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Editorial

The fertility of human rights

Professor Ewing is a polemicist. He likes to mix it. A recent contribution to *Public Law* under the title 'The Futility of the Human Rights Act' provides a good illustration of a well-honed style: 'There is an inexorable process underway which sees a pouring of a liquid from the bottle marked liberty into the glass marked security, with Mr Blunkett as the chief butler'. As the piece goes on, the victims of his ire get a little closer to home: 'rights evangelists will no doubt forever continue to see a light that is only a faint glimmer for the rest of us'. His essential thesis is that 'it will take more than the incorporation of Convention rights to change the judicial role, or indeed the judicial perception of that role'. Professor Ewing sees the ghost of John Griffith, still arguing his case that the judges are not to be trusted, in the gloomy halls occupied by what he delights in calling 'the juristocracy'. His final judgement? 'In the turbulent times in which we now live, it is incumbent on the courts to be more assertive in the protection of the vulnerable individual.'

Time has, of course, caught up a little with this purple prose, though published only in December last year. Mr Blunkett is, after all, no longer with us. The House of Lords judicial committee basks in the glow of an 8-1 kicking of the Attorney-General in relation to Part 4 of the Anti-Terrorism, Crime and Security Act.

Yet, Professor Ewing still poses a challenge for an organisation, like JUSTICE, which would style itself now as, at least in part, a human rights organisation. The passage of the Human Rights Act has transformed how we present ourselves. Until the mid-1990s, we would not have used a rights language. We would have mustered ourselves under the flag of the rule of law. And, indeed, we still assert a wider range of objectives to include in statements of our position: advancing justice, human rights and the rule of law. To what extent does Professor Ewing correctly challenge us to justify our conversion to human rights as a central goal?

Professor Ewing's hypothesis is that the domestic judiciary has been insufficiently independent of the executive. In particular, it has been over-swayed by considerations of 'national security' whenever it actually came to the point. Professor Ewing finds much in the oeuvre of Lord Donaldson, one of the newly sanctified defenders of liberty in the House of Lords, to justify his argument, including the Hobbesian observation that 'the maintenance of national security underpins and is the foundation of all our civil liberties'.[1] From this, he advances his argument: 'liberty' is 'sick in the land of the rule of law'; yet, Labour's Human Rights Act gives even more power to the judiciary; indeed, it is but one measure of a government which, in a range of legislation, has proved itself authoritarian and profoundly illiberal.

Professor Ewing has the great value of being both provocative and readable. He calls for a response on at least three levels. First, he illustrates an insecurity of support for the Human Rights Act that might not be apparent to those who would style themselves human rights activists. Repeal of the Human Rights Act is probably inconceivable as a practical policy but that has not impeded criticism from both major political parties. The Conservative Party has announced it will review the Act. Labour ministers grow restive under the yoke of their own making, with David Blunkett, no mean polemicist in his own right, memorably remarking: 'Frankly, I'm fed up with having to deal with a situation where parliament debates issues and the judges overturn them'.

More fundamentally, it is probably true to say that the public at large have still not yet taken human rights to their hearts. For example, the European Charter of Fundamental Rights, the subject of a recently opened JUSTICE website, www.eucharter.org, has, at least as yet, very little support and the majority of potential voters in the forthcoming EU referendum would probably agree with Keith Vaz's memorable assertion, while still Minister for Europe, that the charter was about as valuable as the 'Beano'. The point of human rights is that they encapsulate human values. That is still an argument to be had with the British people. It is put off at our peril. It may be that the EU referendum will provide a space for this debate. The way in which Diane Pretty's case galvanised public debate shows how human rights litigation can actually increase democratic engagement in issues which politicians fear to raise.

Second, Professor Ewing challenges us to see how recent jurisprudential history can be interpreted through a more generous eye. He quotes the majority judgment in *Liversidge v Anderson* in his litany of judicial shame but, actually, the only quote that any student remembers from that case is Lord Atkin's losing lament: 'amid the clash of arms, the laws are not silent'. Never mind that he was allegedly ostracised by his brother judges for this kind of dangerous rhetoric. History will place him on the winning side. The trickle of judicial resistance to executive power has matured into a torrent. Surging into this stream was the development of judicial review in the 1980s and the growing confidence of the judiciary to redefine their position as 'lions under the throne'. Indeed, Professor Griffith sought to justify his aversion to judicial discretion by what he argued was the outrageously unfair judgment in the GLC *Fares Fair* case in which precedence was given to ratepayers over voters. That case was heard early in the decade. His argument has, however, become increasingly difficult to maintain. A forensic analysis of the cases would surely show that – for a variety of reasons which might include the development of the jurisprudence of administrative law, the growing influence of Europe, the failure of democratic politics to avoid long periods of government by one political party – the constitutional position of the judiciary is shifting. Paradoxically, of course, the government – while lamenting this in some areas – is accelerating this process and the Constitutional Reform Act

2005 will, finally, separate the elements of our constitution as never before. It will also create in the office of the Lord Chief Justice a powerful embodiment of judicial power independent of the executive.

