum state benefits. In the search for cuts, this has been steadily reducing for civil cases since 1986.

1986 marked a turning point because, in that year, a major set of emergency cuts were made to civil provision in order to meet a projected overrun on the budget – leading to the reduction of dependants' additions in civil cases. From 1986 to the present date, legal aid has remained in transition, with governments implementing a range of reforms designed to cap expenditure and control budget growth. In 1991, Lord Mackay remarked, as Lord Chancellor, that:

*We are just about at the limit of what is possible without radical change.*²⁸

We soon passed that limit in a process of bipartisan reform in which the incoming Labour government in 1997 adopted pretty well in its entirety the programme set out by Lord Mackay in 1996.²⁹ Labour added the idea of a 'Community Legal Service', without obscuring it with too much detail. Thus, providers were moved to contracts; quality criteria built in; civil costs capped; not for profit providers encouraged; and the Legal Services Commission began to micro-manage provision within a very loose statutory framework. Much of this was desirable: much inevitable. But, since no-one seems happy with the current arrangement – the government wants more cuts, the providers more money and clients more services – it seems likely that the process of transition will continue.

The global picture

It helps to place legal aid not only within its domestic historical context but within a global one. The UK has played a world role in relation to legal aid. Commonwealth and European countries have been inspired to follow its example since the Second World War. British officials were involved in the entitlement to legal aid that was implicit in the UN Declaration of Human Rights in 1948³⁰ and explicit in the International Covenant on Civil and Public Rights. This requires a defendant:

*To have legal assistance assigned to him, in any cases where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.*³¹

UK lawyers were there too for the drafting of the equivalent in the European

Convention on Human Rights, under which a defendant has the right:

*To defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require.*³²

The convention right extends, however, beyond criminal cases to those relating to 'civil rights and obligations'.³³ Case-law on the extension to civil cases has admittedly been cautious. A state need only provide a lawyer in civil cases where it is 'indispensable for effective access to the court' either because the lawyer is mandatory or there would otherwise be severe prejudice because of the 'complexity of the procedure or the case'.³⁴ Nevertheless, a significant number of cases will come within this requirement.

Human rights have, however, only latterly provided a language as a motor for the development of legal aid. Four other waves of development can be identified, albeit manifesting in different countries, at different times and in slightly different forms. All have a continuing resonance in the current pattern of domestic provision.

The first wave of development was led by professional obligation, voluntary organisation and charitable practice. Thus, the organisation now known as the Legal Aid Society of New York was formed as the German Immigrants Society in 1876. Such charitable organisations were so prevalent in the United States that, by 1911, they had formed their own National Alliance of Legal Aid Societies. In the UK, we had the Poor Man's Lawyer movement, linked to the university settlements. In the former Soviet Union, and much of Europe, lawyers acted for criminal defendants by reason of their office, *ex officio*, generally for free or very little remuneration. Remnants of this wave remain visible in the involvement of the not-for-profit charitable sector and in the gathering *pro bono* movement among large commercial firms.

The second wave was that initiated by the example of the UK in the 1950s. This was followed by a number of Canadian provinces and Australian states. Thus, for example, Ontario began a voluntary legal aid scheme in 1951, put on a statutory footing in 1967. This was based on the UK model and administered by the Law Society of Upper Canada.

The third came from the United States. It developed out of the civil rights struggle; was highly political and oriented towards law reform and strategic litigation; promoted the idea of 'neighbourhood legal services' based around salaried lawyers working in local, shop front, accessible offices and was picked

up as part of President Johnson's 'war on poverty' with leadership provided within the federal Office for Economic Opportunity.³⁵ This caught imaginations around the world and soon networks of community law centres (the UK), community legal centres (Australia), community legal clinics (Ontario) and law shops (the Netherlands) proved that the ideas could successfully be transplanted – often somewhat to the concern of existing private practitioners. In retrospect, some of the language used at this time is interesting. It emphasised the combating of poverty. It showed a somewhat naïve assumption about the power of the law. But, it also prefigured ideas of law in the service of social inclusion though with a more confrontational drive than is currently in use domestically, for example:

*Our responsibility is to martial the forces of law and the strength of lawyers to combat the causes and effects of poverty. Lawyers must uncover the legal causes of poverty, remodel the systems which generate the cycle of poverty and design new social, legal and political tools and vehicles to move poor people from deprivation, depression and despair to opportunity, hope and ambition.*³⁶

Most jurisdictions had trouble absorbing this sort of heady stuff for long – not least the United States which soon staggered into a thirty-year war over the future of federal funding for civil legal services. In England and Wales, law centres were soon seen off as any kind of effective threat by a Law Society acute enough to get the government to establish a generous legal advice scheme that could be operated by its national network of private practitioners. The assertion of the power of lawyers now seems somewhat overblown but the language displays the kind of urgency, commitment and openness to different strategies that is required if the Community Legal Service is to revisit some of the legal strategies of the 1960s and 1970s to use the law to alleviate poverty.

The fourth wave was born out of rising expenditure – giving us the age of administration. This reflected the government spirit of the 1980s and 1990s: the drive better to manage public services and, in some manifestations, to reduce them. The initiative was seized by administrators whose activity is reflected in changes of name – from Legal Aid Board to Legal Services Commission (England); Ontario Legal Aid Plan to Legal Aid Ontario; Victorian Legal Aid Commission to Legal Aid Victoria, from Legal Services Board in New Zealand to Legal Services Agency. These were all designed to indicate a more proactive management role by government nominees. More importantly, one of the old divides of different forms of provision deriving from the two previous waves was bridged. The idea of contracts with providers brought together the formerly very different schemes that provided services on an individual basis through private

practitioners (what Americans called 'judicare' and based on developments in the UK) and salaried services (that had dominated in both US civil and criminal schemes). Many jurisdictions moved to 'mix and match' provision with a combination of different providers, some salaried and others not, in what became known as a 'mixed model' of provision. Contracting was first developed in the United States very crudely and ineffectively to save money. It was then expanded much more subtly in England and Wales as a way of combining cost control with provisions to raise quality. Very soon it was being deployed in the Netherlands, Canada and elsewhere. Other ideas flew around the world, changing only their language – the Very High Cost Cases scheme in England and Wales became, for example, Big Case Management in Ontario.

Administration was certainly needed – in England and Wales above all. The legal aid scheme had been built too much on the needs of its providers, not its clients. Re-orientation is a long job. It may well be that we remain mired in the age of administration for some time, perhaps forever. Rounds of cutbacks and administrative tightening may be how the legal aid world comes to an end. That was the fate of Quebec. However, there are some signs, at least on a global scale, of a fifth wave. This has rights again as the motor for provision – but in the newly-expressed form of human rights. As we have seen, expectations of legal aid, very much on the UK model, were incorporated into the original UN and European Conventions. However, the second wave activism of the 1960s and the 1970s was based much more on ideas of civil or welfare law, rather than on human rights. International human rights obligations, interestingly, have much more influence now than previously. Two very different examples are provided by, on the one hand, a country like Lithuania and, on the other, South Africa. The former is rejoicing in its newfound freedom from the Soviet Union and its membership of the European Union. Considerably assisted by the Open Society organisation founded by currency speculator and latter day Robin Hood, Georg Soros, Lithuania is on the verge of passing a new law on legal aid that will build on two model public defender offices, initially funded by the Open Society. The reason, apart from Soros' personal and driving belief in developing the rule of law, is the need to show compliance with the European Convention and those of the Charter of Fundamental Rights and Freedoms in the new EU constitution.³⁷ The Charter obligations apply only in limited circumstances but, where it does, the commitment to legal aid is unconditional:

*Legal aid shall be made available to those who lack sufficient resources insofar as such aid is necessary to ensure effective access to justice.*³⁸

Other countries influenced by the same motivation, and where the Open Society Justice Initiative is active, include Bulgaria, Turkey and Moldova. In

South Africa, the driving force for a major expansion of legal aid in recent years has been the constitutional requirement for state-funded legal representation in certain criminal cases. This has been the mechanism by which the South African constitution has implemented the appropriate requirements of the UN and Africa Conventions on human rights.³⁹ The effect is the same: the development of a rights-based legal aid scheme.

In the United Kingdom, human rights were given an enormous boost by the Human Rights Act. At the same time, the Labour Government developed the idea of 'social inclusion'. This is discussed further below. At this point, let us just insert a couple of definitions. 'Human rights' are those inalienable fundamental rights guaranteed by international conventions, albeit that some are limited or can give rise to derogation – the right to life, fair trial, liberty, free expression, etc. In this article, the terms 'civil or citizenship rights' are those lesser rights acquired by citizens from the state. They are more conditional but much wider and may extend to rights and obligations in relation to the state (including 'welfare rights' – entitlement to state services) and against other individuals or corporate bodies (eg rights for compensation in certain circumstances).

Legal aid in England and Wales: what's the point?

The language in which legal aid and legal services have been justified has varied at different times, reflecting the wave of their development and the fashion of the times – from that of the Legal Aid Act 1949 to the martial calls of the legal aid warriors of the 1970s. Precisely because legal aid in this country is in transition and flux, we need to be very clear about how we state the purpose of legal aid. This is necessary because of the creation of the Community Legal Service to replace all civil legal aid and advice, notwithstanding that this was a diverse benefit covering very different providers in very different circumstances. The commission elides these in its latest annual report, describing the CLS as if it were a coherent whole: 'the overarching framework through which we combat social exclusion'.⁴⁰ If this is so, we have to be clear about the extremely 'overarching' meaning that is being given to 'social exclusion' in this context because the CLS brings together private practitioners fighting tort claims, largely clinical negligence; private practitioners undertaking matrimonial work – largely relating to disputes over access and maintenance on divorce; private practitioners and some lawyers employed in not-for-profit organisations litigating various public law matters – including judicial review of public services and providers; the same mix plus, now, some directly employed lawyers providing assistance with asylum and immigration cases that combines representation and advice; and not-for-profit organisations with and without lawyers plus private practitioners providing legal advice on a range of civil topics.

There are two particular reasons why talk of social inclusion as the main aim of the CLS has to be undertaken with care. The first is that this language is often used in preference to any reference to rights, even human rights. The second is the definition generally used for social exclusion needs some gloss when used in the context of legal services. As quoted in a joint Lord Chancellor's Department and Law Centres Federation pamphlet, *Legal and Advice Services: a pathway out of social exclusion*, social exclusion is:

What happens when people or areas suffer from a combination of linked problems such as lack of access to services, unemployment, poor skills, low incomes, poor housing, crime, poor health and family breakdown.⁴¹

The concept of social exclusion was developed in response to criticisms that poverty was just about lack of money,⁴² as a more sophisticated way of describing the web of deprivation that can snare the poor. It has deservedly been an extremely important driver of government policy. In the context of legal aid, it gives the real value of focusing on outcomes and on what has been known as 'social welfare law', as largely listed in the quote above. The purpose of funding civil legal aid becomes to use the law to provide access to services, higher income, better housing etc. But, social exclusion needs also to include concepts of civil or citizenship rights that revive the ideas that used to be implied by the language of 'access to justice'. It needs to incorporate notions of empowering citizens to obtain rights and, thus, being better included within society. In the context of legal aid, social inclusion has to be seen as having a hard core – the successful assertion of the rights of those excluded from benefits, services and opportunities to which they are entitled.

Both the commission and its sponsoring department appear somewhat shy of relating legal aid even to human rights concepts, though legal aid is manifestly an important element in how the UK meets its Article 6 obligations under the European Convention. We have seen that the DCA apparently had to be reminded by parliament that legal aid was itself a civil right or obligation and, thus, might attract a right of appeal to an independent tribunal. The commission provides an example of the same failing in talking of criminal legal aid in its latest annual report:

We aim to target available resources on highest priority clients and where legal aid interventions can add the greatest value and provide the most beneficial outcomes. An example of our work is the Reducing Offending Through Advice Scheme which was launched in June 2004 and is the first of its kind in England and Wales. The project is funded by the Invest to Save Budget – a joint Treasury/Cabinet Office initiative – and additional

*matching funding from LSC.*⁴³

Wrong point; wrong audience; wrong facts. The Reducing Offending Through Advice Scheme (ROTAS) is a thoroughly desirable project that aids those in prison. The commission, which took over responsibility for criminal legal aid in the higher and Crown Courts, from 1 April 2003, spent a considerable percentage of its available resources on extremely serious criminal matters where, day after day, solicitors and barristers ensured that the state complied with its obligations as to due process and the Crown Prosecution Service was correctly put to proof on the charges against their clients. ROTAS was a drop, no doubt desirable, in the bucket – even with its opportunities for collaboration with the Treasury.

Legal aid will, and must, hinder some government targets – now referred to as ‘public service agreements’. A prime example will be the highly publicised commitment to ‘bring to justice’ 1.25 million offenders by 2007-8. This is a perfectly reasonable target for the government overall but the job of the defence lawyers funded by the commission is to work as zealous advocates in the interests of their clients which will – on every plea of not guilty – correctly impede the meeting of this target. This has not only to be acknowledged, it must be welcomed as reflecting due process. Defence services cannot be incorporated within crime reduction strategies – or, if so, only with extreme care and on the margins.

So, what about the Community Legal Service?

The Community Legal Service has undoubtedly unleashed a wave of creativity and experiment into civil legal services. Research into need; the development of the quality mark; innovative experiment with new delivery mechanisms; the establishment of web-based information; CLS Direct’s telephone advice service – all these, and more, are testament to a new energy in provision. There remains, however, at its heart a contradiction and an uncertainty that needs to be resolved: its fundamental purpose. This is closely linked to the debate on social inclusion.

A recent DCA study of the CLS took, understandably enough, Lord Falconer’s stated understanding of the CLS’s purpose:

*Improving justice and access to justice and promoting people’s rights ... through ensuring that legal advice is readily available for those that need it.*⁴⁴

The secretary of state at least acknowledges rights – though he highlights advice

rather than the litigation that is actually the bulk of the work. Others are less careful. The joint DCA/Law Centres Federation publication states erroneously:

The focus of the CLS is on meeting the type of needs that most affect people's lives, in particular providing advice and help on problems in social welfare law categories of law such as housing, debt, employment, welfare benefits, community care, discrimination, immigration and mental health.⁴⁵

This describes only a minority of the work undertaken by the CLS. Civil legal aid has its origin in the 1949 legislation which was concerned with legal aid in matrimonial cases. Family cases continue to dominate expenditure – amounting to a gross £488m for legal representation in 2003-4 and accounting for just under 300,000 of the 700,000 advice matters begun in the same year. Of the legal representation cases, half were accounted for by public law Children Act cases and domestic violence. Of the non-family law representation cases that cost in total £330m in the same year, only £89m related to areas of social welfare law (and that is including all cases designated as relating to ‘public law’).

This dissonance was picked up by the recent ‘Independent Review’ of the CLS. It found confusion of understanding which was, somewhat damningly, ‘most visible among service providers and their representatives, as well as members of CLS partnerships (CLSPs). The confusion appears to it twofold. On the one hand, service providers:

Appear to understand the aims of the CLS as being less about the outcomes of improving access to information and advice, and more concerned with the outputs surrounding CLSPs and the Quality Mark.⁴⁶

On the other hand, despite stress on the new orientation of the CLS:

The majority of resources and time are still spent, and are seen to be spent, on planning, managing and delivering those more traditional roles associated with the previous civil legal aid fund.⁴⁷

The review’s first recommendation was that there was a need to ‘clarify and make more transparent the aims and functions of the CLS, both internally and to external service providers and stakeholders’. Procedurally, it argued for an executive director to be appointed for the CLS. The DCA has now consulted on this proposal. Meanwhile, the commission is consulting on a range of possible cuts to eligibility and scope which are specifically designed further to reduce litigation but without an open political debate on the re-prioritisation of expenditure.

This issue of the focus of the CLS has to be addressed. Confusion is damaging. In June 2000, the Lord Chancellor set by direction for the commission to implement two 'top priority' categories of civil work and four further priority areas. Only one related to social welfare law. The two highest priorities were:

- (a) special Children Act proceedings ...;
- (b) civil proceedings where the client is at real and immediate risk of life or liberty.

It might be noted in passing that the first of the above is correctly giving force to the provisions of the UN Convention on the Rights of the Child.⁴⁸ The second group were:

- (a) help with social welfare law issues that will enable people to avoid or climb out of social exclusion, including help with housing proceedings ... and advice relating to debt, employment rights, and entitlement to social security proceedings;
- (b) domestic violence proceedings;
- (c) proceedings relating to the welfare of children;
- (d) proceedings against public authorities alleging serious wrong-doing, abuse of position or power or significant breach of human rights.

These seem perfectly correct. Most of them relate to human and civil or citizenship rights – rather than coming within any narrow definition of social exclusion. This is not blindly to argue for continuation of 'traditional' patterns of legal aid expenditure. The Law Society was originally concerned to fund private matrimonial work and, as a result, to abolish the salaried divorce department that it had been compelled to establish during the Second World War.⁴⁹ On the contrary, the Lord Chancellor was correctly stating a new set of priorities involving public law rights in relation to the adoption of children; the protection of women from domestic violence; cases alleging wrongdoing by public figures and institutions, including local government, police officers and doctors. These are vital roles. They are about defending a fundamental set of human rights and a set of citizenship or civil rights of lesser, but still great, importance. Without them, people will feel powerless and excluded.

Expenditure on family cases is inconvenient and somewhat expensive. It may well be that mediation should become the primary method of decision for most family disputes, whether legally aided or not. There can be no doubt, however, not only of how distressing a divorce can be but, as LSC research itself indicates, how much divorce and relationship breakdown is related to a cluster of problems 'comprising domestic violence, divorce, relationship breakdown and

children problems'.⁵⁰ Single parent families – particularly those where the parents are in the process of splitting – are bound to be at the heart of concerns over social inclusion. Indeed, eligibility for remedies in relation to domestic violence should surely remain as high as is possible. Thus, procedures for all family cases may be usefully developed which avoid courts and litigation – that is one proposition. But, legal aid should remain as a way of providing assistance largely to women going through a traumatic period of their lives which we know is likely to shatter their standards of living and life. It must be available to all those who would be unable to afford to pay to go private.

Thus, the contribution of services provided under the CLS to social exclusion is threefold: they can assist in the assertion of an individual's human rights against the state; they can directly operate to eliminate poverty and discrimination through, for example, increasing income or reducing debt by helping the exercise of civil or citizenship rights; thirdly, the CLS's unique contribution to a social inclusion strategy is that its services operate to include its clients within the processes open to others. It empowers them to do something about their situation and to take action in relation to unacceptable treatment from public authorities, corporate bodies or individuals. That justifies the role of advice but it should also be noted that this is the traditional justification for strategic or public interest litigation in which the problems of a class of people are advanced through a case which challenges law or practice. This was very much the emphasis of the third wave movement in the United States which scored some notable victories.

A practical complication for the CLS is that it is not the sole provider of services with these objectives. It is the majority funder of legal services and a minority funder of all advice – from lawyers and non-lawyers. This has not prevented it from assuming a leadership role over both extending – through its quality mark – throughout the advice sector and even into government services. One way forward would be to expand its role so that it can become a Community Legal and Advice ServiceS or CLASS – bringing together other relevant funding from sources as diverse as the European Community, the Department of Trade and Industry, the Community Fund and the Office of the Deputy Prime Minister. CLASS could be created as a genuine partnership at a national level between all these diverse interests, with the commission funding provision which is specifically legal or oriented to litigation and appeal. This would be difficult to do at an institutional level and it is notable that, at a local level, the community legal services partnerships have largely proved incoherent.

The alternative must, however, entail some recognition that the CLS cannot easily assume the funding responsibility for general as well as legal advice,

assistance and representation. There needs to be better definition of boundaries. The danger is that money will be switched from 'hard services', specialist legal help that may include litigation, to 'soft' advice. This would have an obvious temptation for the Legal Services Commission – it could undertake more cases. But, it might also represent a lowering or 'dumbing down' of assistance. Most poor people spend disproportionate amounts of their time struggling with bureaucracies. That is actually why they need a lot of the advice and assistance. It must be remembered that sometimes a bureaucracy can best be shaken up by a successful judicial review of its practices. One case can, therefore, have more effect on a cause of social inclusion than a mass of advice to individuals. A major government objective in bringing forward the Human Rights Act was precisely to shake up public services with some objective standards that could be enforced.

A clear long-term strategy

There is no 'magic bullet' that will solve the problems of legal aid. The triangle of pressures from providers, funders and clients is too great. However, more is clearly needed than the proposed appointment of another manager, even a high-level executive director for the CLS. Much more fundamental thinking has to be done. Below are twelve principles, largely evolved from the analysis above, that surely at least merit consideration as the basis for future development.

1. Legal aid is both in crisis and in transition. It needs more clarity as to its purpose, scope and eligibility. Fundamentally, it needs to be designed around the needs of its clients. The form of the scheme should return to one in which eligibility and scope is clear in legislation rather than relegated to detailed and confusing codes. This will help public and clients' understanding of its role.

2. The purpose of both civil and criminal legal aid is to combat constitutional and social exclusion: it provides services so that everyone can exercise his/her rights – both those usually described as 'human rights' (fundamental protections against the state, largely in criminal cases but also some civil matters) and a broader range of civil or 'citizenship rights' (against the state, corporate bodies or individuals). Legal aid has a supplementary purpose or consequence: it eases the administration of justice: for example, representation in the magistrates' court allows greater use than otherwise of lay magistrates. Alternatives to legal aid should be sought where appropriate but care should be taken that any further attempted privatisation of funding does not encourage excessive litigation or have other undesirable side effects.

3. Legal aid must be integrated within a range of 'access to justice' policies to produce 'appropriate dispute resolution' for different types of problem. 'Vertical

strategies' need to be developed for different areas of exclusion so that these policies are co-ordinated from the bottom up – from advice through various forms of resolution. We should, however, beware of legally aided clients being excluded from courts in circumstances where a private paying client would use litigation.

4. The need for legal aid is integrally linked to policies on substantive law and legal practice. This is particularly the case in crime: new Home Office initiatives must be costed in relation to 'downstream' legal aid costs.

5. Civil legal aid must operate in an environment of some certainty. The budget for civil legal aid needs to be independent of criminal costs. The criminal budget and, logically, the appropriate part of the civil budget that meets the government's human rights obligations should not be capped. The remaining civil budget, if it is to be capped, should be ring-fenced.

6. A client of legal aid services should face clear tests of financial eligibility that are based on the rules for capital and income which apply in relation to basic means-tested state benefits. The rules must be clear, fair and a liability for any contributions based on the same structure as state benefits. The client should have a right of appeal to an independent tribunal. There should be some logic to the levels of free legal aid and the upper limit of contributory legal aid – at, purely for example, double free levels.

7. The *Criminal Defence Service* and a *Community Legal Service* need to be expanded so that the provision of both is seen as a 'national legal service' providing services throughout the whole country to national standards and, thus, without advice or, indeed, litigation deserts.

8. Legal aid must be provided by practitioners of the highest quality, whether legally qualified or not. It is important that these practitioners are independent of government or government agencies, such as the Legal Services Commission. The government has to devise a strategy where legally qualified practitioners may be seen as a separate sector within the legal profession but where the incentives, of remuneration and otherwise, are such that good lawyers at appropriate levels of experience are attracted. This probably requires some form of security of employment which would be incompatible with a scheme based on private practitioners operating under short-term competitively awarded contracts. The model should be much more that of the National Health Service. For both solicitors and barristers, ways should be found to trade certainty of employment for levels of remuneration. Remuneration levels should be transparent, public and set, in the longer term, nationally. We need publicly to

discuss the net salary scales for non-qualified and qualified staff even if allowances have to be made, at least initially for gross costs. A scheme might be developed where at least some counsel might be retained to work full-time on legal aid work. The scholarship scheme for new entrants could be expanded to make legal aid attractive to those who might, otherwise, go elsewhere.

9. The delivery of front-line legal aid needs to move to larger units that provide services to national standards, preferably set in statute, to those within their catchment area. Such units might involve private practice or other corporate forms of provision. Standards, eg as to diversity, policy and staffing, would be a requirement of such units. A client would then have a right to services as statutorily defined from these larger units of provision. The provider would have a duty to provide whatever services were demanded and which qualified under statute or contract.