The Human Rights Act can be placed firmly within this tradition of a wider judicial role. As Helen Mountfield's or Henrietta Hill and Aileen McColgan's analyses indicate, this is a slow and uneven process. However, a stream of cases highlight the change – particularly the House of Lords' challenge to Part 4 of the Anti-Terrorism, Crime and Security Act (*A v Secretary of State for the Home Department*)[2] and *Ghaidan v Godin Mendoza*[3] in which Lord Steyn encouraged a more creative judicial approach. Mr Justice Neuberger's minority assertion that conventions against torture overwhelm the common law in relation to the admissibility of evidence in civil cases may yet turn out to be a harbinger of the future rather than a deviation to be lost in the past.[4] The judiciary is on the move and the tectonic plates of the constitution are shifting. The 8-1 extent of the Lords' recent judgment is surely an indicator of that. So too was the successful resistance to government attempts to insert a judicial 'ouster' clause in its recent asylum legislation. In the short-term, it may feel that it has achieved something close to its immediate goal: a very limited appeal system for asylum cases. However, in the longer term, those concerned to preserve judicial supervision of the executive may yet see that they have won an important battle.

The government's presentation of control orders in the Prevention of Terrorism legislation, discussed in Eric Metcalfe's paper, provided a good example of the debate that is now required about the relative balance of the executive, legislature and the judiciary. Our constitution does amount, in Lord Hailsham's phrase, to 'an elected dictatorship'. The Human Rights Act is part of a process of rebalancing the relationship of the judiciary and the executive – and its enactment is enormously to the credit of the government. However, it needs to be complemented by a rebalancing of parliamentary power. The House of Commons was effectively prevented from seriously engaging with the Prevention of Terrorism legislation by the existence of the government whip. In particular, the House of Commons, as the elected legislature, needs to grab back power from the executive.

Finally, Professor Ewing's criticism of the Human Rights Act overlooks a great practical and practitioner advantage. The Act brings diverse causes under one common banner. Look, for example, at the winners at the annual JUSTICE/Liberty Human Rights Awards for 2004. They ranged from well-known civil liberties campaigners to the Gypsy and Travellers Law Reform Coalition. Also listed were Redress, the campaign against torture, and the Kurdish Human Rights Project. The Act has inspired a whole range of activists, both legal and lay, who would now identify themselves as within a common movement and draw sustenance from that. What is more, the Act has invigorated student study of law relating to the poor and marginalized, albeit in a very different way, and with a very different language,

from the radical legal movements of the 1960s and 1970s. Human rights has made the study of areas of law, like asylum, interesting to students in a context where, paradoxically, cuts to legal aid are lessening the numbers of job opportunities in traditional legally-aided fields. Helping to compensate for that, at least to some extent, is the fact that human rights is increasingly relevant for those practising in the corporate field.

Professor Ewing ends with a challenge:

> *The incorporation of Convention rights has to mean something more than simply new lyrics for old songs. It must also mean that new songs are to be sung in the courtroom as well as in the lecture theatre. Otherwise the disappointment that turns to disillusionment will lead to loss of confidence not only in the [Human Rights Act] but in the judges themselves.*

Let us raise all our voices to that.

Notes

1 *R v Secretary of State for the Home Department ex parte Cheblak* [1991] 1 WLR 907.
2 *A and others v Secretary of State for the Home Department* [2004] UKHL 56.
3 [2004] UKHL 30.
4 [2004] EWCA Civ 1123.

Protecting a free society? Control orders and the Prevention of Terrorism Act 2005

Eric Metcalfe

Eric Metcalfe considers the idea of control orders introduced by the Prevention of Terrorism Act 2005 as an instance of the government's more general approach to human rights issues in the context of counter-terrorism, ie one of seeking measures that are useful rather than necessary. This article also provides an overview of the scheme of the Act and asks whether control orders can be said to be strictly necessary as a counter-terrorism measure in the UK.