10. The organisation of the Community Legal Service needs to evolve to recognise that the fact that the CLS is a minority funder of advice on matters relevant to social exclusion but yet has the potential to be a lead organiser in bringing together the diverse providers of advice services. The CLS, or some part of it, needs to evolve into a Community Legal and Advice Service.

11. Every effort should be taken to reduce unnecessary costs of delivery of service. The Legal Services Commission should work with practitioners within each area where it has a 'vertical strategy' to devise improvements to procedure or substantive law which would allow savings. However, increased complexity or greater workloads – as is currently apparent in the criminal cases – must be recognised as legitimately incurring additional costs.

12. Legal advice is vitally important as a way of early identification and solution of problems that might otherwise be more expensive for the state and extensive for the client. However, any attempt to 'dumb down' civil legal aid, in particular, so that larger numbers of people may be seen for low-level services at the expense of those with more serious problems must be resisted. There needs to be renewed return to the debate about the best way of using legal services to combat social exclusion – with particular reference to the potentially strategic role of test case or public interest litigation.

We will see in due course how well the recommendations of the latest fundamental review match up to these proposals.

Roger Smith is JUSTICE's director.

Appendix

Legal aid spending 1998-99 to 2003-04

Cost per year in £m	1998-99	1999-2000	2000-01	2001-02	2002-03	2003-04
CIVIL						
Civil representation net		564.9	560.2	476.2	483.3	514.1
Legal help		203.6	231.7	258.3	329.5	383.8
TOTAL CIVIL	836.4	768.5	791.9	734.5	812.8	897.9
Crime						
Criminal defence net	401.7	411.6	450.4	508.3	526.4	533.5
Higher Courts			422	474.1	569.3	645
TOTAL CRIME			872.4	982.4	1095.7	1178.5
TOTAL civil + crime			1664.4	1716.9	1908.5	2076.4
Administration cost	59.9	62.4	72.4	71.6	73.4	90.2
% total that is crime			52	57	57	56

References

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Notes

1 HMSO, Cm 2854.

2 HMSO, Cm 3305.

3 Law Society *Trends in the Solicitors' Profession 2001* table 5.8. Figures for later years are not available because of the demise of figures collected from collective insurance arrangements. The Law Society figure excludes, illogically, about £400m of legal aid income other than from government, eg contributions from clients. However, it does include VAT and disbursements which are passed to third parties, eg, experts.

4 Bar Council's Strategy Group *Strategies for the Future* The General Council of the Bar, 1990, figure 4, p18.

5 5,061 offices had a contract at the end of March 2003. The number of offices was 12,708. Law Society *Trends in the Solicitors' Profession 2003* and Legal Services Commission *Annual Report 2003-4*.

6 2,900 at the end of March 2003. As above.

7 See Abel *English Lawyers between Market and State: the politics of professionalism* OUP, 2003, as reviewed in *JUSTICE Journal* 1 [2004].

8 S4(2).

9 DCA *The Draft Criminal Defence Service Bill: consultation paper and explanatory notes*, 2004; LSC *A New Focus for Civil Legal Aid: a consultation paper*, 2004.

10 House of Commons Constitutional Affairs Committee *Draft Criminal Defence Service Bill Volume 1*, HC 746-1, 2004, para 8.

11 As above, appendix, p67.

12 *Report of the Advisory Committee on the Better Provision of Legal Advice*, HC4229, HMSO, 1986; Legal Aid and Assistance Act 1972.

13 D Irvine 'The Legal System and Law Reform under Labour' in D Bean *Law Reform for All*, Blackstone, 1996, p8.

14 Citizens Advice *Appendix to Report on the Geography of Advice*, 2004, unnumbered page.

15 Legal Services Commission *Annual Report 2003-4*, HC870, 2004, p52.

16 'Supplementary evidence submitted by the Legal Services Commission in response to questions from the committee'. House of Commons Constitutional Affairs Committee *Draft Criminal Defence Service Bill Volume II*, HC 746-II, Ev93.

17 See eg Houseman and Perle *Securing Equal Justice for All: a brief history of civil legal assistance in the United States*, Center for Law and Social Policy, 2003.

18 Foreword in Bean, above and quoted in Sommerlad 'Some Reflections on the Relationship between Citizenship, Access to Justice and the Reform of Legal Aid', *Journal of Law and Social Policy*, September 2004, p345.

19 Eg Pleasence and others, *Causes of Action and Social Justice*, The Stationery Office, 2004.

20 Eg consultancies on quality, the Public Defender Offices and various delivery pilots.

21 Summer 2004

22 Law Society *Protecting Rights and Tackling Social Exclusion: proposals for the future of publicly funded legal services* Law Society, 2003, para 1.1.

23 'Long-standing pay freeze has minor thaw', *Independent Lawyer*, September 2004, p3.

24 House of Commons Constitutional Affairs Committee *Civil Legal Aid: adequacy of provision, volume 1*, HC 391-1, para 148.

25 P14.

- 26 Griffith *What are they good for? Advice agencies' experience of the Community Legal Service Partnerships* Advice Services Alliance, 2004, p50.
- 27 House of Commons Constitutional Affairs Committee *Civil Legal Aid – adequacy of provision*, as above, para 103.
- 28 Speech, 4 October 1991.
- 29 Lord Chancellor's Department *Striking the Balance: the future of legal aid in England and Wales* HMSO, Cm 3305, 1996.
- 30 Article 10 'Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal ...' and Article 11 'Everyone charged with a penal offence has the right ... [to] all the guarantees necessary for his defence'.
- 31 Article 14.3(d).
- 32 Article 6.3(c).
- 33 Article 6.1.
- 34 *Airey v Ireland* (1979-80) 2 EHRR 305.
- 35 See *Securing Equal Justice for All*, as above, pp3-9.
- 36 Quoted in Handler, Hollingsworth and White *Lawyers and the Pursuit of Legal Rights*, Academic Press, 1978, p5.
- 37 See eg Open Society Justice Initiative *Justice Initiatives*, February 2004, pp4-18.
- 38 Article 47.
- 39 *Justice Initiatives* (as above) p25.
- 40 P18.
- 41 Law Centres Federation, 2001, p11.
- 42 Eg in the writings of Professor Peter Townsend and much of the Child Poverty Action Group work that he influenced.
- 43 P17.
- 44 DCA *Independent Review of the Community Legal Service*, 2004 p5.
- 45 *Legal and Advice Services: a pathway out of social exclusion*, p7.
- 46 *Independent Review*, p20.
- 47 As above.
- 48 In particular for civil cases, Article 12(1).
- 49 LAG *A Strategy for Justice*, 1992, p4.
- 50 Pleasance et al *Causes of Action: civil law and social justice* TSO, 2004, p37.

Prosecuting by consent: a public prosecution service in the 21st century

Ken Macdonald QC

Below is the annual JUSTICE Tom Sargant Memorial Lecture given by the Director of Public Prosecutions on 19 October 2004.

Introduction

The office of the Director of Public Prosecutions was created by the Prosecution of Offences Act 1879. Prior to this, all prosecutions in England and Wales were undertaken either by private individuals or by the police. But the new Director's powers were limited to certain serious or sensitive cases. And so for another hundred years the vast majority of criminal prosecutions continued to be brought by the police. In our jurisdiction there was still no disinterested public authority empowered to conduct routine criminal prosecutions. This was, in international terms, a highly unusual state of affairs – and it impacted adversely on the administration of justice in this country for generations. Indeed, in spite of the creation of the Crown Prosecution Service in 1986, or perhaps because of its severely curtailed remit, the damaging effects of this continue to be felt. I want to show how we are, finally, seeking to move decisively away from this legacy.

Essentially our purpose is to turn the CPS into what it should have been from the start – an influential organisation of stature, at the heart of criminal justice, with all the powers and responsibilities associated with similar bodies in other jurisdictions: in other words a properly empowered public prosecution service. It may well be that this, I would argue, belated transformation could not have been embarked upon until recently. It may be that we have had to go through the experiences of the last 18 years to arrive at a position where we could begin to develop ourselves in this way. In any event, the process has begun. Of course, there is a long way to go.

A little history

By the mid-1980s a consensus had at last generally been reached that it was not appropriate for the police both to investigate and to prosecute crime. There needed to be separation. So, the Prosecution Of Offences Act 1985 set up the Crown Prosecution Service, under the leadership of the Director of Public Prosecutions. At a stroke, the DPP became responsible for all criminal

prosecutions commenced by the police in England and Wales. Of course, in spite of the general consensus, we all know that this was not a development which was welcome to everyone. Some in the police were hostile.

As I have suggested, the remit granted to the new CPS was as notoriously limited as its funding. Essentially, the CPS would receive files of cases investigated and charged by police. It would review those files in accordance with appropriate prosecution tests. If those tests appeared to be passed, the case would, more often than not, be handed over to a barrister in independent practice to prosecute through the courts. Beyond this, the huge focus of the CPS's own work and brutally limited advocacy was in the magistrates' court. The Bar, of course, was happy enough with this.

Yet, in spite of the modesty of the new CPS's function (one government minister of the day describing it as 'low grade legal work'), even the responsibility that the CPS was given for reviewing files, and so for necessarily deciding that some cases did not pass the appropriate test, was particularly unpopular with the police – and with some sections of the press. In certain quarters, we became known as the Criminal Protection Society. This was an attitude which completely failed to understand, as some still do, the distinction between evidence justifying arrest and evidence sufficient for prosecution – or the risk to justice and the dreadful financial waste associated with confusing the two. This simple failing had clogged our courts for years with an endless stream of cases which should never have been there in the first place – and which were never going to result in convictions let alone pleas of guilty. I have no doubt it also led to many miscarriages of justice.

The only purpose was to consume time and energy and to sap public confidence because so many cases seemed to be going nowhere – or convictions were obtained in others which were so implausibly brought. The cost in professional frustration was incalculable. This was a system which was literally incompetent. The failing I have identified also served to highlight, in the most simple and straightforward way, what was wrong with a criminal justice system that lacked a properly empowered prosecuting authority. For its absence from police stations and the point of charge, to its absence from the courtroom and from everywhere in between, justice in those days suffered from a continuing imbalance which did nothing for public confidence.

An equally damaging and lasting effect of the difficult early relationship between the CPS and the police was a disconnection between us and the public – particularly victims and witnesses, for whom the police retained sole responsibility. The CPS was seen as aloof, avoiding direct contact with the public

and not explaining prosecution decisions except occasionally by a brief reference to the code test that had been applied. In the early days, our offices were even ex-directory, lest outside contact contaminate the purity of our albeit very limited prosecutorial decision making. This was a double whammy. In fact we had little power, but we were seen as remote, we refused to explain ourselves – and so we usually got the blame for everything when things went wrong. And the circle was completed by our suffering in silence.

Let me state the obvious: it was completely untenable, and corrosive of public confidence in the criminal justice system as a whole, to have a prosecution service that was not respected by the public. All this meant that the prosecution service had to develop in stature. It had to assume new roles. It had to take over responsibility from investigators for all those decisions which were properly decisions to be taken by lawyers. It had to move into new areas of practice so that a career with us provided the best criminal lawyers with the opportunity to exercise all the skills their training has provided – including, importantly, advocacy.

My predecessor, David Calvert-Smith, recognised these problems and realised that without change, public confidence in the CPS as a credible organisation was at risk. He was right. And what needed changing went right to the heart of the CPS's original remit. Fundamentally, it is not tenable for us to be complicit in a public perception that we are somehow sandwiched between the police and the Bar, working the magistrates' courts or otherwise playing pass the file. For a public prosecuting authority to accept such a role:

- distorts the balance of the system, woefully compromising evidence gathering, case building and victim and witness care;
- savages our status; and above all
- results in a poor service to the public.

Not least, any such authority would find itself third or fourth on any list of places an ambitious criminal lawyer would want to work.

And so, at the turn of the century we promoted reforms such as communication with victims, increasing engagement with the public, improved witness care and a return to closer working with the police. As a result the CPS is very far from the organisation that was set up in 1986. It has grown in public respect. It has won the trust of the police who are supporting our current reforms in a way unthinkable in the 1980s. And it has won the confidence of the executive, which has invested it with significant new resources and an increasing role in driving justice reform. It also contains people of huge talent and commitment

from all backgrounds and races. It is the biggest law firm in the country by a mile. And I think it is clearly now ready for the next and most radical stage in its development.

Accountability and independence

I want to explore some of the issues raised by our plans for reform and explain what lies at their heart. And the principle of prosecuting by consent, which is set out in the title, encapsulates perfectly the major issues that face the CPS in this process and in this new century. It is about exercising power with accountability.

Let me go straight to that context. There is no doubt that necessary reforms in the role of prosecutors are making them more powerful. This is all about power, after all. That is inevitable as we build an organisation which begins at last to shoulder its appropriate share of responsibility in criminal justice. But, process is part of a contract. People will accept an enhanced role for prosecutors so long as we make a bargain to hold fast to values of fairness, impartiality and independence. That is to say that in playing a more central role in prosecuting criminal activity robustly, promptly and fairly, we aim only for safe convictions in which the public can have confidence. An essential foundation of public confidence in criminal justice is that prosecutors should be trusted. Indeed, that is the first duty of prosecutors: to be trusted.

Equally, an essential precondition of public trust is that we should be independent. People in this country do not want politicised justice, any more than they want prosecutors who merely act as tame lawyers to the police. People in this country want a prosecution service that is confident, strong and independent. We all understand that decisions taken with fairness, impartiality, integrity and independence are more likely to deliver justice. Decisions that, for whatever reason, lack these characteristics risk miscarriages of justice. They also seriously undermine confidence in the rule of law, on which everything else depends.

So, we strive to find our own place in the constitutional firmament. This is not always easy. It presents challenges. But these are challenges of practice rather than of principle. There is unanimity on the principle. These twin requirements of public confidence and independence seem to me to raise in turn two issues.

Community engagement

First, it is obvious that in carrying out their functions, prosecutors must have the confidence of the public. That is what brings authority. So, quite contrary to what used to be believed, prosecutors must be responsive to, and engage with,

the communities they represent. To do this properly may require them to take on additional duties or powers. As the police have long recognised, if the community has confidence that the police represent and respond to their concerns, there will be a greater willingness on the part of the public to play its part in the process. An obvious example: in countries where the police are an instrument of state oppression or are perceived as a coercive force, they are less likely to be able to rely on the practical support of members of the public to assist them in carrying out their essential functions, including upholding the rule of law. The same principle applies to public prosecutors. Victims and witnesses are less likely to put themselves to the trouble of reporting crime, making statements and attending court if they are not confident that the prosecutor has taken into account their interests in the case.

But the degree to which those interests should be taken into account brings me onto my second point. Prosecutors must also remain impartial. This is an essential attribute of independence. Decisions must be independent and fair. A public prosecutor has to be just – and has to be seen to be so. But this is not always easy. Our society is hugely diverse. This is one of its greatest strengths. But it also means that there are communities within communities which may have very different needs, desires, opinions, even morals. While there is usually a shared interest across communities in being protected from violence or theft, there are also circumstances where the position of one group may conflict directly with that of another. An expression of free speech by one person may be considered threatening or offensive by somebody else.

So there are obviously tensions between engaging with the community and maintaining an impartial independent role. But in spite of these, I firmly believe that the CPS needs vigorously to reposition itself as an outward-looking prosecuting authority that is accountable to the public that it represents, while retaining the independence and discretion that is essential to its quasi-judicial function. In my view, we have a positive duty to engage with the public, to take into consideration developing social concerns and mores, to identify those areas where we are lacking tools to do the job and then to engage with the public in a debate about our acquiring them. We have a duty to be publicly accountable.

The old-fashioned idea that criminal justice somehow sits above the community and consists of principles and practices beyond popular influence or argument is elitist and obscurantist. We are putting this new approach into practice. We are seeking and developing engagement with communities at all levels – in fact I insist on this as a part of our most basic duty as public prosecutors.

Policy development

Perhaps this is most starkly seen in the field of policy development. We spend a lot of time on this. Obviously, we don't just move through our work blindly. So I have a policy directorate which consists of some 70 lawyers and other staff. And we develop priorities and guidance and rules of working for our staff. But we cannot do this adequately without community help. So now we go looking for it. We have already done it with domestic violence, racist and religiously aggravated offences, homophobic crime and serious sex crime. In essence we went out and consulted with community groups, the voluntary sector and other agencies. And we took account of everything we were told before drafting and publishing policy documents in these areas.

The idea is that we are properly informed. And that we can be judged against what we say we will do. This is particularly important in the area of hate crime. We understand that these offences are particularly serious because they are motivated by discrimination and hate and strike at the heart of diversity in society. So I also have regular meetings with black and minority ethnic groups, faith groups, secular women's groups, LGBT (Lesbian, Gay, Bisexual and Transgendered) groups and so on. We listen to them to build up relationships so that we can take their views into account when we are developing new policies. The only sensible way of finding out what people want is to go and ask them, not to make assumptions on their behalf. That is why we are also developing a national community engagement strategy, so that as well as becoming an integral part of front line prosecutor activity, it also becomes an integral part of management, planning and strategic decision-making.

We have moved a long way. From the threat of a formal CRE investigation in 2001 to our current status as a Whitehall beacon organisation in diversity issues. Only last week we were short-listed in the *Guardian's* Diversity awards for 2004. None of this is a 'bolt-on'. It seems to me that it is part of the essence of what makes a prosecution service public and trusted.

A public prosecution service for the future

So, now we want to build on this community engagement and increasing confidence to create a prosecution service that is a world-class organisation. World class in decision-making, case-building and presentation, staffed by talented people and seen as a world-class employer.

But beyond winning more engagement from the public in our work, what are the concrete steps we need to take?

Strengthening the prosecution process

Early advice and charging

Decisions taken at all points of the prosecution process need to be of the highest possible quality. In particular, investigations need to be focussed and consistent with due process. The fundamental decision about whether the evidence turned up by an investigation justifies a prosecution needs to be sound. If a prosecution is required, the selection of the appropriate charges must be accurate. These are all jobs for prosecutors. And finally, we are giving them to prosecutors. My staff is moving into police stations to work with investigators, giving advice and counsel where it is necessary. Sometimes we help the police to design operations. Sometimes we advise them to conclude operations or to run them in a different way. We are a legal resource that investigators need and increasingly trust.

We are giving our prosecutors the power they should always have had to make the legal decisions and judgments and calls that prosecutors as lawyers should make, including the power to rule that appropriate cases should be diverted away from the courts and dealt with elsewhere. The new statutory charging arrangements place the charging decision, by law, in the hands of the prosecutor. This is a significant transfer of power from investigator to prosecutor. It is a major signifier of the future. It is the basic building block in an entirely new architecture for criminal justice. In essence, we shall become the gatekeepers in the system. No case goes ahead unless it gets through us first. Of course you will readily see that this also means that any investigation which defies our advice in its conception or in its conduct is likely to doom itself before it begins. This simple truth will change cultures in ways we cannot even yet begin to imagine. More immediately, this is a huge opportunity for us to use our skills to ensure that the right decisions are made from the outset, so cases can be properly built and safe convictions obtained against guilty defendants. Equally we must ensure that we do not bring cases which should not be brought and which are not justified by any sufficient evidence.

This is a two-way street. Because I have no doubt whatsoever that the involvement of a prosecutor from the earliest stages of an investigation, right through to the charging decision and beyond, far from being something to fear, will clearly and tangibly strengthen fairness and due process. In every other fair trial jurisdiction, prosecutors and investigators work together and in co-operation. Our failure to follow this model has compromised investigations and it has compromised prosecutions. I am sure it has also resulted in miscarriages of justice. It has been bad for victims, for witnesses, for defendants and for the public. This is going to change.

Pre-trial interviews

But we need more than this. We also need some other process changes. Let me start by saying this: I agree with my old pupil mistress, Helena Kennedy, that when you are embarking on a reform programme in an area as sensitive as criminal justice, you start by deciding what is not negotiable.

So let us be clear: fair trial, routinely open, before an independent and impartial tribunal is not negotiable. Equality of arms, fairness between prosecution and defence, is not negotiable. The right to full disclosure of the case against you is not negotiable. And the criminal standard of proof is not negotiable. It seems to me appropriate that the Director of Public Prosecutions should say all this plainly and clearly.

Indeed I expect all criminal lawyers would agree on the list, a litany of Article 6 rights, those I have mentioned and others. As many of you will know, I was a defence lawyer at the Bar and my chambers was well known for its human rights work. I understand these issues. But beyond what is not negotiable in a civilised system of justice, we have to recognise what is baggage. And in this jurisdiction we have a fair bit of that.

Some of you will be aware that before I took up my post, the CPS undertook, on behalf of the Attorney-General, a public consultation exercise on the question of prosecution pre-trial interviews with witnesses. This followed, I think, the Damilola Taylor case. The Attorney-General has yet to publish his conclusions, but I am firmly of the belief that the rule forbidding such interviews should go. Prosecutors must be permitted to interview witnesses about their evidence where they believe it is necessary to do so to reach a fully informed prosecution decision. Most members of the public are astonished to learn of the existence of a rule forbidding such an obvious safeguard and they are right to be astonished. I cannot think of another fair trial jurisdiction where the principle applies. It is an unjustifiable throwback to the days I mentioned at the outset when prosecutions were brought by private individuals. It is baggage and it needs to go.

Empowering the prosecutor to interview a witness about the evidence the witness can provide is a natural part of giving prosecutors a greater role in advising the police and the responsibility for determining the charge. Enabling prosecutors to take, in the words of Lord Justice Auld, 'full and effective control of cases from the charge or pre-charge stage'. This is not an Americanisation. Witness interviews are accepted practice in the Canadian provinces, Australian states and in Northern Ireland. Indeed our research has discovered that in Canada any judge would consider it a dereliction of a prosecutor's duty if he or

she had not interviewed an important witness before the trial began. Anyone who is familiar with Canadian constitutional law will know Canada to be a jurisdiction where human rights, due process and the separation of prosecution and investigation are taken very seriously indeed. Interviewing witnesses is not seen as incompatible with these principles. And that is because it is not.

As the DPP for New South Wales said in a letter on this topic to one of my staff: 'It's high time (you) entered the 21st century'. I agree with him.

Victims and witnesses

Indeed the criminal justice process in England and Wales is unusual, if not unique, among common law jurisdictions in the extent to which prosecutors have traditionally kept themselves at arms' length from prosecution witnesses in all circumstances. This includes victims. So that far from interviewing them pre-trial, we did not even talk to them. It was almost as if they were unclean. The sight of a prosecutor talking to a victim would provoke a furious complaint to a judge or a lacerating, or supposedly lacerating, cross-examination. In my view, this world of criminal lawyers was becoming more and more unreal and more and more divorced from what the community wanted and expected from us. Because what this approach absolutely guaranteed was the disengagement of victims and witnesses from the prosecution and trial process. Disengagement implies that they were once engaged; perhaps it would be more accurate to describe it as non-engagement.

As the 20th century was drawing to a close, this situation began to change, much of it as a result of the vision and the work undertaken by my distinguished predecessor, David Calvert-Smith. For the first time, prosecutors were obliged routinely to explain their decisions to people who were not part of the criminal justice system. This created a really fundamental change of culture in the CPS. Though I have to say that the fact we had to wait until the 21st century to see this happen is an indication of how hidebound the system had become.

No witness no justice

I am pleased to say that now we are now taking this very much further. Our 'No Witness No Justice' witness care programme is currently being implemented throughout the country. This has, at last, brought prosecutors directly and positively into the business of victim care.

From now on, whenever a statement is taken by police, they will be required to undertake a needs assessment for the witness. This means considering the specific needs of the witness and the preferred means of contact, as well as victim personal statements, the need for any special measures, willingness to

attend court, childcare and transport problems and so on. After charge, dedicated witness care teams will manage the delivery of information and support to witnesses throughout the life of a case, providing a single point of contact and tailoring information and support to meet the individual needs of the witnesses. A 'thank you' letter will be sent at the conclusion of the case, which will also include the details of the outcome. How is this working in practice? Well, the evidence so far is extremely promising. Witness attendance rates have improved in all areas, by an average of 19 per cent across the pilot sites. Ineffective trials resulting from witness problems have reduced by 27 per cent.