'History repeats itself', Marx is reported to have written, 'the first time as tragedy, the second as farce'.[1] And the passage of the Prevention of Terrorism Bill in early March 2005 certainly had a cyclical quality to it. Over three years since the last piece of counter-terrorism legislation – the Anti-Terrorism Crime and Security Act 2001 (ATCSA) – was hurried through parliament in the wake of September 11, the government was again seeking to rush through counter-terrorism measures engaging fundamental rights. And whereas ATCSA was enacted in only 32 days, the 2005 Act managed to pass in just 18.

There was no need of repetition, however, for the passage of the 2005 Act probably contained sufficient elements of both tragedy and farce in its own right to satisfy the dramaturgical requirements of history. The comedy of errors was, of course, the foreshortened parliamentary debate on legislation engaging fundamental rights, culminating in a 32-hour volley of amendment and counter-amendment between the Commons and the Lords. The tragic flaw – aside from the damage caused to the idea of due process by the Act itself – is that the government appears to have learnt little from its mistakes thus far, most notably its use of indefinite detention under Part 4 of the 2001 Act. This short article looks briefly at (i) the background to the Prevention of Terrorism Act 2005 (POTA), (ii) the idea of 'control orders', (iii) the Act's provisions, and (iv) the broader question of whether the Act is even necessary as a counter-terrorism measure.

The rush to legislate

The various elements that set the stage for the frenetic parliamentary debates on POTA are well-known. Part 4 of the 2001 Act gave the Home Secretary the power to indefinitely detain those foreign nationals whom he suspected of

involvement in international terrorism.[2] In order to pass Part 4, the government was obliged to derogate from Article 5 of the European Convention on Human Rights (ECHR).[3] Part 4 itself was subject to annual renewal by both houses of parliament each March.[4] In December 2004, the House of Lords found both the government's derogation and the Part 4 powers incompatible with Articles 5 and 14 ECHR.[5] The government then had a window of three months in which to bring forward fresh legislation before the Part 4 powers would have to be renewed on 14 March or else those detained under it would be released from custody.

Although it seems that the government was genuinely surprised by its 8-1 defeat in the House of Lords and, therefore, rushed to pass the replacement legislation, it was not as though the government had lacked sufficient opportunity to prepare it for the eventuality. After all, the report of Privy Counsellors in December 2003 – a full 12 months before the House of Lords' ruling – had recommended that the Part 4 powers be repealed. Indeed, the strength of that report had prompted the Home Office to publish a consultation document on counter-terrorism powers in advance of the parliamentary debates on the renewal of Part 4 in March 2004.[6] In his foreword to the paper, the then Home Secretary, David Blunkett, said:[7]

> *I … hope this document will begin a wider debate over the next months. It is important that this debate should be inclusive and genuinely consultative. I am therefore proposing a far longer period of consultation – six months – than would normally be the case …. The debate needs to begin now so that we – Parliament and the wider public –* ***can reach an informed judgement*** *on how to proceed in the years ahead [emphasis added].*

The consultation concluded in August but the government held back from publishing its response until it knew the outcome of the House of Lords' hearing. However confident the government may have felt as to the result of that hearing, it appears to have failed to make any sort of contingency plan for the possibility that it might lose. The impression of absence of forethought is strengthened when one considers how little heed the Home Office seems to have paid to potential problems with the use of control orders and the vagueness of the drafting of POTA itself.

The idea of control orders

The idea for the use of control orders came from one of the recommendations of the Newton Report – the report of the Privy Counsellor Review Committee that also called for the repeal of indefinite detention powers under Part 4 of ATCSA.[8] However, it is important to put that suggestion in its proper context. The basic thrust of the Newton Report was that more needed to be done to

ensure that those suspected of terrorism were prosecuted, rather than subject to extraordinary measures.[9] To that end, it made a number of suggestions for increasing the use of criminal prosecution, including lifting the ban on the use of evidence from telephone intercepts in criminal proceedings;[10] using a security-cleared judge in an investigative role to gather and vet evidence for use in a subsequent prosecution;[11] developing a more structured process for the disclosure of evidence;[12] and greater use of surveillance generally.[13] The proposal for 'restriction orders' (as the report termed them) came well down the list, under the heading 'other options', in which it noted that 'even adopting some or all of the measures above, it may not be possible to prosecute in every case'.[14] It therefore noted:[15]