Broadly, we are placing prosecutors at the heart of this programme, which is right where they belong. Bluntly, I expect prosecutors to have a sympathetic and civilised relationship with victims and witnesses.

Conditional cautioning

Prosecutors in other fair trial jurisdictions also have an important role in diverting appropriate cases away from the courts. I am pleased to say that we are shortly to be given this power too.

For many years police officers have had the power to caution suspects. Our power will go a step further. We shall, where appropriate, conditionally caution individuals. This might be tied to drug treatment, restorative action, the payment of compensation and so on. This is an important development. Again it will change the culture and make explicit a prosecutor's role in crime reduction and community safety. On an individual level, the introduction of the conditional caution will permit prosecutors to refer suitable offenders to early drug intervention programmes, such as those currently being piloted by the Home Office.

This has the potential, in appropriate cases, to reduce levels of, for example, acquisitive drug-related crime at far greater benefit to the community than anything achieved by putting people endlessly through court or prison. I shall be expecting prosecutors to work with local communities, voluntary organisations, the police and other agencies to develop initiatives tailored for local needs. In this way, as with others, contact between my staff and the public will increase. And the important and appropriate role of prosecutors in crime reduction will be made explicit.

Advocacy

In the United States, in continental Europe, in other fair trial countries, the public prosecuting authority is an employer of choice. We need to be as well. In

the United States, the brightest law graduates head for the District Attorney's office or to work for the Department of Justice, sometimes staying, sometimes later moving off into private practice. They routinely recruit successful lawyers from private firms. This is as it should be. Open democratic societies need prosecuting authorities of stature, staffed by the best people, well versed in rights and due process.

Much of what I have said about the reform of our role and our increasing power and influence within criminal justice, makes us more attractive as an employer. And I am delighted to say we are finding it easier and easier to recruit high-quality people. In particular, all over the country, increasing numbers of lawyers are joining us from private practice. I welcome this and I encourage it. It is a very healthy development.

But as I said at the outset, we need to be offering lawyers in our organisation all the challenges that criminal lawyers train for. Many will greatly enjoy the challenge of working side by side with the police in developing investigations. This is exciting and energising work, right at the front line.

Many will enjoy the challenge of being charging lawyers, of making the final decision about whether a case goes to court or not. Many will enjoy their new role in diversion, or in community engagement and policy work. And many will enjoy advocacy. Indeed, my own strong view is that if we do not have this as a realisable aspiration in the prosecution service, we will not succeed in any of our other plans. You cannot expect to be an employer of choice for criminal lawyers without the possibility of advocacy. So we need to develop a cadre of trial lawyers. This will not threaten the Bar. Firstly, we will never do anything approaching all prosecution advocacy. Secondly, I have no doubt that, just like in other jurisdictions, future advocates will move backwards and forwards from the prosecution service to the Bar – as no doubt I shall.

Finally, the Bar is an institution of fundamental public and constitutional importance – and the criminal Bar, in spite of many doomsayers, has clearly grown in power in the 26 years that I have been a member of it. Perhaps it needs to be a little more self-confident. Of course a prosecution service will always use barristers of ability and commitment – and in huge numbers. But trial law will strengthen us at all levels. It will improve our advice to the police. It will improve our charging decisions. It will improve our witness care. It will change the whole culture of our organisation for the better. And we are a hugely diverse group of lawyers. We can help to change the face of the courts for the better, too.

Conclusion

All this is ambitious. But I think in the past, my organisation has, if anything, lacked ambition – and this lack of ambition has not served the public interest. All over the world, British legal institutions are, still, admired and respected as models. It really is time the same applied to our public prosecution service.

More power to determine and to shape cases, more engagement with the community, more respect for victims and witnesses, a greater role in court, profound attachment to independence and the possibility, finally, of judicial appointment – these, I think, are the features of a prosecuting organisation which is fit for public purpose. They are also the building blocks of our future.

Ken Macdonald QC is the Director of Public Prosecutions.

The International Commission of Jurists: a global network defending the rule of law

Nicholas Howen sets out a strategy for the future of the International Commission of Jurists, of which JUSTICE is the British section.

A small blue book

Shortly after I took up the position of Secretary-General of the International Commission of Jurists (ICJ) in April this year I read through the discoloured pages of a short ICJ publication from 1966: *The Rule of Law and Human Rights: Principles and Definitions*. With an introduction by an earlier Secretary-General, Nobel Peace Prize laureate Seán MacBride,¹ this small blue book spoke clearly and forcefully across the decades to rule of law challenges we face today. It summarized how a series of highly influential ICJ gatherings of jurists in the 1950s and 1960s – in Athens, New Delhi, Lagos, Rio de Janeiro, Bangkok and Colombo – had helped to define the rule of law for the modern world, from the regulation of states of emergency to the practical implications of the separation of powers. So many of the principles shaped or refined by these conferences have since been incorporated into the authoritative texts of United Nations human rights treaties.

These ICJ gatherings called for the legal profession to show leadership in protecting human rights and the rule of law. In Bangkok the jurists said that the ultimate protection of the individual under the rule of law ‘depends on the existence of an enlightened, independent and courageous judiciary’. In Rio de Janeiro they called on lawyers to give ‘guidance and leadership’ so that humans could ‘meet the dangers of the times’.

Today, we face an acute sense of global insecurity and growing inequality worldwide. The sense of leadership and purpose, clarity of the rule of law vision, firmness of principle and a conscious internationalism reflected in the pages of that small blue ICJ book are as critical today as they were in the post-Second World War period.

Global network

The ICJ is a unique worldwide network of judges and lawyers drawn from every legal tradition in all regions of the world founded 52 years ago in Berlin.² The ICJ is composed of 60 eminent jurists elected by its members, with 37 national sections and 45 affiliated organizations, with its Secretariat based in Geneva.³

JUSTICE, founded in 1957, is one of the oldest and most prominent ICJ national sections. As Secretary-General I see this worldwide network as the heart and the unique strength of the ICJ. It will become increasingly important over the coming years as the ICJ builds itself into a much stronger global, legal advocacy force that has significant impact on the shape of laws, policies and practices at national, regional and international levels, in favour of the rule of law, international law and human rights.

The particular expertise of the ICJ is the practical protection of human rights through legal and judicial systems at national, regional and international levels and promoting adherence to the rule of law. The ICJ uses a range of legal and advocacy methods, from trial observations and legal interventions such as submitting *amicus curiae* briefs in court proceedings and legal memoranda to governments analysing proposed laws, to sending expert missions to countries and carrying out public and private advocacy through its members, sections and affiliates.

Critical threat to the rule of law today

Last August the ICJ brought 160 jurists from around the world back to Berlin, the city of its birth, for its biennial conference. Several years ago few would have predicted that the ICJ would have to meet to consider one of the most critical global threats to the rule of law that we have seen for many years. Counter-terrorism measures worldwide are challenging our most basic assumptions about the rule of law and human rights. The ICJ's role as one of the guardians of the rule of law has again been brought into sharp focus.

It is clear that terrorism is creating victims. The fact that many counter-terrorism measures are creating new victims demands some deep reflection. Governments have a duty to protect people from terrorism. They must, however, protect people from terrorist acts and abusive acts by the state. Both duties form part of a seamless web of protection that states must fulfil.

We are again hearing governments trying to justify the use of torture to extract information. The United Kingdom Court of Appeal recently even agreed in a majority judgment⁴ with the UK government's policy that evidence obtained by torture in another country could be used in a British court against a person suspected of terrorist offences.⁵ Yet international law that binds the UK clearly stipulates that torture can never be justified – and never means never.

In the United States authorities have tried to redefine torture to exclude psychological pain and to avoid their responsibility. Prominent lawyers have even proposed that torture could be somehow regularised in a form of judicial

torture warrant.

Around the world we have seen people suspected of terrorist offences removed beyond the protective reach of the courts, held without judicial review, without access to habeas corpus. Incommunicado detention is now more widespread and in more countries government ministers can put those suspected of terrorist offences in administrative detention for long periods without charge or trial. In some countries detainees have been summarily taken or expelled, without due process, in violation of the usual extradition procedures, to countries where they can be tortured with impunity.

The separation of powers has come under strain, with civilian justice militarised and civilians tried by military or other special tribunals. Speaking about the detainees in Guantánamo Bay, Lord Steyn, a UK Lord of Appeal, said 'The military will act as interrogators, prosecutors, defence counsel, judges and, when death sentences are imposed, as executioners'.⁶ We have seen basic fair trial guarantees ignored, rights of defence cut down and rights of appeal removed.

Vague definitions of terrorism have been used to suppress legitimate dissent. Indeed, without any agreed definition of terrorism internationally, the range of often loose definitions of terrorism in national laws opens the door to such abuses. The definitional void will become worse as long as Security Council Resolution 1373 imposes heavy legal obligations on states to combat terrorism without saying what terrorism is and what it is not.⁷

The phenomenon of excessive counter-terrorism measures is not just an issue in the USA or Europe. It touches all regions of the world, with the combined effect of new counter-terrorism measures adopted since September 2001 and other, long-standing laws and policies that have violated human rights in the name of national security or fighting terrorism.

Almost from its very beginnings, the ICJ has been active on terrorism, counter-terrorism, states of emergency and internal security acts. Many human rights lawyers still use a seminal 1983 ICJ study on states of emergency.⁸ Looking into the annals of ICJ reports and action, the roll call from history is long: Peru, Sri Lanka, Spain, Turkey, Israel, Colombia, Northern Ireland, India, Algeria and many others. No continent has been immune from cycles of appalling terrorism and excessive counter-terrorist measures.

Across the world we also saw in the past governments use anti-terror and internal security legislation to suppress peaceful political opposition, demonstrations and writings in the name of internal subversion. From Chile

and Argentina to Singapore, South Africa, the Philippines and South Korea, we saw in the past political opponents branded as terrorists and a threat to national security. We must learn the lessons of this history.

We also know from history in many countries that abusing rights does not help eradicate terrorism. The US military in Iraq recently admitted that it has obtained far more 'high value intelligence' since it ended torture and inhuman treatment in Abu Ghraib prison. As lawyers we hold states to human rights standards that they themselves drafted and which already build in a balance between national security and individual rights and give states a significant margin of appreciation. These laws are still adequate to regulate the response of governments to the terrorist threats of today.

ICJ commitment and leadership role of the legal profession

The 160 jurists at the ICJ biennial conference adopted the *Berlin Declaration on Upholding Human Rights and the Rule of Law in Combating Terrorism*.⁹ This declaration is the first instrument of its kind to contain a concise set of 11 human rights and rule of law principles that states should follow in their counter-terrorism measures.¹⁰ The declaration does not formulate new standards, but simply reaffirms those that have come under threat since September 2001.

The Berlin Declaration also signalled the commitment of the ICJ and judges and lawyers around the world to take a global leadership role in showing how the rule of law can and must be respected in addressing terrorism. As in the 1950s and 1960s, the world needs principled, strong and clear positions in favour of the rule of law. The rule of law is the first defence against arbitrary power and the strength of our rule of law and human rights norms will be judged by whether they hold up in times of crisis, when governments are most tempted to ignore them, yet when they are most needed.

The problem, however, is that the legal and human rights community is struggling. We face a public that is frightened; that in many countries seem ready to allow governments to suppress rights – principally the rights of others. Policy-makers dismiss general statements of human rights principles as unrealistic.

Rule of law organisations such as the ICJ will have to amplify their voices by forging alliances with other global, regional and national human rights and legal organisations and drawing on legal expertise and our ability to command attention at the highest levels of the judiciary, legislature and executive.

The ICJ will convene a panel of eminent jurists on counter-terrorism and human rights. These jurists will spend at least one year listening to lawyers, human rights defenders and victims in a series of national and regional hearings in countries around the world. They will bring together the lessons of history and of many different peoples and nations. They will investigate to what extent today's counter-terrorism measures respect human rights.

There is also a need today to move away from general principle to a detailed exploration, with governments, of the nature of today's security threats and the acceptable limits of counter-terrorism measures. Lawyers should play a key role in creating a dialogue that is based on reason. The ICJ will engage in quiet but intensive discussions with civilian and military authorities responsible for counter-terrorism measures, through a series of Roundtable Policy Dialogues that will seek to change attitudes and policies.

The United Nations and regional organizations must accept their clear responsibilities as guardians of international law and human rights. The ICJ expects these organizations to monitor and hold member states accountable. In particular, the UN Security Council's Counter-Terrorism Committee should bring its dictates into line with international human rights obligations and bring in senior human rights experts who are able to review reports received from states and advise the committee. The ICJ is also working for the UN Commission on Human Rights, the main human rights body of the UN, to appoint an expert, called a Special Rapporteur, to monitor the counter-terrorism measures of states and hold states accountable to their human rights obligations.

The ICJ has stepped up its monitoring¹¹ of trends in terrorism and counter-terrorism worldwide and will intervene to help prevent, minimize or reverse the negative impact of significant counter-terrorism measures and to condemn acts of terrorism.

Independence and accountability of judges and lawyers

Today's counter-terrorism measures are only one manifestation of challenges to the rule of law to which the ICJ has responded over many years. The ICJ is known for its tenacious work over many decades for the independence of judges and lawyers and for the justice system to be active protectors of human rights and the rule of law.

A country's justice system is clearly central to the protection of human rights and freedoms. Judges, lawyers and prosecutors should play a major role in

ensuring that victims or potential victims of human rights violations obtain effective remedies and protection, that perpetrators are brought to justice, and that anyone suspected of a criminal offence receives a fair trial. The judicial system is an essential check and balance on the executive branch of government, ensuring that laws and acts of the executive comply with human rights norms.

Through its Centre for the Independence of Judges and Lawyers (CIJL) founded in 1978, the ICJ works to establish justice systems that are independent in law and practice, are active in protecting human rights and freedoms, and that ensure access to justice for the most marginalized. It places a heavy responsibility on judges and lawyers to protect human rights courageously and to be accountable and uncorrupt.

The CIJL has a long tradition of observing and reporting on the fairness of significant trials around the world. Most recently, the ICJ observed the retrial and appeal of Leyla Zana and her co-defendants, all former Turkish parliamentarians, and the appeal of Anwar Ibrahim, the former Deputy Prime Minister of Malaysia.

International human rights law-making and UN human rights reform

The ICJ is also known for its long experience in shaping new global or regional human rights standards when existing standards do not adequately protect against human rights violations.

In new initiatives the ICJ is working to strengthen the human rights legal accountability of corporations and international public actors such as the United Nations, the International Monetary Fund and the World Bank. Building on its significant work in the adoption by the UN General Assembly of a Declaration against enforced disappearances, the ICJ is advocating a new treaty to prohibit enforced disappearances. Emphasising the need for victims to obtain remedies and the ICJ's long-standing work on economic, social and cultural rights, the ICJ is also working for a new Optional Protocol to the International Covenant on Economic, Social and Cultural Rights that would enable victims to make individual complaints to the UN about violations of economic, social and cultural rights. The ICJ has long opposed impunity and is working for clear United Nations principles to strictly limit the role of military tribunals, to provide reparations to victims and to guide government action against impunity.

In the 1960s Seán MacBride launched a campaign for the creation of a United

Nations High Commissioner for Human Rights. Today, the ICJ continues to seek greater decisive authority for human rights within the UN, including fundamental reform such as the creation of a full-time, professional UN human rights treaty monitoring system.

Global networks are notoriously difficult to mobilize and unite. The gathering of ICJ jurists in Berlin in August this year revealed a renewed energy and drive by ICJ Commissioners, national sections and affiliated organisations around the world to tackle the most serious challenges to the rule of law we face, from counter-terrorism to fundamental attacks on the independence of judges and lawyers.

Nicholas Howen is Secretary-General of the International Commission of Jurists.

Notes

1 Seán MacBride, former Minister for Foreign Affairs of Ireland whose signature appears on the European Convention on Human Rights and who was instrumental in the founding of Amnesty International, served as Secretary-General of the ICJ from 1963-1970. He is the only person to have been awarded both the Nobel Peace Prize and the Lenin Peace Prize.

2 The ICJ was born on the ideological front line of a divided post-war Berlin in memory of Dr Walter Linse. He denounced arbitrary arrests, secret trials and detentions in labour camps in the Soviet zone. He was abducted by East German intelligence agents and later executed in Moscow for 'espionage'. This led to a group of lawyers founding the ICJ at the inaugural congress in Berlin in 1952.

3 One of the longest serving Secretary-Generals of the ICJ was Niall MacDermott, the former British Cabinet minister who held the position for 20 years until 1990. He was known for having led the first international fact-finding mission to Chile after General Augusto Pinochet's coup and for helping to expose the systematic abuses committed by the regime of Idi Amin in Uganda. He supported the creation of many rule of law organizations around the world, such as the Andean Commission of Jurists, which is still an ICJ affiliate. In the 1990s Niall MacDermott's successor as Secretary-General, Adama Dieng, from Senegal, was prominent in support of African non-governmental organizations and the creation of an African regional human rights system.

4 *A and others v Secretary of State for the Home Department*, [2004] EWCA 1123.

5 The UK has ratified and is legally bound by the UN Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (the CAT), which in Article 15 states simply and unambiguously that '... any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made'. The court disregarded the CAT because this provision has not been given effect in UK law by parliament. However it is a cardinal principle that a state cannot use its domestic law as an excuse to avoid a clear international legal obligation. In his dissenting opinion Lord Justice Neuberger argued that the use of torture undermines the right to a fair trial. He observed that 'by adopting the fruits of torture, a democratic state is weakening its case against terrorists, by adopting their methods'.

6 Johan Steyn, 'Guantánamo Bay: The Legal Black Hole', *ICLQ*, Vol 53, January 2004, pp1-15, at p9.

7 In the words of a French judge and the Chief Commissioner of the French National Police, 'La résolution 1373 ... décrète la chasse universelle au terrorisme sans le définir' Jean-François Gayraud; David Sénat, 'Le terrorisme', *Collection 'Que sais-je?'*, N° 1768,

Presses universitaires de France, 3ème édition, Paris, 2002, page 29.

8 International Commission of Jurists, *States of Emergency: Their Impact on Human Rights*, 1983, Geneva.

9 See http://icj.org/news.php3?id_article=3503?=en

10 For more detailed analysis of international law and human rights principles relating to terrorism and counter-terrorism, see International Commission of Jurists, *Terrorism and Human Rights*, Volumes I (April 2002) and II (March 2003), in English, French and Spanish.

11 The *ICJ E-Bulletin on counter-terrorism and human rights*, which can be received by subscribers as an email, provides an overview of development in this area and is available at http://icj.org/article.php3?id_article=3513&id_rubrique=37?=en.

The Royal Commission on Criminal Justice and factual innocence: remedying wrongful convictions in the Court of Appeal

In an article linked with that which follows, Stephanie Roberts reports on research that she undertook in relation to the operation of the Court of Appeal in remedying wrongful convictions.

Introduction

Although the Court of Criminal Appeal was originally created¹ to remedy wrongful convictions, the general feeling has been that it has never fulfilled this function. The main difficulties associated with the court have stemmed from its function in deciding appeals on factual grounds where, at its most simplistic level, the appellant is arguing the jury made a mistake and he or she was wrongly convicted. These grounds necessarily involve the court to some extent trespassing on the role of the jury and the difficulty comes from determining how far the court is allowed or should be allowed to do this.

These difficulties were acknowledged by the Royal Commission on Criminal Justice² (RCCJ), which was established on the day the Birmingham Six were freed, with the aim of proposing reforms to the appeal process which would restore public confidence in the ability of the criminal justice system to identify and correct miscarriages of justice.³ A research study was undertaken on the RCCJ's behalf by Kate Maleson in 1991 which analysed the judgments of the court to assess how, in practice, it interprets and applies its powers to review convictions.⁴ I replicated this study using judgments from 2002 to update Maleson's research in order to determine whether any significant changes had been brought about by the recommendations of the RCCJ, which were enacted in the Criminal Appeal Act 1995. The aims of this article are to use the empirical data to evaluate those grounds of appeal which raise factual issues, fresh evidence and lurking doubt appeals, to see if there are any noticeable improvements in the court's ability to identify and correct miscarriages of justice.

Methodology

The methodology was identical to that adopted by Maleson except that the first 300 available⁵ appeals against conviction which the court considered in 2002

were reviewed. These covered the period from January to May. Each judgment was analysed separately and information gathered on the grounds of appeal; the approach of the court to the case; and the result of the appeal. Where the court commented on relevant issues such as fresh evidence, or the 'lurking doubt' principle, these were recorded in order to obtain both qualitative and quantitative information on the court's powers and practices.

Lurking doubt appeals

The 'lurking doubt' ground of appeal was created by Lord Widgery in 1968 in *Cooper*⁶ and requires the court to form its own subjective opinion about the correctness of the jury verdict, notwithstanding the fact that no criticism can be made of the trial, and there is no fresh evidence. In their 1989 report on miscarriages of justice,⁷ JUSTICE stated that in its experience of assisting with appeals against conviction, the lurking doubt power had made very little difference to the way in which the court decided appeals. It was only able to find six reported cases since *Cooper* when the court had quashed the conviction on the grounds that there is a lurking doubt because the conviction was against the weight of the evidence, and where nothing had arisen since the trial.⁸

Malleson's research revealed that the principle of lurking doubt was referred to directly or indirectly in 10 of the 281 appeals in her sample which were finally decided. This suggests that 'lurking doubt' cases do, indeed, constitute a relatively small proportion of appeals. Her conclusions were that:

The Court appears to regard the principle as a last resort for those cases where no criticism can be made of the trial, yet concern about the justice of the conviction still lingers. Its reluctance to interfere with the jury's verdict undoubtedly inhibits the Court from expanding this category of appeal.⁹

The RCCJ discussed the 'lurking doubt' ground and stated that it 'fully appreciates the reluctance felt by judges sitting in the Court of Appeal about quashing a jury's verdict' as 'the jury has seen all the witnesses and heard their evidence; the Court of Appeal has not'. Nevertheless, it recommended that:

as part of the drafting of section 2, it be made clear that the Court of Appeal should quash a conviction, notwithstanding that the jury reached their verdict having regard to all the relevant evidence and without any error of law or material irregularity having occurred.¹⁰

The majority recommended that there should be a single ground of appeal which was whether a conviction 'is or may be unsafe' but the government rejected the words 'is or may be' preferring the test to be simply 'is unsafe' which

was enacted in the Criminal Appeal Act 1995. In their response to the RCCJ, the government stated that the concept of lurking doubt was incorporated into the unsafe ground.¹¹ However, in 1999 in *F*,¹² the court appeared to suggest that lurking doubt was no longer a valid ground of appeal. Roch LJ stated:

The phrase 'lurking doubt' is not now, in our opinion, a proper approach. Parliament in section 2(1) of the Criminal Appeal Act 1968, as amended by the Criminal Appeal Act 1995, has laid down a simple test. In our view it is undesirable to place a gloss on the test formulated by Parliament which has the advantage of brevity and simplicity.

But in *R v Criminal Cases Review Commission ex p Pearson*,¹³ which was decided after *F*, Lord Bingham CJ stated that *Cooper* was incorporated into the safety test. Thus, empirical research was required to see if it did still apply and if so, to what extent.

The 2002 sample of judgments revealed that the principle of lurking doubt was referred to directly or indirectly in seven of the 300 appeals, with one allowed and six dismissed or refused. In the one allowed, lurking doubt was not actually raised as a ground of appeal but the concept of lurking doubt was referred to by the judges when quashing the conviction:

At the end of our reading, all three members of this Court have an uneasy feeling about the safety of these convictions and that unease must register in allowing this appeal against conviction.¹⁴

Lurking doubt was directly referred to in five of the six appeals dismissed or refused:

The third point raised is that this Court should have a lurking doubt about the safety of the conviction ... We have come to the conclusion that there are no doubts about the safety of the conviction.¹⁵

In those circumstances we conclude... that we feel neither a lurking doubt nor reason for substantial unease about these findings of guilt.¹⁶

There is no possibility, in our judgment, of applying the lurking doubt exception. We are satisfied that the verdicts are not even arguably unsafe.¹⁷

We do not feel a lurking doubt about the verdicts.¹⁸

The final matter which we have considered is Mr Evans' submission that,

*when all the evidence is added up ... should lead us, that is to say this Court, to what can be summarised as a lurking doubt in the Cooper sense. We are not left with such a doubt.*¹⁹

The sixth appeal merely argued that ‘the convictions are unsafe’ which was listed as a separate ground of appeal, amongst others, but was not referred to by the judges when refusing the application as it was a renewed application to appeal.²⁰

This research confirms that, despite the ruling in *F*, the concept of lurking doubt has been incorporated into the safety test and is still a valid ground of appeal. But similar conclusions can be drawn with *Malleson* that this ground of appeal tends to be thought of as a last resort, either by the appellant as a ground of appeal or by the judges as a mechanism for determining the appeal. It tends to be argued when all the other grounds have failed and very rarely provides a ground of appeal on its own.

Whilst the court’s reluctance to interfere with the jury’s verdict does, undoubtedly, inhibit the court from expanding this category of appeal, the RCCJ report highlighted the deficiencies of the court’s review process in locating lurking doubts. One of the main reasons for the court showing such deference for the jury verdict is because an appeal is not a re-hearing. Accordingly, the jury, which has seen the witnesses, is supposed to be in a better position to draw inferences than the court which generally just read a transcript of the judge’s summing up at the leave stage and in preparation for the appeal. As the former Court of Appeal judge, Sir Frederick Lawton, has stated ‘reading a transcript of the evidence is not conducive to raising a lurking doubt’.²¹ This explains why very few lurking doubt appeals manage to get past the leave filter and why very few of those that do are successful.

Fresh evidence appeals

The court was initially given very wide powers to adduce fresh evidence under s9 Criminal Appeal Act 1907 but it adopted its own restrictions largely because of its deference to the jury verdict and its reverence for the principle of finality. The restrictions the court imposed were that the evidence had to be credible²² and relevant to the issue of guilt,²³ the evidence had to be admissible²⁴ and the evidence could not have been put before the jury.²⁵

The Donovan Committee was set up in 1965 to review the working practices of the court and it heard evidence that the conditions the court had imposed on the reception of fresh evidence were too narrow and the condition which had caused the most disquiet was the one which stated that additional evidence

should not have been available at the original trial. The committee recommended that additional evidence should be received if it was relevant and credible and there was a reasonable explanation for the failure to place it before the jury.²⁶

The Donovan Committee recommendations were a late amendment to the Criminal Appeal Act 1966 which then became s23 Criminal Appeal Act 1968. S23(1) consisted of a general discretion for the court to admit evidence 'if they think it necessary or expedient in the interests of justice.' In addition, s23(2) set out a duty to admit evidence if the criteria of credibility, relevance, and an adequate explanation for not adducing it at the original trial were fulfilled.

But it would appear that the court continued to adopt a restrictive approach. The RCCJ stated that it had been suggested in evidence to them that the court took an excessively restrictive approach to whether the fresh evidence was available at the trial and whether there was a reasonable explanation for the failure to adduce it.²⁷ The commission felt that the court's powers under s23 were adequate but the question was whether the court had construed them too narrowly. It had been suggested to the commission that the test in s23(2) that the evidence had to be 'likely to be credible' was too high a test and they recommended that the test should be changed to 'capable of belief' as this would 'be a slightly wider formula giving the court greater scope for doing justice'.²⁸

The RCCJ's proposals were given legislative effect in s4 Criminal Appeal Act 1995 which amended s23 of the 1968 Act. There were two major alterations to s23. The rarely-used power to rehear the evidence presented at the trial was removed and the duty to admit fresh evidence as set out in s23(2) was abolished. The court has a discretion to admit fresh evidence and has to have regard to similar factors which governed the duty to admit fresh evidence such as (a) whether the evidence appears to the court to be 'capable of belief'; (b) whether the evidence may afford any ground for allowing the appeal'; (c) whether the evidence would have been admissible in the lower court on an issue which is the subject of the appeal and (d) whether there is a reasonable explanation for the failure to adduce the evidence.

It is questionable as to whether these changes would bring about a liberalising of the court's attitude. Substituting a discretion for a duty would appear to be detrimental as it was because of the court's restrictive use of its discretionary power in the 1907 Act that a duty had to be imposed in the 1968 Act. There have also been arguments that the 'capable of belief' amendment is merely a cosmetic change. Under the old legislation 'credible' was held to mean 'well capable of

belief',²⁹ and therefore the former test was 'likely to be well capable of belief'. This is replaced by the words 'capable of belief' and JC Smith argued³⁰ 'how can likely to be capable of belief be a higher test than is capable of belief? It seems to be the other way round'. He argued that to lower the threshold, the section should have provided 'may possibly be capable of belief (or credible)'.³¹

It was against this background that the empirical research was conducted in order to determine whether the court had adopted a more liberal approach to fresh evidence appeals under the Criminal Appeal Act 1995. In Malleeson's sample in 1990, the total number of grounds from 300 appeals was 329 and of those, 23 were based on fresh evidence (seven per cent of the total grounds). In the 2002 sample, the total number of grounds from 300 cases was 641 and of those, 37 were based on fresh evidence (six per cent of the total grounds).

Therefore, the rise in the number of fresh evidence grounds could be interpreted as the court adopting a more liberal approach as arguably more fresh evidence appeals are getting through the leave filter. But the rise in fresh evidence grounds could also be explained by a rise in the number of grounds generally. Overall, the percentage of fresh evidence grounds in relation to all the grounds was lower – being six per cent in the 2002 sample and seven per cent in Malleeson's. In Malleeson's sample of 23 fresh evidence grounds, five were allowed, 15 were dismissed or refused and three were adjourned for a full hearing being renewed applications to appeal. Therefore of the total grounds, 35 per cent were successful (five allowed and three adjourned) with 65 per cent unsuccessful. In the 2002 sample, of the 37 fresh evidence grounds, nine were allowed, 27 were dismissed or refused and one was adjourned for a full hearing. Therefore of the total grounds, 27 per cent were successful (nine allowed and one adjourned) with 73 per cent unsuccessful. Thus, although a more liberal approach may be illustrated by an increase in fresh evidence grounds being heard by the court, the success rate of such appeals is lower in the 2002 sample which suggests that whilst more fresh evidence grounds are possibly getting through the leave filter, the success rate of such appeals has not increased.

Malleeson's conclusions were that 'fresh evidence cases are rare and treated with great caution by the court. Only in very limited circumstances will such evidence be admitted and if admitted, form the basis of a successful appeal'.³² The 2002 sample appears to confirm this despite the hopes of the RCCJ that the amendments to the court's powers would give it 'greater scope for doing justice'. Once again Malleeson stated that 'the problem of the court impinging on the jury's role was apparent from the few fresh evidence and lurking doubt cases reviewed'.³³ But just as the court's review function causes problems in lurking doubt appeals, it also causes problems for fresh evidence appeals, as illustrated

by Lord Parker CJ in *Parks*:³⁴

It is only rarely that this court allows further evidence to be called, and it is quite clear that the principles upon which this court acts must be kept within narrow confines, otherwise in every case this court would in effect be asked to effect a new trial.

This explains why the court is reluctant to allow fresh evidence on appeal: it would be presiding over a retrial, which is not its function. It also explains why the court continues to adopt a restrictive approach even though its powers change with the aim of liberalising its approach.

Conclusion

The recommendations of the RCCJ, as enacted in the Criminal Appeal Act 1995, appear to have provided somewhat of a dichotomy. In the early 1990s, it was thought that the Court of Appeal was acting in accordance with *Cooper* and going through a liberal phase which was illustrated by the quashing of the convictions of the now notorious miscarriages of justice cases such as the Birmingham Six and the Guildford Four, though it was not clear whether these were the start of the liberal phase or the result of it. Therefore, it was the aim of parliament to devise a form of words which would restate the existing practice of the Court of Appeal.³⁵ However, it is clear from the comments of the RCCJ on lurking doubt and fresh evidence appeals that it was its aim to liberalise the court's approach and bring about some change, even though there were conflicting views as to whether this would actually happen.

The empirical evidence is conflicting as to whether this has happened or not. With regard to lurking doubt appeals, the fact that these grounds are being argued shows this is still a valid ground of appeal and has been incorporated into 'unsafe'. However, there are fewer of these in the 2002 sample than there were in Malleon's sample which arguably shows that the court is not taking a more liberal approach to these appeals. It is difficult to know whether the low number is caused by this ground not being argued too often because appellants and their lawyers know this is rarely successful, or whether the appeals are being brought but they are being filtered out at the leave stage. What is clear is that neither the leave procedure nor the process of review are conducive to locating lurking doubts as reading a transcript of evidence may provide the answer as to whether an irregularity has occurred but it rarely provides the answer whether someone has been wrongfully convicted.

With regard to fresh evidence appeals, there were more fresh evidence grounds raised in the 2002 sample which shows that either more fresh evidence appeals

are being brought to the court or that more appeals are being heard by the court. But this could be explained by the much larger number of grounds generally in the 2002 sample being nearly double the 1990 sample. A key factor is the success rate which shows that in Malleon's sample 35 per cent were successful as opposed to 27 per cent in 2002. This shows that although more fresh evidence grounds might be brought to the court or getting through the leave filter, the chances of success were higher before the Criminal Appeal Act 1995 than they are now after the changes have been made.

Both lurking doubt and fresh evidence grounds illustrate the difficulties the court's review function causes the court in deciding appeals on factual grounds and identifying and remedying miscarriages of justice. If this fundamental issue is not addressed, then consequent amendments to legislation to liberalise the court's approach will prove to be as ineffective as they have done in the past. It may now be time to address the role of the court rather than just amending its powers after high-profile miscarriages of justice.

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Notes

1 Criminal Appeal Act 1907. The Court of Criminal Appeal became the criminal division of the Court of Appeal in 1966 (s1 Criminal Appeal Act 1966).

2 The Runciman Royal Commission on Criminal Justice (Report, cmnd 2263, London: HMSO, 1993).

3 The term 'miscarriage of justice' in this article is used to describe those cases where a factually innocent person has been wrongfully convicted.

4 K Malleon, *Review of the Appeal Process, RCCJ Research Study No 17* (London: HMSO, 1993) 1.

5 The transcripts were obtained from the Casetrack website and some of the judgments were not available because of reporting restrictions. Malleon's transcripts were examined in the Supreme Court library.

6 53 Cr App R 82. Lord Widgery stated: '... in cases of this kind the Court must ask itself a subjective question, whether we are content to let the matter stand as it is, or whether there is not some lurking doubt in our minds which makes us wonder whether an injustice has been done. This is a reaction which may not be based strictly on the evidence as such; it is a reaction which can be produced by the general feel of the case as the Court experiences it.' In later cases the concept of lurking doubt has remained but different wording has been used. In *Wellington* (1991) Crim LR 543, the court referred to a 'reasoned or substantial unease'.

7 JUSTICE, *Miscarriages of Justice* (London: JUSTICE, 1989).

8 *Pattinson and Laws* 58 Cr App R 417; *Thome and Others* 66 Cr App R 6; *Lamb* 71 Cr App R 198; *Thompson* 74 Cr App R 315; *Pope* 85 Cr App R 201; *O'Leary* (1988) Crim LR 827.

9 See n4 above, 12.

10 See n2 above, ch 10, para 46.

11 *Royal Commission on Criminal Justice: Final Government Response* (London: Home Office Communication Directorate, 1996).

12 (1999) Crim LR 306.

13 [1999] 3 All ER 247.

14 *Marsh* [2002] EWCA Crim 1497.

15 *Morris* [2002] EWCA Crim 158.

16 *McGuirk* [2002] EWCA Crim 861.

- 17 *Baig* [2002] EWCA Crim 823.
- 18 *Martin* [2002] EWCA Crim 1214.
- 19 *Graham* [2002] EWCA Crim 1296.
- 20 *Brownlie/Heemskerk* [2002] EWCA Crim 921.
- 21 *The Times*, 23 October 1990, 38.
- 22 *Flower* 50 Cr App R 22.
- 23 *Dunton* 1 Cr App R 165.
- 24 *Tellett* 15 Cr App R 159.
- 25 *Jones* 2 Cr App R 27.
- 26 Donovan Committee, *Report of the Interdepartmental Committee on the Court of Criminal Appeal* (cmdn 2755, London: HMSO, 1965) para 136.
- 27 See n2 above, ch 10, para 55.
- 28 *Ibid* para 60.
- 29 *Beresford* 56 Cr App R 143.
- 30 JC Smith, 'Criminal Appeals and the CCRC 2' (1995) *NLJ* 572.
- 31 JC Smith, 'The Criminal Appeal Act 1995' (1995) *Crim LR* 920, 928.
- 32 See n4 above, 11.
- 33 *Ibid* 16.
- 34 46 Cr App R 29.
- 35 See Michael Howard, *HC Debs*, 6 March 1995, col 24.

Unappealing work: the practical difficulties facing solicitors engaged in criminal appeal cases

Janet Arkinstall reports on issues raised by solicitors undertaking criminal cases in the Court of Appeal.

This article is based on the observations of an experienced group of practitioners who are committee members of the Criminal Appeal Lawyers Association (CALA), an organisation formed in 2000 that aims to encourage the highest standards of practice among lawyers undertaking appeal work, to improve the law relating to appeals and represent the interests of its members. All have substantial experience in both general criminal work and criminal appeals. Steven Bird has run his sole criminal practice in south London since October 2000. Before that he was a partner in a medium-sized mixed firm, working in its criminal department. He has 12 years' experience. Ewen Smith has more than 30 years' experience, and is one of 15 partners in a medium-sized mixed firm based in Birmingham. Campbell Malone is a former partner, and now consultant, with a 22-partner mixed firm in the north west of England, and has 35 years' experience in crime. Jane Hickman is a founding partner in a medium-sized north London criminal justice firm, established 13 years ago, and has 30 years' experience.

All of the solicitors commented that there are huge numbers of convicted people seeking advice on an appeal, but there is a general lack of solicitors prepared to do the work involved in investigating these cases. Smith points out that although the number seeking advice is large, it represents a small proportion of those convicted in the Crown Court – for example, the 2001 judicial statistics show that of all those committed to the Crown Court only eight per cent went on to appeal. Requests for help come at a number of different stages in the appeal process. The client may have just been convicted and is unhappy with his/her trial representation, especially if s/he has been advised that there are no grounds of appeal. In some cases there has been an unsuccessful appeal, perhaps some years earlier, but new evidence has come to light and an application to the Criminal Cases Review Commission (CCRC) is sought. Prisoners often write directly to practitioners, having heard of them via word of mouth within prisons, or from a CCRC list sent to unrepresented applicants. There may also be

referrals from other solicitors who do not do criminal work, or do not do appeal work.

Bird estimates that he receives about 10 to 15 letters per month requesting help with an appeal. He has had to set some arbitrary criteria for selecting those he will look at: so he will not take on cases involving a prison term of less than five years, or where the person is at liberty. Smith's Birmingham firm turns away about four to five enquiries per month, even though he requested removal from the CCRC lawyer list. Malone turns away eight or nine requests a month. Hickman estimates her firm deals with two per cent of requests and that between one hundred and two hundred potential clients are turned away each year. She says:

Many of our members receive applications daily from people in prison who want help getting into and through the CCRC and the Court of Appeal. It is hard to gauge the number involved but the impression is of more than a thousand – perhaps several thousand – prisoners who want help. For some this represents a final attempt to escape the consequences of conviction for a serious criminal offence. These people are wasting scarce funds. However, there is an objective need for them to get proper advice as early as possible so they can settle down and do their sentences. Others really will have suffered the nightmare scenario that has featured in so many great films. They have been wrongly accused, convicted and imprisoned for something they have not done. The reality is that the vast majority will never receive skilled legal advice, whether guilty or innocent. There are simply not enough lawyers to do this work.

Recruitment difficulties

All solicitors complained that there is a serious shortage of criminal lawyers, particularly ones with experience. It is extremely difficult for firms to recruit solicitors because criminal law is not seen as a secure career option, as it once was. Future prospects for criminal lawyers are perceived to be very uncertain, which discourages newly-trained lawyers from entering the field. Jane Hickman blames this on the government's legal aid policies – where the criminal legal aid system is subject to the amount of change it has seen recently, and rates of payment are low. Those already working in the field conclude their jobs are at risk, and seek alternative work. The standard of candidates for positions therefore falls. The work is also perceived to be seedy, a perception not helped by the way in which some members of the government regard defence lawyers, as simply standing in the way of bringing guilty offenders to justice.

Of the difficulty of recruiting Bird says:

Lots of CVs will arrive, but there is a lack of experience. Duty solicitors of three to four years' call are able to demand £40,000 and I cannot pay that because criminal legal aid simply does not pay that well. And if I do recruit someone less qualified they will spend two to three years gaining experience but then leave to become freelance accredited representatives, where they can earn £25 to £30 an hour.

The nature of duty solicitor work is also problematic. Night time call-outs to police stations mean that it is almost impossible to combine this work with raising a family, which further reduces the pool of possible applicants.

Appeal work is generally more difficult than general crime, and the ideal appeal lawyer needs a lot of experience in handling heavy and serious criminal trials. S/he needs to have knowledge of what happens at all stages of the criminal process – during the investigation, at court etc – and a thorough knowledge of substantive criminal law and the rules of evidence. As Smith says 'it is knowing which buttons to press. Thus you do need to be senior, you do need to be tenacious and you need to know the system'. If the solicitor does not have this experience there is a need for a senior person to supervise his/her work. Where a case is taken over following the trial it will usually involve a huge amount of reading.

Firms will generally try to combine appeal cases with general criminal work, but because cases which are before the courts are very active and involve performing a series of well-defined tasks, a lawyer's appeal cases tend to be neglected. It is, therefore, difficult for a lawyer to have a caseload of appeal and general crime at the same time. Bird believes it is best to have a dedicated person handling the appellate work, and has employed very junior lawyers, some of whom are not qualified solicitors but have a good law degree, to undertake some of the more routine tasks, such as indexing a file, sorting out legal aid funding, and summarising the case. But for the person to do these tasks effectively, s/he needs to have an understanding of the trial process to be able to know what has gone wrong. He says 'each investigation involves a huge amount of time reading the papers and at the end of the day it is simply not possible to delegate the need for the senior practitioner to do this'. Although trainee solicitors are able to assist with the small tasks in relation to assessing the merits of a potential appeal, 'in order to properly assess what may have gone wrong you need to be able to understand how the CPS has presented the case, how the lawyers dealt with the issues, and if there has already been an appeal, assess why it was that the appeal failed. This involves reading the entire file, which by the post-appeal stage is very large generally'. He considered that the best young lawyers to do the initial sorting work are possibly barristers, as their training in opinion

writing gives them an eye for spotting grounds of appeal. Malone argues there are two theories as to what makes a good appeal lawyer. One is that the lawyer must have the ability to sort out the minutiae of the case and work out exactly where it has gone wrong; the other is that an experienced lawyer will simply get a feel about the case from reading the papers. He says the reality is probably at a point somewhere in between.

Legal aid issues

Legal aid for work done in connection with an appeal or a CCRC application is paid at a flat hourly rate under the means-tested Advice and Assistance scheme. All interviewees state that the hourly rate, which in London is £49.70 per hour and slightly less elsewhere, is much too low, and this creates a disincentive for lawyers to undertake the work. This amount is paid for all work necessary to determine whether there is any merit in an appeal or CCRC application, to undertake any investigations, to obtain counsel's opinion and to apply for leave to the Court of Appeal, or for a reference by the CCRC. It is the only form of funding available until leave to appeal is granted or a reference is made. Unlike other criminal work, there is no way to be paid an enhanced rate if the case is complex or difficult.

The Advice and Assistance scheme is administered under the General Criminal Contract, by which means the Criminal Defence Service of the Legal Services Commission (LSC) contracts to buy the services of individual firms. For reasons of administrative convenience, contracted firms exercise devolved powers relating to the individual grant of advice and assistance, which means that the commission does not have to individually assess each case. Firms are paid on a monthly basis, and are subject to an annual audit. The audit, of 20 randomly selected files, is to allow the LSC to assess the amount of work done on the files, compared with the amount of money paid. If the audit results in an 'audit score' of more than 10 per cent – that is, the amount by which the claims on the audited files have been reduced by the auditor as a percentage of the amount actually paid – the firm will be reclassified and become liable to repay to the LSC the same percentage of the whole year's payment. Problems arise when the selection of files for audit includes appeal files, because the auditors rarely come across such files, and do not understand that the nature of the work involved is different from a 'normal' criminal case. This has had very serious and unfair consequences for firms that undertake appeal cases.

The amount of advice and assistance legal aid is limited to £300 for an appeal and £500 for a CCRC application. After that, the solicitor must apply to the commission for an extension if more work is necessary, or when seeking to instruct an expert witness or obtain counsel's opinion. However, although an

extension for a specific amount of time at a rate per hour will be granted, and the solicitor will go ahead and do the work or incur the disbursement work on that basis of that amount, when the file is audited the auditor may decide that the work was not reasonably carried out, or was paid at too high a rate, despite the terms of the extension that was granted.

Bird gives the following example of this unfair and arbitrary rule:

Often the LSC will agree an extension of counsel's fees for a certain task for a number of hours at a certain rate of pay. However, on audit the LSC has decided that both the amount of hours spent by counsel and the hourly rate, albeit previously agreed by the LSC, to be excessive. This means that the firm may have already paid counsel, for example, 12 hours at £100, but are only allowed on assessment 6 hours at £70.

Another problem arises from the application of the sufficient benefit test, which exists to ensure that funded cases have some legal merit and are not 'hopeless', and the fact that a client may have been given advice by his/her previous solicitor or counsel that no grounds for appeal exist. Clients will often approach another solicitor in such circumstances, having been given the negative advice fairly recently. Often they will be critical of the way in which they were represented. Bird points out, whether or not they are critical of their previous counsel, there have been many cases overturned on appeal where there has been initial negative advice. However, in such circumstances there is a risk that the LSC may disallow the entire claim, which could have disastrous financial consequences for a firm if it results in reclassification.

If the client is granted leave to appeal by the Court of Appeal or if the CCRC grants a reference back to the Court of Appeal and the solicitor is granted a representation order by the court, appeal work does become financially viable. It pays up to £111 per hour. However, the solicitor will have had to examine a huge number of cases for a tiny proportion to actually get to this stage – one interviewee estimates that this happens in about 10 per cent of the cases examined.

Other practical difficulties

As explained above, it is possible to obtain an extension of legal advice and assistance to obtain the opinions of counsel and experts. It may also be necessary to purchase the transcript of a trial, which can run into thousands of pounds. However, unless counsel and experts are content to wait until the end of the case to be paid, firms will find themselves with very large amounts of money tied up in their appeal files. The terms of payment under the General

Criminal Contract attempt to alleviate this problem by allowing an additional five per cent payment per month, but where a firm has a large number of long-standing appeal cases this benefit is cancelled out.

Clients seeking advice with respect to an appeal are usually, by definition, all in prison, and they may be accommodated anywhere around the country. It is very time-consuming to visit them, often taking up at least an entire day. Travel time is paid at only £25 per hour. Although with appeal work there is usually less need to see the client, compared with when preparing for a trial, quite often attendances are necessary. This is so even where there are no grounds for appeal since the client often needs to hear this in person to understand it properly. Technology is assisting in some areas, where local courts have video conferencing facilities which local practitioners are able to use.

So is appeal work worth doing?

All interviewees reported that they found appeal work enormously satisfying from a professional point of view. It is seen as challenging and interesting, and represents much more of an intellectual exercise than first-instance trial work because it involves looking back over the criminal trial process, critically examining the decisions that were made by defence and prosecution lawyers, analysing rulings made on the admission of evidence and the directions of the trial judge, to decide whether anything, and what, went wrong in the process.

A successful case is an immensely satisfying experience. Such an outcome will enhance the reputation of the lawyer concerned. Professional kudos also comes from association with cases that are reported and which can change the law. A successful appeal will also create positive publicity for the lawyer's firm as a whole, and be of benefit to the lawyers who are not necessarily involved in criminal work. One lawyer stated that his fellow partners viewed the work he did with complete bewilderment, because of the nature of the work itself and its lack of fee-generating capacity. However, positive publicity is seen as being of substantial benefit to the firm as a whole.

From a financial point of view, however, the rewards are meagre. As a result, there are not enough lawyers doing the work. If a lawyer is paid more money to do general criminal work, there is absolutely no incentive to undertake appeal work, which is both paid less and perceived as more difficult. The amount paid for a large criminal trial can be double that which is paid for investigating and trying to put right that which has gone wrong at a trial.

Smith says of appellant work:

It is so badly paid and with the very low rates generally for crime, senior practitioners cannot spend time doing this work, not least travelling to see clients. The need to keep one's head above water drives senior solicitors to do work that pays, as opposed to work that does not, and unfortunately miscarriage work is regarded by many as at the bottom of the pile, purely because of finances.

Quality control and the need for standards

CALA lawyers are very concerned about what they perceive as a general lowering of standards in the quality of work performed by criminal lawyers, both in relation to general criminal work and appellate work. Most cases of miscarriage of justice involve people not doing their jobs correctly, be they the police, prosecution, judge or the defence lawyers, and often a case will involve a combination of errors made by different players. Lawyers who take over cases at the appeal stage get a very good sense of whether the initial advice and representation was well or badly done. There may have been a conflict of interest for the solicitor in acting for multiple defendants. Examination of the original criminal trial file may show up regular changes of counsel and other personnel, or that there was a lack of supervision of junior practitioners when attending court, or that clerks rather than qualified lawyers were sent along to court inappropriately.

These situations often arise because of a lack of resources, caused by low payment for legally-aided work, compared with the high cost of running a firm, and the need for the firm to undertake a large amount of cases in order to break even. This may result in a client's instructions not being properly listened to, issues or witnesses not followed up, and experts not instructed. It may mean that although a client's defence is completely unbelievable, no one has had the time to sit down with that client and confront him/her with that fact until the last minute before trial.

Poor advice and representation can contribute to an innocent person being wrongly convicted. Malone estimates that in 50 per cent of the cases he investigates the client is unhappy with the way s/he was represented. It is, of course, extremely difficult to succeed by using lawyers' incompetence as a ground of appeal. The incompetence must be flagrant, and, accordingly, Malone estimates that it would form part of the reasoning for allowing an appeal in only one per cent of cases.

The legal aid audit process is designed to provide some quality control, but the effectiveness of this system depends on the experience of the auditor. As a result, although a file may look impressive, and be 'all present and correct' in terms of

the audit criteria, this does not mean that the quality of the legal work is up to scratch. When a file is transferred to an experienced lawyer s/he can often see through the audit compliance measures, and realise that the former lawyer simply did not understand the issues involved. The LSC is now moving to a system of peer review, but Hickman points out that the problem will continue to be how the peer reviewers are appointed, and how their ability to assess the work of the peers is to be assessed.

Conclusion

The Criminal Appeal Lawyers Association has met with the LSC to explain the difficulties of legal aid and appeals, and has suggested that a better system would be to individually assess appeal cases at their conclusion, thus avoiding the risk of a nasty surprise occurring at audit. Specialist assessors could be trained in appeal work. A system for interim assessments should also be introduced, and payments to counsel and experts could be delayed until the assessed amount was known. CALA solicitors have also sought payment of higher hourly rates, particularly for complex cases, but recognise that such an increase is unlikely to occur. However, until the great discrepancy between the amounts paid for general criminal work and appeals is reduced there will be no incentive for practitioners to undertake appeal work.

CALA has expressed concern over quality control generally in relation to crime, and particularly in relation to appeal work. It points out that, in other areas of publicly-funded work, there is a tendency to send it to where it will be done in the best way. It believes that a system of accreditation for appeal lawyers is necessary. Until the practical difficulties involved in doing appeal work are sorted out it is likely that the current shortage of solicitors will continue, lessening the chance that people in prison who should not be there will be able to get access to the help they need to exercise their rights of appeal. It is not enough that courts of appeal and commissions exist – the state should ensure that appeal rights are of practical use and are not merely abstract and illusory.

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The Hague Programme: new prospects for a European Area of Freedom, Security and Justice

Marisa Leaf examines the future direction of European Union policy on justice and home affairs.

The creation of an Area of Freedom, Security and Justice (AFSJ) has headed the EU's political agenda since the Tampere European Council in October 1999. The five-year programme developed by that European Council to realise the AFSJ, 'the Tampere Programme', is drawing to a close and the discussions that will shape the next agenda are already underway with the launch of a consultation on the future of Justice and Home Affairs (JHA) by the European Commission¹ and the publication of a European Scrutiny Committee Report on the EU's JHA Work Programme.² Landmark changes have taken place in European criminal justice during the course of the first programme. Many of these go to the heart of national sovereignty and directly affect the lives of EU citizens.

The second five-year programme, known as 'the Hague Programme', will inevitably be influenced by the new EU Constitutional Treaty, despite considerable uncertainty as to whether it will be ratified by all member states. The consequences of enlargement to 25 will also play an important role in the future development of co-operation in criminal matters. Finally, the impetus given to counter-terrorism policy by the tragic events of September 11th 2001 and March 11th 2004 is likely to continue to affect the development of EU criminal justice policy as a whole. The Hague Programme will be agreed by the European Council in Brussels on 5 November 2004. Against this rapidly evolving backdrop of events, what can we expect for the future of EU criminal justice from the Hague Programme?

The European Commission's assessment of the Tampere Programme

The legislative progress made under the Tampere Programme has been regularly documented in a 'scoreboard', published at six-monthly intervals. The end of this five-year period culminated in a Communication from the European Commission that was expected to provide a final assessment of the achievements and shortcomings of the Tampere Programme, with projections for the next five-year agenda.³ However, this report has been strongly criticised

by the European Scrutiny Committee⁴ in the following terms as providing little analysis:

We note the long list ... of the Regulations, Directives and Decisions which have been adopted since 1999 to give effect to the Tampere programme. Legislation is not, however, an end in itself. The Communication does not evaluate the practical benefits of the measures that have already been adopted. It is not possible to judge, therefore, whether all this effort and expense has achieved the expected benefits.

The Commission, therefore, provides little assistance in evaluating the impact of measures adopted under the Tampere Programme or in constructing the next agenda. Furthermore, while a consultation proposed by the Commission is to be welcomed, the prospects for a meaningful and transparent dialogue with those outside government are slim given the very last minute publication of the Hague Programme prior to the JHA Council on 25-26 October.

The Tampere Programme encompasses a huge range of issues – EU asylum, visa and immigration policy, civil and criminal justice, police, judicial and customs co-operation and external action as well as the arrangements for the elaboration of a draft EU Charter of Fundamental Rights. This paper focuses on judicial co-operation in criminal matters, an area that has been radically overhauled in the last two years. In particular, the European arrest warrant has been implemented falteringly across the EU, transforming the nature of extradition between EU member states. EU counter-terrorism policy has driven many of these wider developments in EU judicial co-operation as well as far-reaching agreements with third states, notably the United States of America. The next sections will document some of the most important developments in judicial co-operation in criminal matters under the auspices of the Tampere Programme.

Judicial co-operation instruments: mutual recognition and the European arrest warrant

The Tampere Presidency Conclusions proclaimed:

Enhanced mutual recognition of judicial decisions and judgments and the necessary approximation of legislation would facilitate co-operation between authorities and the judicial protection of individual rights. The European Council therefore endorses the principle of mutual recognition which, in its view, should become the cornerstone of judicial co-operation in both civil and criminal matters within the Union.⁵

The principle of mutual recognition was seen by some member states, notably

the UK, as a more politically feasible alternative to full harmonisation. It allows many historical safeguards to be removed on the understanding that criminal justice systems across the EU are equally robust and contain comparable, if not identical, protections for individuals. Little, if any, research had been done to support this assumption, which has been widely criticised as being based on little more than blind faith in the practical application of the European Convention on Human Rights (ECHR).

The mutual recognition programme received a sharp injection of political will in the immediate aftermath of September 11th. Subsequently, the European arrest warrant (EAW)⁶ was agreed in record time, replacing extradition with a simplified process of surrender between EU member states and limiting many of the grounds on which extradition could be refused. It has been followed by a draft framework decision on confiscation orders,⁷ a framework decision on freezing orders to prevent the destruction, transformation, moving, transfer or disposal of evidence,⁸ a draft framework decision applying the principle of mutual recognition to financial penalties⁹ and, most recently, a Commission proposal for a European evidence warrant¹⁰ which will form part of a package to replace current mutual assistance procedures. This raft of measures has been condemned by interested NGOs, including JUSTICE, for its lack of adequate, or even consistent, safeguards and the detrimental effect it is likely to have on the rights of suspects and defendants involved in cross-border cases where these instruments apply.

As the first measure in the field of judicial co-operation to implement the principle of mutual recognition, the EAW was expected to act as a litmus test before further mutual recognition instruments were agreed. Its experience so far highlights why it would have been wise to demonstrate it could work before the coercive measures enumerated above were so quickly adopted in its wake. The Commission admits there were some 'delays in transposition' of the EAW but concludes 'the first cases handled show that the mechanism works well'. The delays were in fact so serious that on 1 January 2004, the deadline for **implementation**, only eight member states had actually implemented the Eurowarrant. Much of the delay can be attributed to the fact that the EAW was agreed in haste, with little consideration of the implications it would have on individual and often constitutional rights in the member states. In August, reports emerged that the President of the Czech Republic, Václav Klaus, had vetoed the EAW bill on the basis that it would permit Czech nationals to be extradited and tried in other member states.¹¹

Cases both before and after implementation of the EAW demonstrate that judicial co-operation in criminal matters will continue to be frustrated unless

human rights are respected in practice by the member states.¹² This can only be achieved by the adoption of minimum rules on criminal procedure – envisaged as the natural counterpart to the mutual recognition programme since its inception at the Tampere European Council – stringently monitored by independent experts and justiciable in the national and European courts.

The Commission did, in fact, present a green paper on procedural safeguards for suspects and defendants in criminal proceedings throughout the European Union in February 2003.¹³ This has only recently evolved into a concrete proposal for a framework decision.¹⁴ It covers (i) access to legal advice; (ii) access to interpretation and translation for non-native defendants; (iii) protection for vulnerable persons; (iv) access to consular assistance; (v) a letter of rights; and (vi) evaluation and monitoring. The final proposal seriously dilutes both the scope and level of the safeguards initially explored in the green paper. While the preamble states that it is intended to enhance ‘confidence in the criminal justice systems of all the Member States which in turn will lead to more efficient judicial co-operation in a climate of mutual trust’, it also explicitly states that its provisions ‘do not impose obligations on Member States that go further than the ECHR’. Indeed, in some areas, it does not *even* reach the minimum standards set by the ECHR or the EU Charter of Rights. Article 6 ECHR, for example, guarantees legal aid where a person does not have sufficient means to pay for legal assistance and ‘the interests of justice so require’ – a test that should automatically be met wherever there is an international dimension to criminal proceedings – but which is not reflected in the Commission proposal. There is also serious concern at paragraph 8 of the preamble which purports to exclude the scope of the framework decision from ‘certain serious and complex forms of crime in particular terrorism’. The implementation of such a provision would prevent the minimum standards of the framework decision applying to the cases in which it was most needed and risk bringing the EU’s standards below even those of the ECHR.

Meanwhile, another proposal on defence rights has also been presented by the Commission – an amendment to the regulation establishing the European Anti-Fraud Office (‘the OLAF proposal’)¹⁵ that would guarantee certain essential rights to those subject to OLAF investigations. The OLAF proposal is a positive step towards improving the procedural guarantees for *some* suspects, namely those subject to OLAF investigations. However, it suggests that member states are willing to protect the rights of some more than others.

In developing the Hague Programme, member states need to commit themselves to improving the rights of individuals affected by EU mutual recognition instruments, as promised by the 1999 Tampere European Council, in order to

ensure that individual rights do not suffer through greater European integration.

Judicial co-operation institutions: Eurojust and a European Public Prosecutor

A provisional Judicial Co-operation Unit¹⁶ was established in December 2000 to further the Tampere programme. This was succeeded in February 2002 by Eurojust,¹⁷ whose role is to facilitate the co-ordination of national prosecuting authorities and support criminal investigations in organised crime cases. Eurojust is still relatively new and awareness of what it does, both by the public and by national authorities, is poor. The Commission envisages an expansion of Eurojust's role, placing it at 'the centre of European criminal policy' and establishing a European Prosecution Service from within it, with specific responsibility for offences against the Union's financial interests.

Any future expansion of Eurojust's role will require the provision of adequate human and financial resources, particularly given the EU's recent enlargement to 25 member states and the added strain this will place on every institution, agency and body of the Union. But efficiency is not the only aspect on which the Commission must focus; accountability must also be addressed. Given the sensitive nature of data received and processed by EU agencies such as Eurojust and Europol, for example, future development of their respective roles must also be sure to take account of the variation in data protection standards between member states. This issue is not considered by the Commission in its Communication. Similarly, there is a need to confront current variations in the national laws that determine the powers and controls applicable to individual Eurojust staff. These disparities result in variable levels of accountability and hinder effective co-operation between member states. The removal of the restrictions on the jurisdiction of the European Court of Justice to review the activities of Eurojust envisaged by the new constitutional treaty and the increased involvement of national and European parliaments in the evaluation of Eurojust's activities should help to diminish these inequalities. It will be important to establish a clear delineation of Eurojust's role with other bodies, such as the European Anti-Fraud Office (OLAF) and the European Judicial Network (EJN), to improve co-operation, visibility and accountability. This is a prerequisite for the success of any public awareness-raising campaign the Commission may wish to conduct.

The Commission's calls for a European Public Prosecutor (EPP) follow its presentation of a green paper on the criminal law protection of the financial interests of the Community and the establishment of a European Prosecutor in December 2001¹⁸ and are equally unsupported by concrete justifications for the creation of this new post. Nor, again, is any reference made to the need for work

on the approximation of certain procedural rules to avoid 'forum shopping' for the most advantageous jurisdiction. The creation of a EPP cannot be sensibly discussed in the absence of parallel moves to establish rules on matters such as selection of jurisdiction, admissibility of evidence, Eurobail¹⁹ and EU-wide defence rights.

EU counter-terrorism

The Commission communication on the Tampere process reaffirms the Union's continuing commitment to tackle terrorism on all fronts. However, the Commission is quick to attribute concerns that measures adopted in the aftermath of September 11th overemphasise the security aspects of tackling terrorism at the expense of liberty and justice to 'certain media reports'. These concerns were in fact substantial enough to merit a special report on the balance between freedom and security within the EU by the EU Network of Independent Experts to supplement its 2002 Annual Report.²⁰ This report draws attention to the human rights abuses that have resulted from counter-terrorism legislation introduced by the EU and in the member states since September 11th.

Noteworthy examples of measures adopted under the auspices of the EU's counter-terrorism policy are the framework decision on the definition of terrorism,²¹ the EU lists of suspected terrorists and terrorist organisations,²² the European arrest warrant,²³ and the 2000 Mutual Legal Assistance Convention (MLA),²⁴ Article 13 of which provides for joint investigation teams to be set up. There are serious concerns about the scope of the EU definition of terrorism, which is imprecise enough to cover protests and urban violence where protestors cause 'extensive destruction to ... private property likely to ... result in major economic loss with the aim of unduly compelling a government or international organisation to perform or abstain from performing any act'. A challenge on these grounds to the Belgian law implementing the framework decision is currently pending in the Belgian Cour d'arbitrage. Similarly, the EU lists of suspected terrorists established in December 2001 have been drawn up without reference to any legal, let alone public, criteria and the routes of political and judicial accountability have been obstructed by the confusion caused by instruments adopted under both the second and third pillars of the Treaty on European Union. The EU Network of Independent Experts in Fundamental Rights concluded in the thematic comment attached to its 2000 Report that these lists violate the rights of those included to an effective remedy before a judge, to the presumption of innocence and to the preservation of their reputations.²⁵ Challenges to the legality of these lists are also pending in the ECJ, a decision on the merits having been sidestepped by the European Court of Human Rights (ECtHR).²⁶ Finally, the procedures by which these measures were agreed were opaque, undemocratic and unjustifiably accelerated. Many of the

instruments adopted under the guise of counter-terrorism in fact have a far broader scope, notably the EAW, Article 13 MLA and the co-operation agreements with the US.

EU/US co-operation

The Commission's assessment of the Tampere Programme makes only fleeting reference to relations with the United States, noting that these are 'very close, particularly in the fight against terrorism'. The signature of two judicial co-operation agreements is alluded to but 'evaluation' is limited to the fact that the Union obtained better guarantees than the provisions of most bilateral agreements, in particular with regard to the death penalty. In terms of future co-operation, the Commission merely notes that 'dialogue proceeds through the New Transatlantic Agenda'.

During the course of the Tampere Programme, two important judicial co-operation agreements have been made with the United States as well as a Europol/US treaty on the exchange of personal data and an agreement on passenger name records (PNR).²⁷ These originate from the JHA Council held in the aftermath of 11th September but have not been restricted in scope to terrorism. Nor do they sufficiently acknowledge that the protection provided in the European Union by the ECHR, the EU Charter of Fundamental Rights and Freedoms and specific EU legislation, for instance the EU Mutual Assistance Convention, is not binding on the United States.

These controversial agreements have been negotiated in secret, with limited input from the European and national parliaments, and in the shadow of tight deadlines. Furthermore, the agreements on extradition and mutual assistance are the first to be concluded between the European Union as a whole and a third country and so carry the added concern that they will serve as a model for future negotiations with third countries. Given their importance and their impact upon individual rights, a rigorous assessment of both the process by which they were adopted as well as their practical effects is a serious omission from the Commission's Communication. The uncertainty generated by the EU/US agreement on PNR which caused airlines to be described by the European Parliament as being 'caught between a rock (if they follow Community law they are liable to US sanctions) and a hard place (if they give in to the US authorities' demands they fall foul of the data protection authorities)' was wholly unsatisfactory. Many airlines agreed to supply US authorities with PNR despite the lack of adequate data protection safeguards in the draft agreement and the unanimous rejection of the agreement by the European Parliament's Committee on Citizens Rights and Freedoms.²⁸ If EU co-operation with the US is to be further consolidated in the next five-year programme, greater attention needs to

be paid to the inclusion of appropriate safeguards and remedies for those affected by EU/US agreements.

Prospects for the Hague Programme

The European Commission sees the establishment of an Area of Freedom, Security and Justice as 'one of the most outstanding expressions of the transition, from an economic Europe to a political Europe'. It considers that substantial progress has been made since the inception of the Tampere Programme in 1999 but that a great deal still remains to be done. Where success is perceived to be limited, the Commission attributes this primarily to institutional difficulties in decision-making, restrictions on the European Parliament's role as co-legislator and constraints on the jurisdiction of the European Court of Justice in police and judicial co-operation in criminal matters, as well as a lack of political will to agree or implement sensitive measures at the core of national sovereignty.

The new context in which the Hague Programme will be devised includes a newly-agreed EU Constitutional Treaty. This is yet to be ratified by all 25 member states and the consequences of one or more member states failing to do so remains unclear. Even going on a best-case scenario, however, the treaty would not take effect in the member states until the end of 2006, two years into the Hague Programme. Nonetheless, the treaty provides us with an important indication of how the Council envisages the future development of the Union, and notably the Area of Freedom, Security and Justice. Its main provisions relating to judicial co-operation in criminal matters will be examined in the next section.

EU Constitutional Treaty: developments and implications

Decision-making in the Council

A highly sensitive area of policy at the very core of national sovereignty, EU Justice and Home Affairs has historically been subject to special decision-making rules that require unanimity in the Council and the mere consent of the European Parliament, rather than its joint legislative participation. Decision-making under the third pillar is renowned for being opaque, unaccountable and notoriously difficult to achieve. The issue of retaining member states' vetoes, particularly over the creation of common rules on criminal procedure and substantive criminal law, was amongst the most controversial tackled during treaty negotiations.

The new treaty makes Qualified Majority Voting (QMV) and co-decision with the European Parliament the general rule in Justice and Home Affairs, including

in respect of the development of common rules on criminal procedure and the definition of criminal offences and sanctions. An important exception is the creation of a European Public Prosecutor that will still necessitate unanimity in the Council. Where, however, a member state considers a draft framework law on criminal procedure or criminal offences and sanctions would 'affect fundamental aspects of its criminal justice system' it can prevent its adoption by QMV through a referral to the European Council.²⁹ This referral triggers a suspension of the usual legislative procedure and may result in either the submission of a new draft law or 'enhanced co-operation' between those member states (at least one-third, ie nine) that wish to proceed. It is known as 'the emergency brake'.

The extension of QMV to this area of law will ease decision-making in the newly enlarged Union and facilitate the adoption of vital minimum rules on criminal procedure, the definition of criminal offences and sanctions. In principle, the emergency brake procedure should ensure that where coercive actions by a state are envisaged QMV will be tempered to ensure legitimacy through full democratic accountability. However, it is not clear whether the emergency brake provisions will be justiciable in cases brought before the ECJ. In the hands of an activist court, this could seriously diminish the value of the emergency brake mechanism in the interests of legal certainty.

Approximation of criminal procedure

The development of procedural safeguards has historically been obstructed by a lack of political will and the absence of a clear legal base in the treaties. The insertion into Article III-171 of the Constitution of legal bases for the approximation of certain aspects of criminal procedural law (mutual admissibility of evidence between member states; the rights of individuals in criminal procedure; the rights of victims of crime; and any other specific aspects of criminal procedure agreed unanimously by the European Council with the consent of the European Parliament), combined with an extension of QMV (subject to the emergency brake procedure) should, therefore, facilitate the adoption of procedural safeguards that are urgently needed both to guarantee defence rights and facilitate the EU's mutual recognition programme.

Minimum European standards in this field will reduce the likelihood of double standards being applied between member states in this area of law where rules vary widely. Increased cross-border co-operation on the basis of mutual recognition will only reinforce these anomalies in the absence of EU-wide minimum rules. Common standards should also diminish the chances of 'forum shopping' by prosecuting authorities in cross-border cases. There is, however, a danger that common European standards could take a 'lowest common

denominator' approach that would not extend defence rights beyond the scope of the ECHR. Furthermore, the emergency brake procedure and provisions on enhanced co-operation may result in higher levels of protection for suspects and defendants being developed in some member states than in others, a situation that will cause unequal standards to persist and aggravate the lack of genuine mutual trust between states.

Approximation of substantive criminal law

The new treaty also establishes, at Article III-172, a legal base for the creation of certain minimum rules on the definition of criminal offences and sanctions, again with QMV and co-decision as the general rule. An emergency brake is incorporated where such laws would affect fundamental aspects of a member state's criminal justice system.

The approximation of certain serious criminal offences and sanctions will help to ensure that serious cross-border crime is addressed in all member states and attracts sufficient penalties. It will also consolidate the mutual recognition basis of EU judicial co-operation in criminal matters by ensuring greater consistency between those offences across the EU in respect of which judicial authorities can co-operate, and by increasing legal certainty. This is particularly important where the double criminality requirement is abolished and application of the mutual recognition principle gives effect to the criminal laws of one member state in all others. As a minimum definition, however, it will not prevent member states adopting more extensive definitions or stricter penalties, which will then be given effect to in all other member states through instruments such as the EAW.

Transparency and democratic control: national parliaments

The new treaty significantly fortifies the role of the national and European parliaments in the EU. In particular, the treaty provisions on openness and transparency³⁰ should greatly assist legislative scrutiny, notably through the requirement that Council meetings and European Council meetings be held in public, with transparency of member states' policy positions, when legislating. A protocol on the role of national parliaments in the EU sets out their entitlement to receive Commission consultation documents and draft legislative Acts, as well as agendas and outcomes of Council meetings, and (apart from in exceptional cases) requires a period of six weeks to elapse before the adoption of the draft Act. These exceptional cases that permit the time allocated to the national parliaments for scrutiny of draft legislation to be reduced in 'cases of urgency'³¹ are, however, of concern. In its response to the European Scrutiny Committee's Inquiry into the EU's Constitutional Treaty,³² JUSTICE observed:

Cases of urgency may be defined by political interests and often in precisely the type of cases that require more rather than less democratic scrutiny. In the aftermath of September 11th, for example, highly sensitive and politically controversial legislative measures such as the EAW were adopted under an exceptional 'urgent procedure'. In its Minority Opinion on the Commission proposal for a EAW, the European Parliament emphasised that the accelerated negotiations requested by the Extraordinary Council did not 'allow scope for anything approaching serious consideration of the proposal and a measured assessment of its particularly wide ranging implications for the rules of criminal procedure'.

Moreover, the reason supplied for use of the urgent procedure in relation to the EAW was the 11th September attack on the United States. However, as highlighted above, the EAW has a far broader scope than counter-terrorism.

The treaty also incorporates a formal scrutiny procedure by national parliaments of draft legislation for compliance with the 'subsidiarity' principle – that competence should, as far as possible, be exercised by member states. Acting together, a third of national parliaments can oblige the institution or group of member states responsible for a draft legislative act to consider whether to maintain, amend or withdraw the draft, giving reasons for the decision. This effectively amounts to a 'yellow card' rather than the 'red card' sought by the UK that would have given national parliaments a veto over draft legislation that does not comply with the subsidiarity principle.

Regrettably, human rights concerns were not also included as an explicit ground for national parliaments to lodge objections to draft legislation.

Transparency and democratic control: European Court of Justice (ECJ)

In removing many of the particularities of the third pillar of justice and home affairs, the new treaty also expands the jurisdiction of the European Court of Justice (ECJ) in this field. The complex system of 'opt outs' from the ECJ's preliminary rulings jurisdiction is abolished so that any national court will be able to request such a ruling concerning the interpretation of the treaty or the validity and interpretation of acts of the EU institutions, its bodies, offices and agencies. This will greatly enhance accountability, in particular subjecting the activities of Europol and Eurojust to judicial scrutiny.

The only distinct provision on ECJ jurisdiction in JHA that remains is an exception for operations carried out by member states' police or other law enforcement services or where member states take action to maintain law and order and safeguard national security. There are concerns that this exception

may restrict ECJ jurisdiction in relation to future EU minimum standards in procedural safeguards for suspects and defendants.

Conclusion

The Union's new constitution takes some important steps towards placing human rights and the rule of law at the core of EU activities. In particular, it increases the role of the national and European parliaments, extends the jurisdiction of the ECJ into JHA and formally creates new legal bases for the approximation of procedural safeguards, as well as incorporating the EU Charter of Fundamental Rights and directing the Union to accede to the European Convention of Human Rights (ECHR).

It remains to be seen, however, whether the political will exists to adopt minimum standards that exceed the floor of protection provided by the ECHR and, if so, whether these will be agreed by *all* member states or, under the enhanced co-operation provisions, by only a limited number of states willing to protect those affected by EU measures in their territory.

Important gaps have also been left by the new treaty with regard to the evaluation and monitoring of compliance by the EU and member states with individual rights. Incorporation into the treaty of the EU Charter and the annual reports of the Network of Independent Experts that assess member states' compliance with its values are extremely valuable, as will be accession to the ECHR and the external review by the European Court of Human Rights (ECtHR) that this will bring. However, specific evaluation of member states' implementation of EU policies continues to focus solely on efficiency and does not envisage monitoring for human rights compliance even in Justice and Home Affairs, which has a direct and growing impact on the enjoyment of individual rights. The premise of the mutual recognition programme in the existence of comparable individual protection across the EU makes such monitoring urgent and imperative.

Further, the degree of involvement of the national and European parliaments in the political monitoring of Europol and the evaluation of Eurojust's activities is uncertain. The treaty, again, stops short of a direct authorisation for the parliaments to monitor the activities of Europol and Eurojust for human rights compliance rather than simply efficiency. Finally, any evaluations will be conducted by the European Commission and the member states themselves rather than by independent experts on the basis of peer review, with active input from the national and European parliaments.

Considerable uncertainty also remains in respect of the ECJ's ability to review

any eventual safeguards where they relate to operations carried out by member states' police or other law enforcement services or member state action to maintain law and order and safeguard national security. This would severely impede the potency of any EU-wide procedural safeguards that are agreed in the future to counter the effect of mutual recognition instruments that remove individual protections.

Finally, Article 7 TEU allows the Union to prevent and remedy a serious and persistent breach of the EU's common values, as set out in Article 6 TEU. If this monitoring mechanism is to be taken seriously, consideration needs to be given to appropriate penalties where there is a clear risk of a serious and persistent breach, or an actual serious and persistent breach of the common values of the Union. In the context of judicial co-operation, for example, suspension of mutual recognition instruments until the risk or the actual breach has been satisfactorily resolved should be contemplated. The Commission's recent communication on Article 7 TEU³³ is a welcome opening for this debate to begin and the discussions on The Hague Programme should seize the opportunity to take it further.

It is hoped that member states will follow the firm lead set by the new EU Constitutional Treaty towards acknowledging the central role of human rights in the creation of an Area of Freedom, Security and Justice. The time is long overdue for EU-wide safeguards to catch up with the rhetoric of the Tampere Programme and satisfy the rapidly developing needs of EU citizens in a common judicial area.

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Notes

1 COM (2004) 4002 final; SEC (2004) 680; SEC (2004) 693, 2.6.2004.

2 *The EU's Justice and Home Affairs' work programme for the next five years*, 28th report of session 2003-2004, HC 42-xxviii, 14.7.2004.

3 *Ibid.*

4 *Ibid.*, at para 18.

5 At para 33.

6 OJ L 190/1, 18.7.2002. See extensive JUSTICE briefings on the European arrest warrant and on the UK Extradition Bill 2002, available at www.justice.org.uk.

7 OJ C 184/8 2.8.2002.

8 OJ L 196/45 2.8.2003.

9 OJ C 278/4, 2.10.2001.

10 COM (2003) 688 final, 14.11.2003.

11 Radio Praha, reported by euobserver.com 24.8.2004.

12 See *R v Secretary of State for the Home Department, ex parte Rachid Ramda* [2002] EWHC 1278 Admin; *Irastorza Dorronsoro*, Cour d'appel de Pau, (No 238/2003), judgment of 16 May 2003; *Yves Machicote*, Cour d'appel de Pau, (No 264/2004), judgment of 1 June 2004.

13 COM (2003) 75 final, 19.2.2003.

14 COM (2004) 328 final, 28.4.2004.

15 Regulation 1073/99.

16 OJ L 324, 21.12.2000.

17 OJ L 63, 6.3.2002.

18 COM (2001) 715 final.

19 A green paper on the mutual recognition of non-custodial pre-trial supervision methods was presented by the Commission COM (2004) 562, 17.8.2004 but no reference was made to the need for such an initiative in the Communication on the Tampere programme.

20 'EU Network of Independent Experts in Fundamental Rights, Report on the Situation of Fundamental Rights in the European Union and its Member States in 2002, Thematic Comment 1: the balance between freedom and security in the response by the European Union and its Member States to the terrorist threat'.

21 OJ L 164/3, 22.6.2002.

22 2001/931/CFSP and updates.

23 Ibid.

24 Official Journal C 197, 12/07/2000.

25 See 'EU Network of Independent Experts in Fundamental Rights, Report on the Situation of Fundamental Rights in the European Union and its Member States in 2002, Thematic Comment 1: the balance between freedom and security in the response by the European Union and its Member States to the terrorist threat, VII General Conclusions'.

26 *Segi and Others v 15 Member States of the European Union* (no 6422/02); *Gestoras Pro-Amnistia and Others v 15 Member States of the European Union* (no 9916/02), decision of 16 May 2002 – case inadmissible.

27 *Council Decision of 6 June 2003 concerning the signature of the Agreements between the European Union and the United States of America on extradition and mutual legal assistance in criminal matters* [2003] OJ L181/25; Europol/US treaty on the exchange of personal data, 15231/02 LIMITE EUROPOL 104; EU/US agreement on passenger name records (PNR).

28 EP Motion for a Resolution PE 326.131, 6 March 2003, p3.

29 See Article III-171(3) and (4) and Article III-172(3) and (4).

30 Articles I-41 and III-305.

31 Article 4 of the Protocol on National Parliaments.

32 August 2004, available at www.justice.org.uk.

33 *Communication from the Commission to the Council and the European Parliament on Article 7 of the Treaty on European Union – Respect for and promotion of the values on which the Union is based*, COM/2003/0606 final.

Refugee protection in Europe: reconciling asylum with human rights

Anneliese Baldaccini traces the progress EU member states have made in harmonising various aspects of their asylum policies since co-operation in this field first emerged on the European agenda more than a decade ago. It will be argued that the EU has moved away from a human rights oriented approach to building a common European asylum system to one which is characterised by restriction and deflection and which undermines existing refugee protection standards.

Introduction

In 1992, the Maastricht Treaty made asylum an issue of common interest for the EU and co-operation among EU member states evolved in the form of several non-binding 'third pillar' measures.¹ The Treaty of Amsterdam, which entered into force on 1 May 1999, provided the framework for transferring asylum competences to the Community after a transitional period of five years during which Community legislation defining common minimum standards was to be adopted.² In this five-year period, the Council was to act unanimously on a proposal from the Commission or on the initiative of a member state and after consulting the European Parliament.³ In October 1999, at the Tampere European Council, member states agreed to work towards establishing a Common European Asylum System (CEAS), signalling a desire to move beyond minimum levels of harmonisation of their asylum laws and policies.

Having agreed the legal 'building blocks' of CEAS within the binding deadline of 1 May 2004, asylum policy should now firmly move within the competence of the EU and within the jurisdiction of the European Court of Justice (ECJ).⁴ This means that the Union's policy in this area will be developed within a new institutional framework in which the European Parliament has co-decision power, the Commission has sole legislative initiative, and voting in the Council is by qualified majority. In addition, the ECJ is to be given standard powers in relation to Community asylum law and implementing measures.⁵

Details of the future legislative programme are set out in the EU Constitutional Treaty, which gives the Union a general power to develop CEAS through the adoption of measures aimed, amongst others, at establishing a common asylum

procedure and a uniform status of asylum valid throughout the Union.⁶ The Constitutional Treaty, which if duly ratified by member states will come into force on 1 November 2006, consolidates the new institutional framework in which asylum competences are exercised by the Union. This will ensure more accountability and transparency in EU policy-making on asylum. However, it will not by itself guarantee a Community asylum law with high standards of protection. The first stage of CEAS has been completed with the adoption of measures of questionable content, which betray the EU's promise to guarantee fundamental rights. This casts a shadow over future developments. Much reliance will have to be placed on the greater involvement of the ECJ in ensuring respect for recognised principles of EU law and European human rights standards and filling the threatening gap in the legal protection of individuals claiming asylum in Europe.

The benefits of harmonisation

In just over a decade, closer co-operation on asylum issues and harmonisation of member states' asylum law have become a key policy area of the European Union. The drive to achieve a common policy has been both a response to the sharp increase in asylum applications in EU countries and a consequence of EU integration itself.

The crucial impetus for action at EU level was provided by increasing numbers of asylum-seekers reaching particular member states, leading to calls – from countries experiencing the greatest pressure – for centrally determined 'burden sharing'.⁷ It is generally acknowledged that sharp increases in asylum applications at the end of the 1980s and early 1990s were in large part due to the collapse of the Soviet Union, the civil war in former Yugoslavia and an increased level of warfare and political upheaval in developing countries. Co-operation and consistency in member states' policies was, therefore, to create a level playing field and provide a disincentive to secondary movements within the Community. Different procedures meant that asylum seekers entering the closest or weakest of the EU's external borders could make an application where their chances of being accepted were best.

Moreover, bringing into line their asylum policies also responded to the Community imperative of creating a single internal market in which the free movement of persons was guaranteed. The Treaty of Amsterdam made asylum a key component of member states' commitment to develop the EU into an area of 'freedom, security and justice'. When they met in Tampere (Finland) in October 1999, EU leaders confirmed the idea that 'freedom' should not be reserved for citizens of the European Union, and firmly expressed the conviction that '[i]t would be in contradiction with Europe's traditions to deny such freedom to those who justifiably seek access to [EU's] territory'.⁸

The Tampere European Council meeting, devoted exclusively to building an area of freedom, security and justice in the EU, provided a blueprint for a common policy which, significantly, placed asylum within its human rights context. Several Council Conclusions heed fundamental principles of human rights, most notably in the declared aim to build 'an open and secure Europe, fully committed to the obligations of the Geneva Refugee Convention and other relevant human rights instruments'.⁹ The European Council also firmly underlined 'the importance the Union and Member States attach to absolute respect of the right to seek asylum'¹⁰ in establishing a Common European Asylum System. However, as the legislative proposals called for at Tampere were developed by the Commission and negotiated upon by the Council, this rhetoric has remarkably failed to translate into the Union's asylum instruments.

The asylum directives

The first stage of a new 'harmonised' EU asylum policy was completed with the adoption of the Dublin II Regulation,¹¹ and directives on reception conditions for asylum-seekers,¹² and on the definition of a refugee.¹³ Only the proposed directive on asylum procedures remains outstanding, though a 'general approach' was agreed in the final hours before the deadline of 1 May 2004.¹⁴ The newly-enlarged European Parliament will have to be re-consulted on the proposal, which is likely to defer the adoption of the directive for several months. The UK, which is allowed, under the terms of a protocol attached to the EC Treaty, not to take part in the EU's policies in this field, has opted in to all these measures and is, therefore, bound by them.

There are clear question marks, vividly voiced by the United Nations High Commissioner for Refugees (UNHCR) and NGOs across Europe, over whether the package of legislative measures adopted meets member states' international human rights obligations. UNHCR's stark warnings that several provisions fell short of recognised legal standards and could lead to refoulement in breach of the Refugee Convention¹⁵ – thereby jeopardising the lives of future refugees – were blatantly ignored.

Issues of major concern relate to those instruments which aim to 'harmonise' substantive asylum law by providing a common interpretation of the basic principles of the Refugee Convention, the minimum procedural guarantees that apply to the process of status determination and the treatment of refugees during the determination of their status. We shall look at them in turn.

Directive on the definition of refugee

The so-called 'definition or qualification directive' sets out common criteria for the identification of applicants for asylum as refugees under the 1951 Refugee

Convention. It also lays down criteria for eligibility to subsidiary protection status and defines the obligation member states have towards those to whom they grant international protection.

A harmonised view of 'who is a refugee' requires criteria for a common interpretation of Article 1A of the Refugee Convention, which defines a refugee as someone who 'owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country'.

What constitutes 'persecution' is central to international refugee law. The directive defines acts of persecution within the meaning of Article 1A of the Refugee Convention as acts that are '(a) sufficiently serious by their nature or repetition as to constitute a severe violation of basic human rights', particularly non-derogable rights under the European Convention on Human Rights (ECHR); or '(b) an accumulation of various measures, including violations of human rights which is sufficiently severe as to affect an individual in a similar manner as mentioned in (a)'.¹⁶ These criteria codify existing practice of linking persecution to the norms of international human law.

The directive also broadly reflects the developing international standards in the interpretation of 'membership of a particular social group' by recognising gender-specific forms of persecution, and persecution on grounds of sexual orientation.¹⁷ Moreover, it brings the victims of persecution by non-state agents within the scope of Community asylum law.¹⁸ This settles in a progressive way a long-standing point of contention in Europe where a minority of jurisdictions, notably Germany and France, required persecution to have been carried out by the state. There is, however, the reverse provision that protection, other than by the state, might be *provided* by 'parties or organisations, including international organisations, controlling the State or a substantial part of the territory of the State'.¹⁹ This suggestion is rather alarming as 'quasi-state' authorities are not subjects under international law and are not, under human rights instruments, accountable for their actions.

Entitlement to subsidiary protection arises on account of a real risk that the applicant may suffer 'serious harm', where this is defined as consisting of (a) death penalty or execution; or (b) torture or inhuman or degrading treatment or punishment; or (c) serious and individual threat by reasons of indiscriminate violence in a situation of international or internal armed conflict.²⁰ These criteria to some extent reflect Strasbourg jurisprudence in granting protection against refoulement in Article 3 ECHR cases (freedom from torture and degrading

treatment). They fail, however, to cover other cases that have been interpreted by the European Court as preventing removal, such as where the effect of a person's removal was to withdraw medical and social facilities or constituted an unjustifiable interference with their private life (Article 8 ECHR).²¹ It should be noted that the criteria laid down in the directive are broadly consistent with current UK practice in granting humanitarian protection. The UK, however, uses humanitarian protection very sparingly, and grants discretionary leave to the vast majority of human rights or compassionate cases – a very precarious status that falls entirely outside the scope of the directive.²²

The directive also aims to define minimum obligations that member states shall have towards those to whom they grant either refugee or subsidiary protection status, ie access to employment, to education, social welfare and health care, to accommodation and integration facilities. However, the rules do not guarantee those offered subsidiary protection equal rights to refugees. For instance, entitlement to work for people granted subsidiary status can be made subject to the situation of member states' labour market.²³ Access to social assistance and to health care can be limited to core benefits.²⁴ Access to integration programmes for beneficiaries of subsidiary protection is at the discretion of member states.²⁵ It is difficult to justify this discriminatory treatment, and no attempt to offer an explanation has been made. Indeed, until an inexplicable change of heart, it was the view of the UK government itself that refugee and subsidiary statuses should be closely approximated on the ground that 'an individual's needs are the same regardless of the status granted; [...] meaningful rights, including full access to employment, are significant factors in encouraging genuine integration'.²⁶

One major issue of concern is the provision in the directive dealing with revocation of status, which introduces in EC law an altogether distinct concept from exclusion (Article 1F) or cessation of status (Article 1C) under the Refugee Convention. The directive reproduces both the Convention's grounds for cessation²⁷ (mainly by voluntary acts of the individual or change of circumstances which remove the basis of any fear of persecution) and for exclusion²⁸ (in the case of individuals who have committed crimes against peace, war crimes, crimes against humanity, serious non-political crimes and acts contrary to the purposes and principles of the United Nations). In addition, however, it allows for the revocation of refugee status where 'there are reasonable grounds for regarding [a refugee] as a danger to the security of the Member State in which he or she is resident', or the refugee 'having been convicted by a final judgement of a particular serious crime, constitutes a danger to the community of that Member State'.²⁹ The potentially dangerous consequences to refugees of this provision is palpable in jurisdictions, such as

the UK, where asylum legislation defines 'a particularly serious crime' as one for which the person concerned has received a sentence of imprisonment of at least two years and an automatic presumption is made that such a person poses a danger to the community.³⁰ In addition, some 500 crimes have been defined by Order as 'particularly serious' and will attract a similar presumption, irrespective of the length of the sentence imposed upon conviction.³¹ These provisions massively expand the scope of exclusion from protection against refoulement pursuant to Article 33(2) of the Refugee Convention.³² They are a clear illustration of security concerns creeping into asylum law and undermining refugee protection standards.

Directive on asylum procedures

The purpose of this instrument is to set out equivalent procedures for the granting and withdrawing of refugee status in EU member states. It includes basic principles and guarantees in relation to issues such as the use of detention, the right to interpretation and legal representation (although at appeal level only!), as well as providing for the right to an effective remedy as regards appeals. The appeals provisions, along with 'safe third country' and 'safe country of origin' criteria, are the most critical part of the directive. Implementation of these measures is likely to lead to a significant departure from accepted international standards of refugee protection and make the directive particularly vulnerable to legal challenge.

The 'procedures directive' could be described as a catalogue of member states' worst practice. Key procedural standards have been steadily diluted during negotiations in order to reflect restrictive provisions member states were already applying or hastily introducing domestically. The UK has been a key player in driving down standards in order to ensure that the agreed text would be in line with domestic provisions and with procedural reforms introduced by the Asylum and Immigration (Treatment of Claimants, etc) Act 2004.

Of particular concern are the 'safe country' concepts. They are used in an ever-increasing set of circumstances to construe applications as manifestly unfounded and deal with them speedily, with considerably reduced procedural safeguards. While the agreed draft provides a mechanism for instituting a binding EU minimum common list of third countries as safe countries of origin, 'Member States may also retain or introduce legislations that allows [...] for the national designation of third countries other than those appearing on the minimum common list, as safe countries of origin'.³³ In drawing up the common list, or retaining or introducing a national list, member states need only be satisfied that there is in the country concerned no persecution or threat of serious harm as defined in the qualification directive.³⁴ Thus, a country may be

considered safe for return of an asylum-seeker despite not having ratified and implemented the 1951 Refugee Convention, not complying with other human rights obligations, and failing to have a prescribed asylum procedure in place. While asylum-seekers may rebut the presumption of safety in the examination of their case, they are required to do so in an accelerated procedure and with the burden of proof lying exclusively on them.

Considerably reduced procedural guarantees apply also in respect to the 'safe third country' concept, the application of which is widely left to the discretion of member states.³⁵ Rules to be laid down in national legislation include those establishing a requirement of a connection between the person seeking asylum and the third country concerned.³⁶ The failure to agree reasonable criteria on what is to be understood by 'connection' is potentially very dangerous to refugees as it may facilitate member states' practice to transfer asylum-seekers to countries outside the EU, with which they have tenuous or no links and where effective protection may not be available to them. The UK has been particularly opposed to setting down criteria that would have involved the changing of national rules. UK law does not have a requirement that there be a connection between the asylum-seeker and the third country to which he or she is to be returned. The Home Office appears to have no intention of introducing a requirement that might well be a legal barrier to its current attempts to pursue policies aimed at facilitating the provision of protection in the regions of origin of asylum-seekers – which to many observers appear to be a revamped version of the government's original idea for asylum holding and processing camps.³⁷

The discretionary and open-ended 'safe third country' practice allowed under the directive contrasts with the circumscribed conditions which under international law must be fulfilled for transferring responsibility for an asylum applicant from one country to another. These include: an assessment of safety in the *individual* case and not on the basis of lists; agreement from the third country concerned to admit the applicant to a fair and efficient determination procedure; and a meaningful link between the applicant and the third country.³⁸ Moreover, Strasbourg jurisprudence on the application of the 'safe third country' procedures clarifies that such procedures do not absolve the country of asylum of its duties under Article 3 and that transfers to third countries, where sufficient safeguards are not in place, are not compatible with the ECHR.³⁹

In addition, the directive introduces an alarming 'super safe third country' concept under the guise of an exceptional border procedure. According to this concept, asylum-seekers arriving illegally can be returned to a designated country without examination of their application so long as the country concerned has in fact ratified and observes the 1951 Refugee Convention and

the ECHR, and has in place an asylum procedure prescribed by law.⁴⁰ This provision, which denies outright access to an asylum procedure on the basis of an un rebuttable presumption of safety of the third countries concerned, inscribes into EU law the controversial German practice of returning asylum-seekers to neighbouring countries through which they have travelled without considering their claim.

As for the appeals provisions, while confirming the right to an effective remedy, the directive worryingly leaves at member states' discretion the use of non-suspensive appeals.⁴¹ Non-suspensive appeal rights considerably undermine the ability of asylum-seekers to make use of such a right. By allowing member states to implement appeal provisions, which do not guarantee the right of asylum-seekers to remain in their territory until the final outcome of their claim, member states may breach recognised principles of EU law and international and European human rights standards on the right to an effective remedy. The European Court of Human Rights has held that the right to an effective remedy implies the right to remain in the territory of the member state until a final decision on the application has been taken.⁴²

It should be noted that the directive does not cover procedures for the granting of subsidiary protection but merely requires member states to apply the same provisions where they process requests for asylum or subsidiary status under one single procedure.⁴³ Thus, while governments may apply a harmonised definition of subsidiary status under the qualification directive, they are free to process these applications by different means. Allowing differences in member states' practices in relation to subsidiary protection to continue greatly frustrates the objective of limiting secondary movements.

Directive on reception conditions

The 'reception directive' provides for adequate minimum standards of reception for persons applying for asylum under the 1951 Refugee Convention. It makes a more significant contribution to the harmonisation of standards of protection, placing certain obligations on member states with regard to the provision of information, documentation, education of minors, healthcare, employment, and material reception conditions that 'ensure a standard of living adequate for the health of applicants and capable of ensuring their subsistence'.⁴⁴ It makes provisions for persons with special needs, including vulnerable individuals, victims of torture or violence, unaccompanied children, pregnant women and the disabled. In addition, the directive provides for the right of appeal against negative decisions relating to the granting of benefits or restrictions on freedom of movement, albeit without a corresponding right of free legal assistance which is instead to be laid down by national law.⁴⁵

Effective harmonisation is, however, undermined by member states' failure to align their different policies in relation to one crucial aspect, ie access to employment. While the right to work is guaranteed, the directive leaves member states the discretion to withhold access to the labour market for up to one year, after which they must determine conditions for such access but can still give priority to EU, EEA nationals as well as third country residents.⁴⁶ The UK has recently brought its policy into line with this provision, allowing applicants who have not received an initial decision after one year to apply to the Home Office for access to the labour market.

Moreover, reception conditions may be reduced or withdrawn in a number of circumstances, including where an asylum-seeker fails to comply with residence restrictions or reporting duties.⁴⁷ The directive also implements a provision permitting member states to 'refuse conditions in cases where an asylum seeker has failed to demonstrate that the asylum claim was made as soon as reasonably practicable after arrival'.⁴⁸ This provision, introduced at the instigation of the UK, is almost identical to s55 Nationality, Immigration and Asylum Act 2002. If the domestic application of this provision is anything to go by, it introduces an element of litigation at EU level. After a year-long litigation saga around the implementation of s55, the Court of Appeal has recently found this policy to violate the right to be free from torture, inhuman and degrading treatment 'in a substantial number of people'.⁴⁹ The UK government is appealing the judgment in the House of Lords but has announced that in the interim it will not continue to apply this provision.

In view of the upcoming transposition deadline of 6 February 2005, the Home Office has announced a consultation on the directive to conclude on 3 December 2004. Although EU legislation allows member states to retain more favourable conditions, it is clear from the consultation document that they will use the transposition process to bring down reception conditions to the minimum standards agreed at EU level. There is every reason to believe that other member states will be tempted to do the same, so as not to attract secondary movements to their territory. The consequence is that standards, which have been presented as minimum, will instead become the norm.

As is the case with the procedures directive, minimum reception standards apply to those making a claim for asylum under the Refugee Convention. Member states have discretion to extend the scope of the directive to those applying for subsidiary status.⁵⁰ The Home Office consultation document indicates that there are no plans to do so in the UK. Arguably, however, the matter is irrelevant as there is no avenue in the UK for lodging subsidiary protection claims. The UK operates a single procedure whereby all protection claims are applications for

asylum and individuals awaiting a decision on their claim are, in principle, treated the same.

Conclusion

The legal measures development to complete the first phase of the common European asylum system have failed to achieve an effective level of harmonisation and several provisions fail to comply with international standards of refugee protection. They provide for weak procedural guarantees, allow member states to shift responsibility for asylum applicants to third countries with little regard for the safety of the individual concerned, and amplify the current trend towards restrictions on asylum-seekers. In doing so, they potentially undermine asylum protection within the EU.

The underlying premises of restriction and deflection of much current European policy will need to be reconciled with the respect for a meaningful right to asylum which, as member states and the EU itself recognise – in their rhetoric if not in their practice – is strongly rooted in international human rights law and unequivocally acknowledged in the EU Charter of Fundamental Rights.⁵¹ There is scope for challenging EU asylum provisions that raise issues of compatibility with fundamental human rights through the national courts or for the European Parliament to refer the matter to the ECJ. It is certainly encouraging to know that the European Parliament has recently done so in respect of the failure of the Family Reunification directive to respect the right to family life protected by Article 8 ECHR.⁵²

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Notes

1 See, particularly, the London Resolutions and Conclusions of 30 November-1 December 1992 on: *Manifestly Unfounded Applications for Asylum; Harmonised Approach to Questions Concerning Host Third Countries; Countries in which there is Generally No Serious Risk of Persecution*. See also *Council Resolution on minimum guarantees for asylum procedures* [1996] OJ C274/13; *Joint Position on the Harmonised Application of the Definition of the Term 'Refugee' in Article 1 of the 1951 Geneva Convention Relating to the Status of Refugees* [1996] OJ L63/2.

2 See Title IV of the Treaty establishing the European Community, Article 63.1. Denmark, Ireland and the United Kingdom have reserved the right to not take part in the Council's adoption of measures proposed within the framework of Title IV (Protocol on the position of the United Kingdom and Ireland and Protocol on the position of Denmark annexed to the EC Treaty).

3 *Ibidem*, Article 67.1.

4 There is some uncertainty around this. Firstly, under Article 67.5, revised asylum voting rules apply only after the Council has adopted Community legislation defining common rules. As explained further below, the procedures directive has not been adopted yet. The Council has only agreed a 'general approach' that may be questioned by the new member states which, since their accession on 1 May 2004, have the power to veto the measure, if they wish to do so. Secondly, under Article 67.2, changes to decision-making and to the

ECJ's role after 1 May 2004 are not automatic but require a decision by the Council to this effect. This decision has yet to be taken.

5 Under Article 67.2, the Council must act unanimously after five years to adapt the provisions relating to the powers of the ECJ which hitherto had been prevented from issuing rulings to low-level national courts.

6 See Article III-266 of the Treaty establishing a Constitution for Europe, CIG 87/04, 6 August 2004.

7 Between 1989 and 1992 total applications in Europe more than doubled, from 320,000 to 695,000, declining to a still high 455,000 by the end of the decade. In 1992, almost two-thirds of all applications in Europe were lodged in Germany, which received a still unmatched record of 438,000.

8 Tampere European Council, 15 and 16 October 1999, Presidency Conclusions, para 3.

9 Tampere Conclusions, para 4

10 Tampere Conclusions, para 13.

11 Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria for determining the member state responsible for examining an asylum application lodged in one of the member states by a third country national. (OJ 2003 L50/1). In force on 1 September 2003.

12 Council Directive 2003/9/EC of 27 January 2003 on laying down minimum standards for the reception of asylum seekers. (OJ 2003 L31/18). Implementation deadline: 6 February 2005.

13 Council Directive 2004/83/EC of 29 April 2004 on the minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted. (OJ 2004 L304/12). Implementation deadline: 10 October 2006.

14 Amended proposal for a Council Directive on minimum standards on procedures in member states for granting and withdrawing refugee status, Doc 8771/04, ASILE 33, 30 April 2004.

15 Article 33(1) of the 1951 Convention Relating to the Status of Refugees prohibits to 'expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion'.

16 Qualification directive, Article 9.1.

17 Ibidem, Article 10.1(d).

18 Ibidem, Article 6.

19 Ibidem, Article 7.1(b).

20 Ibidem, Article 15.

21 Eg in *Bensaid* the European Court accepted the principle that mental health was a crucial part of 'private life' within the meaning of Article 8 ECHR because it is a necessary part of a person's personal identity and is required in order for them to develop relationships with others. *Bensaid v UK* (2001) 22 EHRR 10.

22 In the second quarter of 2004, for instance, out of 11,720 initial decisions, 355 resulted in refugee status, 40 in humanitarian protection and 855 in the grant of discretionary leave. Home Office, *Asylum Statistics: 2nd Quarter 2004 United Kingdom*.

23 Qualification directive, Article 26.3.

24 Ibidem, Articles 28.2 and 29.2.

25 Ibidem, Article 33.2.

26 Home Office Explanatory Memorandum to the House of Lords EU Select Committee, 28th Report of Session 2001-02, HL 156, p63.

27 Qualification directive, Article 11.

28 Procedures directive, Article 12.2.

29 Ibidem, Article 14.4.

30 S72 Nationality, Immigration and Asylum Act 2002.

31 Nationality, Immigration and Asylum Act 2002 (Specification of Particularly Serious Crimes) Order 2004. SI 2004 No 1910.

32 Article 33(2) of the 1951 Refugee Convention allows contracting states to deny the benefit of the refoulement prohibition (see n15 above) to a refugee 'whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime,

constitutes a danger to the community of that country’.

33 Procedures directive, Article 30A.1.

34 Annex II to the directive.

35 Procedures directive, Article 27.

36 Ibidem, Article 27.2.

37 At the beginning of 2003, a restricted Home Office/Cabinet Office policy paper titled ‘A new vision for refugees’ advocated ‘safe havens’, ie protected areas of processing in the regions where people could be moved from Europe, and ‘transit processing centres’ in third countries to which those arriving in the EU and claiming asylum could be transferred to have their claims processed. JUSTICE obtained counsel’s opinion on the legality of the UK’s proposals. Available on: www.justice.org.uk/ourwork/asylum/index.html.

38 See eg UNHCR Press Release, *UNHCR urges caution as EU negotiates ‘safe country’ concepts*, 1 October 2003.

39 See *TI v UK*, Application No 43844/98 (7 March 2000) and *Conka v Belgium* (2002) 34 EHRR 54.

40 Procedures directive, Article 35A.

41 Ibidem, Article 38.

42 See *TI v UK* above.

43 Procedures directive, Article 3.3.

44 Reception directive, Article 13.2.

45 Ibidem, Article 21.

46 Ibidem, Article 11.

47 Ibidem, Article 16.1.

48 Ibidem, Article 16.2.

49 *SSHD v Linbuela, Tesema and Adam* [2004] EWCA Civ 540.

50 Reception directive, Article 3.4.

51 See Article 18 of the EU Charter: ‘The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty establishing the European Community’.

52 Case C-540/03.

Moving forward? Human rights for Gypsies and Travellers?

Throughout Europe and the accession states stories abound of Roma people being excluded from schooling and housing while the settled community continues to consider it permissible to abuse them in a way that would not be socially acceptable for any other group. This is reflected in a number of cases that have been taken to the European Court of Human Rights in order to establish their rights. Since its enactment in 1998 one of the areas where the Human Rights Act has had a real effect is in relation to the rights of Gypsies and Travellers. Gay Moon considers why and how some of the developments have occurred.

Gypsies and Travellers suffer profound disadvantage. This was succinctly stated in the periodic report on the United Kingdom, published in August 2003, by the United Nations Committee for the Elimination of all forms of Racial Discrimination. The Committee specifically criticised the UK for its treatment of Gypsies:

The Committee expresses concern about the discrimination faced by Roma/Gypsies/Travellers, which is reflected, inter alia, in their higher child mortality rate, exclusion from schools, shorter life expectancy than the population average, poor housing conditions, lack of available camping sites, high unemployment rate, and limited access to health services ... [and] ... recommends that the State Party adopt national strategies and programmes with a view to improving the situation of the Roma/Gypsies/Travellers against discrimination by State bodies, persons or organisation.

The basis for this criticism lies in a persistent pattern of unparalleled racism, prejudice, discrimination and disadvantage suffered by the Gypsy and Traveller community in the UK, going back a long time.

Perhaps the most eloquent statement of national disdain for Gypsies and Travellers is the attempt to keep them invisible. Thus, despite requests, there was a refusal to even count them as a separate ethnic group in the census in 2001. There is, thus, no accurate estimation of their numbers. What we do know about the relative level of their disadvantage is quite scandalous:

- Gypsies and Travellers experience worse health than any other sector of the population; their life expectancy is thought to be 10 years lower for men and 12 years lower for women compared to the rest of the population.¹
- Gypsy and Traveller infant mortality rates are three times the national average.²
- 80 per cent of children from the Gypsy and Traveller community leave school functionally illiterate. They have great difficulty getting school places, they are disproportionately absent from school and disproportionately likely to be excluded from school.³
- Only 20 per cent of Traveller children attend school in key stage 3, and less in key stage 4.⁴

Who are they? What rights do they have?

The Commission for Racial Equality estimates that there are between 2-300,000 Gypsies and Travellers in England. Most of the Gypsy and Traveller community in Great Britain are 'Romany Gypsies' who are recognised as a racial group covered by the RRA.⁵ 'Irish Travellers' are also recognised as a racial group under the Race Relations Act.⁶ Thus, measures to implement the new Race Relations (Amendment) Act 2000 duties on public authorities should include provision for most Gypsies and Travellers. However, most central and local government processes do not measure or monitor their needs, so they are marginalised from mainstream service provision. As discussed below, they have been the target of a range of other legislative measures.

The keys to progress

Better housing is the starting point for making any real gains in countering deprivation and social exclusion. The lack of a permanent stopping place is crucial because it means that they are unable to register for education, health or other social services. In 2003 18 per cent of the Gypsy and Traveller population were technically homeless compared to 0.6 per cent of the settled population.⁷ Many have felt forced into moving into permanent accommodation, which they do not regard as a satisfactory solution.

It is to the government's credit that a considerable amount of research has been carried out into the existing provision and needs of this community. This research has shown that, in England, of the existent pitches in use about 6,000 are local authority pitches, and 4,800 are private pitches.⁸ Worryingly 26 per cent of these sites are situated next to motorways, 13 per cent next to runways, 8 per cent next to commercial and industrial sites, 12 per cent next to rubbish tips and 4 per cent next to sewage farms.⁹ Additionally, there are about 2,000 unauthorised pitches in England.¹⁰ It is not surprising that they suffer such poor

health. The CRE estimates that an extra 3,000 to 4,500 extra pitches on public sites will be needed in the next three years.¹¹ The money required to do this is tiny compared to the amount of money being put into funding housing for the settled community.

Historically, the Caravan Sites Act 1968 provided that local authorities had to make provision for adequate public sites in their area. This did improve the provision of sites although many local authorities failed to make provision because of local resistance, the perceived inadequacy of the grant from central government and the weakness of the enforcement mechanisms. The 1968 Act was repealed and replaced by the Criminal Justice and Public Order Act 1994 which lifted this legal obligation on local authorities and withdrew central government funding to provide sites. As a result, some local authorities privatised or closed many of the legal stopping places, forcing families back into a cycle of trespass and eviction. This Act was supposed to encourage Gypsies and Travellers to buy their own sites and obtain planning permission for them. This has not happened and is not the right way forward. A system that relies on self-provision of private sites in unplanned locations cannot be an appropriate way to meet the needs of the community. In any event, there is clear evidence of discrimination operating within the planning system. Research in 1999 showed that whereas planning applications normally have an 80 per cent success rate, only 10 per cent of Gypsy and Traveller applications are initially successful.¹² This has led many to set up sites without seeking planning permission, thus creating further community tension and bad feeling. Consequently, the government has countered with further oppressive provisions such as the power to remove trespassers in the Anti-Social Behaviour Act 2003.

The Office of the Deputy Prime Minister has just opened an Inquiry into Gypsy and Traveller sites, so maybe some of these problems will be confronted. The Institute for Public Policy Research, in a recent report, has suggested that:

- networks of sites should be set up across local authorities, co-ordinated by the regional development agency;
- regional housing strategies should consider the need for sites, with funding provided through regional housing boards; and
- part of local authorities' funding for social housing should be made conditional on them providing the necessary sites for Gypsies and Travellers.¹³

The impact of the Human Rights Act 1998

It is perhaps not surprising that the development of a human rights culture has exposed existing legislation relating to the rights of Gypsies and Travellers in the

UK to greater scrutiny. The first case showing the benefits was *R (on the application of Clarke) v Secretary of State for Transport, Local Government and the Regions BC*.¹⁴ This was a planning case where the council had refused planning permission to site a Romany Gypsy caravan in a special landscape area. A planning inspector had dismissed the Gypsies' appeal and this was challenged in the High Court. A particular ground of appeal was that the Planning Inspector appeared to have taken into account that the appellants had previously refused an offer of permanent conventional housing. Such a consideration would not normally be raised or taken into account in any planning enquiry. Mr Justice Burton said:

The question here must be whether the availability, and/or the refused offer, of unsuitable accommodation should have been held against this Appellant ... in my judgment ... it can amount to a breach of Articles 8 and 14 to weigh in the balance and hold against a Gypsy applying for planning permission, or indeed resisting eviction from Council or private land, that he or she has refused conventional housing accommodation as being contrary to his or her culture ... in my judgment, bricks and mortar, if offered, are unsuitable, just as would be the offer of a rat infested barn. It would be contrary to Articles 8 and 14 to expect such a person to accept conventional housing and to hold it against him or her that he has not accepted it, or is not prepared to accept it, even as a last resort factor ... this does not mean that in such a case planning permission must or will be granted.

The judgment was appealed to the Court of Appeal but the appeal was dismissed. However, the remedy for 'homelessness' for a Gypsy or Traveller remains undecided. The Homelessness Act 1996 provides that Gypsies without an authorised place to stop are 'homeless' for the purposes of the Act. However, it makes no provision about what form of housing the local authority has a duty to offer.

This has been followed by *First Secretary of State and ors v Chichester District Council*.¹⁵ Unusually, this case concerns a situation where the planning inspector, having considered the applicants' Article 8 rights, granted planning permission for the use of land as a private Gypsy site. The Council successfully appealed against this decision and the First Secretary of State joined the applicants in their appeal to the Court of Appeal. The court ruled, by a majority, that Article 8 was clearly engaged in respect of the caravans that were their homes, that the inspector was entitled to balance the limited environmental harm caused by the site against the personal circumstances of the applicants and the fact that the local authority had failed to meet its policy objective of providing an adequate number of Gypsy sites.

In *R (on the application of Price) v Carmathenshire CC*¹⁶ Mrs Price, an Irish Traveller, had made a homelessness application; the local authority offered her a house. She rejected the offer. The local authority then took action to evict her from the unlawful encampment that she was occupying. The High Court quashed the eviction action:

In order to meet the requirement to accord respect [for article 8 rights] something more than 'taking account' of an applicant's Gypsy culture is required ... [R]espect includes the positive obligation to act so as to facilitate the Gypsy way of life, without being under a duty to guarantee it to an Applicant in any particular case.

Unfortunately, this case has been followed by *Codona v Mid-Bedfordshire DC*¹⁷ in which the Court of Appeal, whilst approving the case of *Price*, ruled that a local authority offer of accommodation in bed and breakfast premises for a limited period would be appropriate for a Gypsy despite her accepted 'aversion to conventional housing'. It is to be hoped that the House of Lords will clarify the situation.

This human rights approach has also exposed some of the least known corners of the law in relation to security of tenure. The Mobile Homes Act 1983 provided that a person who occupies a caravan or mobile home as his or her only or main residence can only be evicted by court order when it can be shown that the occupier is in breach of his or her licence agreement; has failed to remedy this breach within a specified time; and it is reasonable for the agreement to be terminated. This protection relates to both occupants of privately owned sites as well as those occupying local authority sites. However, s5(1) of this Act specifically excludes land run by the local authority as a caravan site for Gypsies from this protection. This was considered by the European Court of Human Rights in May in *Connors v UK*¹⁸:

The serious interference with the applicant's rights under Article 8 requires, in the Court's opinion, particularly weighty reasons of public interest by way of justification and the margin of appreciation to be afforded to the national authorities must be regarded as correspondingly narrowed ... However, even allowing for the margin of appreciation ... the Court is not persuaded that the necessity for a statutory scheme which permitted the summary eviction of the applicant and his family has been sufficiently demonstrated by the Government. The power to evict without the burden of giving reasons liable to be examined as to their merits by an independent tribunal has not been convincingly shown to respond to any specific goal or to provide any specific benefit to members of the [G]ypsy community ... It

would rather appear that the situation in England as it has developed, for which the authorities must take some responsibility, places considerable obstacles in the way of gypsies pursuing an actively nomadic lifestyle while at the same time excluding from procedural protection those who decide to take up a more settled lifestyle ... the Court finds that the eviction of the applicant and his family from the local authority site was not attended by the requisite procedural safeguards, namely the requirement to establish proper justification for the serious interference with his rights and consequently cannot be regarded as justified by a "pressing social need" or proportionate to the legitimate aim being pursued.¹⁹

The government has not yet decided what steps it will take to remedy this situation referring it instead to the consideration of the Office of the Deputy Prime Minister's (ODPM) Inquiry into Gypsy and Traveller sites.²⁰

Conclusions

It is to be hoped that the results of the ODPM Inquiry will result in a strong new duty to make provision for Gypsy and Traveller sites, with sufficient security of tenure, throughout the UK in full consultation with the Gypsy and Traveller community. In the meantime, their plight needs to be considered whenever the UK's compliance with human rights norms is being examined.

Gay Moon is head of JUSTICE's equality project.

Notes

1 See Lord Bishop of Chester, Hansard, House of Lords, 5 June 2003.

2 See Lord Hanningfield, Hansard, House of Lords, 5 June 2003.

3 See Baroness Sharp, Hansard, House of Lords, 5 June 2003.

4 *Moving Forward: a consultation paper on the provision of accommodation for Travellers and Gypsies*, H Crawley, IPPR, 2003, p6.

5 *Commission for Racial Equality v Dutton* [1989] QB 783.

6 *O'Leary v Allied Domecq* (Case no CL 950275-79 unreported). The Race Relations (Northern Ireland) Order 1997 SI no 869 article 5 makes specific provision for the inclusion of Irish Travellers.

7 *Moving Forward: a consultation paper on the provision of accommodation for Travellers and Gypsies*, H Crawley, IPPR, 2003, p6, quoting figures from the Office of the Deputy Prime Minister Gypsy Count in January 2003.

8 Memorandum by the Office of the Deputy Prime Minister to the Select Committee of the ODPM inquiry into Gypsy and Traveller Sites, May 2004, paras 4.7 and 4.12.

9 *The Provision and Condition of Local Authority Gypsy/Traveller Sites in England*, P Niner, 2002, ODPM.

10 Memorandum by the Office of the Deputy Prime Minister to the Select Committee of the ODPM inquiry into Gypsy and Traveller Sites, May 2004.

11 *Gypsies and Travellers: A Strategy for the CRE, 2004-2007*.

12 *Private Gypsy Site Provision*, T Williams, 1999, ACERT

13 *Moving Forward: the provision of accommodation for Travellers and Gypsies*, H Crawley, IPPR, 2004.

14 [2001] EWHC Admin 800, 9 October 2001.

15 [2004] EWCA Civ 1248, 29 September 2004.

16 [2003] EWHC 42 Admin, 24 January 2003.

17 [2004] EWCA Civ 925, 15 July 2004.

18 Appln no 66746/01 24 May 2004.

19 Paras 86, 94-95.

20 Hansard, 17 June 2004.

Book reviews

Reconcilable Rights? Analysing the Tension Between Victims and Defendants

E Cape (ed)

Legal Action Group, 2004

148pp £15

Reconcilable Rights is a series of essays by an eminent and multidisciplinary set of speakers who took part in a series of seminars in summer 2003, and which were concerned to promote an understanding and reconciliation of the various interests of those involved in the criminal justice system. The government's argument, reflected in the central thesis of the white paper *Criminal Justice – the way ahead* and, subsequently, in *Justice for all*, is that the criminal justice system has for too long ignored the rights of victims of crime and that now the time had come to 'rebalance' the system away from respect for defendants' rights to promote the interests of victims. The model thus presented is of a zero-sum game in which serving the interests of one group – victims – necessarily involved lessening the rights and protections of the other – defendants.

The essays explore the impact of the government's pursuit of this rebalancing exercise on criminal justice processes and outcomes, and they very much achieve the aims, as stated by Professor Cape in his excellent introductory overview, of first contributing to an understanding of why there is a growing polarisation of the rights and interests of victims and of those accused of crime in both government rhetoric and in popular discourse, and secondly of steering the

debate onto a more rational evidence-based course. Four themes run throughout the essays: the political context of criminal justice under New Labour; an analysis of recently proposed changes in the criminal law, particularly those in the Criminal Justice Act 2003, then making its way through parliament, and which, as John Jackson succinctly put it, abolished and severely diluted many of the traditional rights that defendants enjoyed at trial without seriously advancing the rights of victims and witnesses; whether and to what extent victims should be involved in sentencing; and the question of what rights victims should have.

Paul Clark MP, Principal Private Secretary to the Secretary of State for Constitutional Affairs, ably puts the government's case for change. He argues that it is guided by a single clear priority of rebalancing the criminal justice system in favour of the victim and the community so as to reduce crime and bring offenders to justice, and it is to this end that the changes that reduce defendants' rights are aimed. However, most of the other authors question the degree to which these changes will, in fact, help victims or improve their experience of the criminal justice system. The 'small but important' practical ways to improve a victim's experience of criminal proceedings – communication with the prosecutor, information as to the date of all hearings, robust claims for compensation being made on the victim's behalf – which Clark later sets out, and other ways of recognising the role of the victim, are seen as more appropriate than measures which may well improve conviction rates, but at

great cost to the innocent defendant. It is well to reflect that no victim benefits from the conviction of the wrong defendant.

In 'Justice for all in the 21st Century: the political context of the policy focus on victims' Sociology Professor, Sandra Walklate, argues that the victim of crime is being used as a rhetorical political device 'that seems to be increasingly deployed to justify the erosion of defendants' rights in the ever-shifting sands of the culture of control'. Making a real difference to the experience of victims lies in the concept of respect – treating people as individuals, who have greater or lesser degrees of personal resources, and hence the ability to cope with the effect of a crime upon them.

Professors Barbara Hudson and John Jackson echo the concept of building respect as a way to improve the experience of victims of crime within the criminal justice system. Jackson outlines some practical measures to promote respect, including the new statutory code of practice with respect to victims, and the office of the Victims' Commissioner, currently before parliament in the Domestic Violence, Victims and Crime Bill, and ways of improving court procedures to make it less of an ordeal for witnesses to give evidence. Adequate information, access to support services, protection and compensation are other key needs. Francesca Klug addresses the development of victims' human rights under international treaties, particularly the European Convention on Human Rights, noting the centrality of the concept of 'victim' to human rights discourse and the significance of the positive obligation on the state to protect one citizen from another.

Professor J R Spencer, in answering the question of 'what are criminal proceedings for', identifies their main aim as being to convict and appropriately punish the guilty, with the subsidiary aim of carrying out the main aim with as little pain as possible to everyone involved. This leads to four matters of perspective: the defendant must of necessity be the centre of proceedings, because the inquiry is into his/her behaviour, which, if proved, will result in his/her punishment; in this situation the risk of wrongful conviction is the risk we should choose to avoid, over the risk of wrongful acquittal of the guilty; there must be limits on the pursuit of the main aim, so, for example, torture will never be justified; and any measure affecting defence rights must be assessed by asking whether it contributes to the court reaching a just result, in a civilized manner. It is not, therefore, a question simply of whether defence rights are weakened, but rather are they weakened in a way that would 'lead to more convictions of the guilty, or more convictions of the guilty together with more convictions of the innocent?' He endorses Sir Robin Auld's comment that a criminal trial is not a game under which a defendant is provided with a sporting chance.

Using the example of a law requiring the defence to give advance notice of its witness to the prosecution, Spencer argues that although the defendant's position may be weakened, it is not weakened in such a way that will reduce the ability of the criminal justice system to achieve its purpose of convicting the guilty while acquitting the innocent, accepting (as JUSTICE and other organisations responding to the defence disclosure provisions in the Criminal Justice Act 2003 did not) that corrupt

police officers would not be tempted to 'noble' defence witnesses. He applies his test to various changes designed to improve the rights of the victim, including being involved in the decision as to whether to institute criminal proceedings, protection from publicity and special treatment for victims when giving evidence. On the latter issue, JUSTICE shares his opinion that it is 'wholly indefensible' that special measures are only available to vulnerable victims and witnesses, but not to vulnerable defendants, in a way that can only increase the pain of a criminal trial, and promote inequality of arms, for such a defendant.

Jane Hickman, on the other hand, disagrees with Sir Robin and argues that criminal trials are indeed a game in which lawyers 'will (and should) always seek to use any set of rules to their best advantage and that the proper response is to provide a fair framework and adequate resources to each side'. She argues that you cannot deprive a guilty defendant of a 'sporting chance' without also doing so for the innocent. Hickman contrasts the culture of fairness promoted by the government in areas of public life such as education, health, welfare benefits, and housing, with the construction of the defendant in public discourse as the 'monstrous other', where an atmosphere of moral panic makes it almost impossible to speak up for defence rights. Arguing that fairness to victims can be achieved without detracting from defendant's rights, she states that the fact that the 'government wishes us to think otherwise is a profoundly political matter' which may have 'far more to do with the need to cap expenditure than it has to do with the rights of victims. It also serves to cloak the emergence of a deeply

authoritarian society'. Following an extremely interesting 'brief history of crime' taking us from the 1960s to the draconian policies of the last Tory government, she outlines Labour's approach to crime around three themes: the application of modern management techniques to improve efficiency and so narrow the gap between the number of crimes reported and the number of people 'brought to justice'; the demonisation, not only of defendants, but also their representatives; and its fetish of appearing to listen and respond to public opinion, thus encouraging policy-making not based on evidence but rather on anecdote. It is this 'lethal combination of approaches' that she holds responsible for the authoritarianism of its approach to criminal justice policy. Reacting to the current climate as a defence lawyer, that is, someone who sees her clients as people rather than as defendants/criminals, Hickman concludes that 'the present emphasis on taking protections away from the defence can be done only on the assumption that we, the law-making majority, will never find ourselves as defendants. That is absolute folly. Miscarriages of justice happen to "people like us" all the time, or to sons, brothers and neighbours'.

The question of the appropriate role of victims in relation to sentencing in an adversarial system of criminal justice, and the value of Victim Impact Statements (VIS), underlies the debate between Edna Erez and Andrew Sanders. Erez argues that VIS, if properly used, can and should provide victims with a voice at the sentencing stage, in a process that can serve their therapeutic ends. She perceives the legal profession to have misused them, rather than VIS being

seen simply as a way to inform sentence. When VIS can articulate victims' suffering and the way the crime has affected their life, and particularly when judges validate the harm suffered, VIS are a way of making the adversarial system more restorative. Sanders, on the other hand, points to recent research indicating that VIS do not significantly improve victims' levels of satisfaction, mainly because expectations that the statement will make a difference are not realised and victims feel more ignored. His solution to improved satisfaction is through the adoption of a more inquisitorial system, one in which a victim's understanding is increased through participation in decisions, dialogue and sight of the material on which decisions are made. Such participation is not generally thought to affect decisions any more than in an adversarial system, but research suggests that it can improve victim satisfaction, and, importantly, achieve this end without worsening the position of defendants.

This is an extremely interesting volume of essays on a subject central to the criminal justice debate. As we approach the next election it is clear that, for better or worse, the issue of 'law and order' will be the major parties' battleground. Expect a flurry of consultation documents, followed by new legislation, showing Mr Blair's law-abiding citizen that the legacy of the 1960s is well and truly over. In such a climate it is refreshing to read such thoughtful and sensible contributions to the debate.

Janet Arkinstall,
criminal policy director, JUSTICE

The 9/11 Commission Report: Final Report

National commission on terrorist attacks upon the United States

W W Norton, 2004

567pp £6.99

If this report has a fault, it is only that much of it reads like a screenplay. The reader has constantly to remember that this is not some rogue edition of a new series of 24 but a very deadly reality. Its team of authors provide an object lesson of the compression of information in a readable form. The report jumps straight into the narrative with the first chapter heading: 'We have some planes', a quote from an internal transmission mistakenly broadcast outside the aircraft from American Airlines Flight 11 at 8:24. This was 22 minutes before it crashed into the North Tower of the World Trade Center. United Airlines Flight 175 hit the South Tower at 9:03. The following gives some indication of the pace of the narrative. The plane ...

was scheduled to depart for Los Angeles at 8:00. Captain Victor Saracini and first Officer Michael Horrocks piloted the Boeing 767, which had seven flight attendants. Fifty-six passengers boarded the flight ... United 175 pushed back from its gate at 7:58 and departed Logan Airport at 8:14. By 8:33, it had reached its assigned cruising altitude of 31,000 feet. The flight attendants would have begun their cabin service ... at 8:42 the United 175 flight crew completed their report on a 'suspicious transmission' overheard from another plane (which turned out to be Flight 11) just after take off. This was United 175's last communication with the ground. The hijackers attacked

somewhere between 8:42 and 8:46. They used knives (as reported by two passengers and a flight attendant), Mace (reported by one passenger) and the threat of a bomb (reported by the same passenger) ... The eyewitness accounts came from calls made from the rear of the plane, from passengers originally seated further forward in the cabin, a sign that passengers and perhaps crew had been moved to the back of the aircraft. Given similarities to American 11 in hijacking seating ... we believe the tactics were similar on both flights.

Much of the first 350 pages proceeds pretty much at the same exhausting pace – with chapters on the background of Bin Laden and the build up of Al-Qaeda; how the hijackings were planned, financed and organised; the development of counter-terrorism thinking under Presidents Clinton and Bush and events at the World Trade Center. The great advantage of the commission's report over other writing on the same events, such as Bob Woodward's *Plan of Attack*, is that the Commission's sources are so much wider. He relied heavily on briefings from the President and a small number of others. The commission records that it received 2.5 million pages of documents and interviewed 1,200 individuals in ten countries. 160 witnesses were heard orally in 19 days of public hearings. In so doing, the views were canvassed of 'nearly every senior official from the current and previous administrations who had responsibility for topics covered in our mandate'. The bipartisan commission of ten was unanimous and has embarked on a 'public discourse project' in which pairs of commissioners fan out across the United States to maintain pressure for its

recommendations (see <http://www.9-11pdp.org>). What is devastatingly clear from the report is that Iraq had nothing to do with the events of 9/11.

From a policy point of view, the important part of the report is its recommendations. Some of these are particularly sobering when seen from the perspective of after the second Iraq war, which – not doubt, in the interests of continued bipartisanship – it tactfully avoids:

We should offer an example of moral leadership in the world, committed to treat people humanely, abide by the rule of law and be generous and caring ...

There are indications, however, of recognition:

The United States should engage its friends to develop a common coalition position approach toward the detention and humane treatment of captured terrorists. New principles might draw upon Article 3 of the Geneva Conventions on the law of armed conflict. That article was specifically designed for those cases in which the usual laws of war did not apply. Its minimum standards are generally accepted throughout the world as customary international law.

There are other indications of a need to remember fundamental civil liberties:

As the President determines the guidelines for information sharing among government agencies and by those agencies with the private sector, he should safeguard the privacy of individuals about whom information is shared.

The absence of such safeguards is one of the problems with the wholesale sharing of information from EU sources noted in Marisa Leaf's paper.

The commission steers clear of Iraq. Many of its 'softer' recommendations may end up as pious hopes. For those who might need a reminder, however, of the very real nature of the evil to be overcome, this book is essential. Just remember that it is real.

Roger Smith,
director, JUSTICE

The Human Rights Act 1998: An Impact Study in South Wales

R Costigan, J Sheenan, P A Thomas
Cardiff Law School, Cardiff University,
2004

107pp £15

The Human Rights Act came into force three years ago. The flood of cases forecast to clog up the courts did not materialise. Although there have been some high-profile uses of the Act, there has been relatively little research into its actual effect at a grassroots level. This study was conducted in a deprived area of South Wales, representing about eight per cent of the Welsh population, and draws some sobering, if unsurprising, conclusions about the use of the Act in everyday practice.

The overall conclusion of this local study is that the Act is not being used to its full potential for a number of reasons, not all directly linked to the particular character of the area in which the research was undertaken. The single most significant cause was a simple lack of knowledge on the part of the

solicitors interviewed. Almost all of those questioned had been to training sessions before the Act came into force, so had some basic academic awareness of its effect. However, there was still a widespread belief that the Act only applied to 'high profile' cases, such as euthanasia or use of torture. Added to this was a general feeling that use of the Act is simply not financially viable. Most of the firms in the area had the majority of their work funded by the Legal Services Commission and found it too difficult to use the Act creatively within the time constraints of a high case turnover.

The Act is most used to provide a supporting argument rather than a main one. This confirms research published by the Public Law Project (*The impact of the Human Rights Act, 2002*) and the statements of practitioners reported in Roger Smith's article in the last edition of the *JUSTICE Journal* ('Test case strategies and the Human Rights Act'). Worryingly, the authors identified in their research that this secondary use of the Human Rights Act often appeared to be a way of shoring up an otherwise weak case. Concern is compounded by general reports of negative experiences in the local courts, which had a tendency to view human rights arguments as a 'time wasting complication'. As a consequence, the Act is often given somewhat mechanistic reference in judgments, apparently more in order to avert a potential ground of appeal than seriously to grapple with the arguments presented.

The study points out that the obvious solution to these problems is further and more practical education of solicitors and magistrates. There needs to be a

focus on the application of the Act to their daily caseload, and an inspiration to use the Act creatively, without relying on precedents as justification.

Studies like this one offer an invaluable understanding of some factors preventing the Human Rights Act from being used to its full potential, but the emphasis is really on just how far we still have to go.

Helen Turnbull,
Intern, June-August 2004, JUSTICE,
and now a pupil at 9 Old Square,
Lincoln's Inn

The EU Charter of Fundamental Rights

Steve Peers and Angela Ward (ed)

Hart Publishing 2004

392 pp £45

The European Charter of Fundamental Rights, Politics, Law and Policy originated from a conference held in London in July 2001 to explore both the context and the possibilities of the Charter to enhance the protection of rights within European Union law. The papers collected during this conference offer responses to the many questions that the arrival of the Charter provokes for European and national level protection of human rights. Given the many uncertainties surrounding the Charter, and notably its likely practical effect, the book is innovative in drawing together the views of a wide array of professors in European and international law. The contributors address these uncertainties with reference to their specific area of expertise and explain the impact of the EU Charter of Fundamental Rights from these key perspectives.

The first chapter places the issue of the Charter within the framework of the ongoing debate on EU constitutionalism; questions to what extent the Charter will affect the constitutional balance of EU and member state legal orders on matters of human rights; considers the position of the Charter within the context of the United Nations human rights regime and raises the issues of access to justice and the limitations and derogations on human rights. All these issues are quite pertinent and force the reader to think about the effective impact of the Charter on national legal systems and on traditions of international law. Some authors in the first chapter also go as far as to question the Charter's legitimacy by pointing out its shortcomings and questioning for example the relationship between the Charter and the European Convention on Human Rights. The reader gets from the first part of the book the sense that the Charter will have an interesting and innovative impact on the respect of human rights both in Europe and on an international level.

Aside from focusing solely on political, legal and constitutional issues, seven chapters in part 2 of the book investigate the effect of the Charter on 'milestone' EU policies. These are the internal market, citizenship and immigration, environment and consumer protection, healthcare law, criminal law and privilege against self-incrimination, social security, children's rights and labour law. Analysing the influence of the Charter on 'milestone' EU policies is a welcome inclusion and will be highly appreciated by scholars and practitioners who wish to gain a better understanding of how far the Charter can influence the process of

substantive lawmaking on national and European level. As in part 1, this second part also highlights some shortcomings in EU law that have not been addressed by the Charter, such as the status of EU citizenship that is applicable only to EU citizens who exercise free movement of rights or the weak formulation of children's rights in the Charter. These shortcomings may diminish the potential role of the Charter in driving further EU law and policy in this field.

The European Charter of Fundamental Rights is a welcome addition to the publications that have already been written. It raises some interesting points and makes the reader aware of the importance of the Charter. It also captures the essence of the Charter and outlines its implications at European and national level. This is quite a technical book and perhaps is not intended for those who have no detailed experience and knowledge of EU law.

Marilyn Goldberg,
legal officer, JUSTICE

Economic, Social and Cultural Rights in Practice: The Role of Judges in Implementing Economic, Social and Cultural Rights

Yash Ghai and Jill Cottrell (ed)

Interights, 2004

142pp £20

The United Nations Committee on Economic, Social and Cultural Rights noted in its concluding observations in June 2002, following the UK's 4th periodic report, the deep regret that the United Kingdom has still not incorporated the International Covenant on Economic, Social and Cultural Rights

into domestic law. Whilst the government maintains its justification that the distinction between civil and political, and economic, social and cultural (ESC) means the rights are to be interpreted and implemented differently, yet claim the importance of both sets of rights is equal, any intention to incorporate is still lacking.

Against this background, *Economic, Social and Cultural Rights in Practice* is an opportune publication, raising the debate on the judicial implementation of these rights. The book is a collection of essays, which stem from a memorandum suggesting ways to contribute to the protection and enforcement of economic, social and cultural rights presented to the Advisory Council of Interights by one of the editors, Yash Ghai.

Professor Abdullahi A An-Na'im starts with a strong argument that economic, social and cultural rights should be justiciable. He argues that the distinction between economic, social and cultural rights and civil and political rights weakens the full human rights quality of ESC rights, furthermore undermines the universality and practicality of all human rights, and stresses the importance of the judicial role as a method by which to provide a check on the government's behaviour.

Lord Lester of Herne Hill QC and Colm O'Cinneide are more critical of the judicial role – arguing that the lack of constitutional authority and judicial expertise means that judges are inappropriate to enforce ESC rights, for doing so would require the judiciary to usurp the powers of the legislative or the executive.

Dr S Muralidhar contributes an interesting chapter on India, where under the Constitution ESC rights are Directive Principles of State Policy. These are not enforceable by any court, but have become an important judicial tool to aid interpretation, shown by the example of the right to life being interpreted as including a right of human dignity. The Indian courts have overcome the issue of judicial competence and experience by using expert bodies to provide specific advice.

Geoff Budlender writes about the South African experience, where ESC rights are justiciable under the Constitution. He acknowledges that it is not helpful to talk in general terms about ESC rights, it is more important to focus on the implementation of each right, how the state must respect, protect, promote and fulfil the rights, and does this through a case analysis focusing on enforceability rather than justiciability.

The Honourable Claire L'Heureux-Dube explains how, although ESC rights are not part of Canada's Charter of Rights and Freedoms, the judiciary has extended the use of the protection of equality rights and human dignity to enforce ESC rights. Andras Sajó writes about welfare rights in Eastern European states after communism, where judicial response has been one of caution, and common practice is status quo protective.

Cottrell and Gash conclude with an international case analysis and summarise with the recognition that the courts cannot be an alternative government: 'the primary decision-making framework must be the political process' yet must still be involved, best exemplified by the practice in India and

South Africa.

The overlap between the political and the legal processes surrounding the justiciability of ESC rights is an often-cited obstacle to implementation. International practice, as shown throughout this book, provides clear examples of how economic, social and cultural rights can be implemented and enforced. A common theme throughout the chapters is the reinforcement of the importance of economic, social and cultural rights and the risk of relying on a distinct division between civil and political and economic, social and cultural rights. The focus on the justiciability of the rights in this book is practically important, but the political aspect is not ignored. Placing rights in context is essential, and only by doing so will the case for incorporation continue to be made.

Rachel Brailsford,
research assistant, JUSTICE

Anti-Discrimination Law

Christopher McCrudden (ed)

International Library of Essays in Law and Legal Theory (Second Series), 2004
632pp £125

This collection of essays from America and Canada seeks to draw together 'the most significant theoretical essays in contemporary legal studies' in relation to discrimination law. This is an excellent but ambitious objective, and the book certainly provides a useful resource for those wishing to keep up to date with the current trends of legal thought in relation to the rationale and justifications for discrimination law.

The book is arranged in four sections covering libertarian approaches, concepts of dignity, concepts of distribution and re-distribution and identity and recognition. Each section contains essays supporting the concept as a key determinant and justification for discrimination law together with another opposing it. This means that the central threads of each argument can be followed through and viewed alongside the counter-argument.

Having started with what makes wrongful discrimination wrong it follows with a controversial paper by Epstein on his 'Forbidden Grounds' theme, putting the laissez-faire case for opposing any sort of legislation to prohibit discrimination, describing it as 'a new form of imperialism that threatens the political liberty and intellectual freedom of us all'. This is countered by Donaghue, who pulls together both the shortcomings of Epstein's analysis and puts the economic case for anti-discrimination protection. The next section examines the arguments around human dignity drawing on human rights norms and culminating in a thought-provoking paper by Réame on the interpretation of dignity in Canadian jurisprudence. In the distribution and re-distribution section Strauss argues for a system that works towards proportionate representation of minorities as an entire substitute for anti-discrimination provisions; Sunstein argues for an 'anticaste' principle which 'forbids social and legal practices from turning highly visible but morally irrelevant differences into a basis for second class citizenship'; Joll considers whether and when the concept of reasonable accommodation is useful and Fudge examines two recent Canadian pay equity cases and uses

them to challenge the use of market forces as the primary determinant of the value of work. The final section on identity and recognition discusses the recognition of differing identities, whether it is useful to focus on social groups or does this result in further stereotyping which the anti-discrimination provisions were meant to eliminate?

The editor, Christopher McCrudden, acknowledges in his introduction that anti-discrimination law theory has flowered outside the USA and he rightly mentions Canada, South Africa and the countries of the European Community. So if there is a criticism it is that this book has no essays from South Africa or the European Union where there have been enormous developments in the last ten years. McCrudden rightly acknowledges the wealth of material being produced from Europe, so the case can be made for a third series under this title.

One small further gripe relates to the printing. It is a pity that in preparing this book the publishers appear to have scanned in the articles from their original publications leading to a series of different typefaces throughout the book, each one headed up as it was in the original publication and in some cases the resulting print is slightly blurred, which does not assist the reader. Overall this book gives a good overview of developments across the Atlantic and will provide a useful source for ideas as our equality laws develop.

Gay Moon,
head of equality project, JUSTICE

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1 March 2004 – 31 August 2004

Available on <http://www.justice.org.uk>

1. Briefing on the report of the Newton Committee on the Anti-Terrorism, Crime and Security Act, for debate in the House of Lords, March.
2. Briefing on the Constitutional Reform Bill for the House of Lords second reading, March.
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4. Briefing on the ouster clause in the Asylum and Immigration (Treatment of Claimants, etc) Bill, March.
5. Briefing for the House of Lords second reading of the Asylum Bill, March.
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7. Briefing for the House of Lords Select Committee on the Constitutional Reform Bill, April.
8. Written evidence on EUROJUST prepared for the House of Lords Select Committee on the European Union (Sub-Committee F), April.
9. Written evidence on the European Anti-Fraud Office (OLAF), prepared for the House of Lords Select Committee on the European Union, May.
10. Joint amendments of JUSTICE and Liberty to the Civil Contingencies Bill for the Commons report stage, May.
11. Joint briefing by JUSTICE, Liberty, LAG, ILPA and BIHR on legal aid provisions in clause 14 of the Asylum and Immigration (Treatment of Claimants etc) Bill in the House of Lords, May.
12. Response to the DCA and Select Committee on Constitutional Affairs on the draft Criminal Defence Service Bill, June.
13. Response to the Select Committee on Home Affairs on the draft Identity Cards Bill, June.
14. Written submission to the Parliamentary Committee on Constitutional Affairs in response to the draft Criminal Defence Service Bill, June.
15. Response to the Joint Committee on Human Rights inquiry on the structure, functions and powers of the proposed Commission for Equality and Human Rights, June.
16. Response to the Joint Committee on Human Rights inquiry into the government's Review of Counter-Terrorism Powers, June.
17. Briefing on the Select Committee Report on the Constitutional Reform Bill for the House of Lords, July.
18. Response to the Home Office consultation on Identity Cards, July.
19. Response to the white paper *One Step Ahead – a 21st Century Strategy to Defeat Organised Crime*, July.

20. Briefing on the Civil Contingencies Bill for the second reading in the House of Lords, July.
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23. Response to the DCA consultation on Effective Inquiries, July.
24. Submission to the Home Affairs Select Committee in relation to general principles of sentencing, July.
25. Response to the DTI consultation on the Commission for Equality and Human Rights, August.
26. Response to the CRE consultation on the Statutory Code of Practice on Racial Equality in Employment, August.
27. Response to the Home Office consultation on Counter-Terrorism Powers, August.
28. Response to the European Commission consultation on the Future of Justice and Home Affairs, August.
29. Response to the European Scrutiny Committee's inquiry into the EU Constitutional Treaty, August.

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