> *The current Special Immigration Appeals Commission regime is used in cases which involve the detention of foreign nationals without charge. It would be less damaging to an individual's civil liberties to impose restrictions on*
>
> *a. the suspect's freedom of movement (e.g. curfews, tagging, daily reporting to a police station);*
> *b. the suspect's ability to use financial services, communicate or associate freely (e.g. requiring them to use only certain specified phone 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.*

This proposal seems to follow from several developments. Firstly, under existing immigration law, ordinary asylum-seekers can be subjected to certain kinds of restrictions, including being required to live at a particular address, to wear an electronic tag, and to report on a regular basis to a police station.[16] Secondly, there is an increasingly broad range of civil restriction orders that can be applied to UK nationals in order to prevent some specified harm to the public.[17] The most serious restrictions are still applied following a criminal conviction,[18] but the proliferation of anti-social behaviour orders (ASBOs) in particular has seen a significant rise in custodial sentences being applied to individuals for conduct that, were it the basis for a criminal charge, could never result in imprisonment (eg streetwalking). The use of ASBOs was nonetheless approved by the House of Lords in *R v Crown Court at Manchester ex p McCann,*[19] although the Law Lords noted that applications for the most serious form of ASBO should attract the criminal standard of proof.[20] Thirdly, and most significantly, the European Court of Human Rights has refused to rule out the use of such restriction orders as a justifiable preventative measure, notwithstanding the failure of a criminal prosecution. As the Strasbourg court noted in respect of an Italian 'special police supervision' scheme placed on a suspected Mafioso post-acquittal:[21]

> *it is legitimate for preventive measures, including special supervision, to be taken against persons suspected of being members of the Mafia, even prior to conviction, as they are intended to prevent crimes being committed. Furthermore, an acquittal does not necessarily deprive such measures of all foundation, as concrete evidence gathered at trial, though insufficient to secure a conviction, may nonetheless justify reasonable fears that the person concerned may in the future commit criminal offences.*

The court nonetheless found that the particular restrictions imposed in the applicant's case were unsupported by the evidence and that they therefore breached his right to freedom of movement under Article 2 of Protocol 4 ECHR.[22] It is also important to note that, although the restrictions were imposed on the applicant following his acquittal, Italian criminal procedure allows prosecution appeals against acquittal.[23] Accordingly, the facts in *Labita* bear only limited resemblance to the situation post-acquittal under UK law – a closer analogy would seem to be that of bail pending appeal. In addition to Strasbourg's requirement that restrictions be necessary and proportionate, it is also worth noting that Italian law permitting 'special police supervision'[24] is itself subject to strict judicial control.[25]

The idea of using restrictions as an alternative to indefinite detention gained force with the release of one of the Belmarsh detainees, 'G', in May 2004 under bail conditions that closely resembled house arrest.[26] As the House of Lords noted subsequently:[27]

> *When G … was released from prison by SIAC on bail … it was on condition (among other things) that he wear an electronic monitoring tag at all times; that he remain at his premises at all times; that he telephone a named security company five times each day at specified times; that he permit the company to install monitoring equipment at his premises; that he limit entry to his premises to his family, his solicitor, his medical attendants and other approved persons; that he make no contact with any other person; that he have on his premises no computer equipment, mobile telephone or other electronic communications device; that he cancel the existing telephone link to his premises; and that he install a dedicated telephone link permitting contact only with the security company. The appellants suggested that conditions of this kind, strictly enforced, would effectively inhibit terrorist activity. It is hard to see why this would not be so.*

The Joint Committee on Human Rights also considered the Newton Report's recommendation in its own review of counter-terrorism powers in August 2004,[28] and concluded that the use of civil restriction orders would be 'worthy of further

exploration'.[29] However, the Joint Committee cautioned strongly that such orders would be controversial and that, if introduced, they would need to be:[30]

> *accompanied by sufficient procedural safeguards, such as access to an independent judicial determination of whether the underlying allegation was well-founded, and the type of restrictions imposed would have to satisfy a test of strict necessity in order to be proportionate*

As with the Newton Report, the Joint Committee's support for further consideration of civil restriction orders was only one proposal among a raft of possible measures to facilitate increased criminal prosecution of terrorist offences, in particular relaxing the ban on intercept evidence.[31] However, the Home Secretary, Charles Clarke, announced on 26 January 2005 that the government was minded not to lift the ban and instead bring forward fresh legislation to provide for 'control orders' as an alternative measure where it was 'not always possible to bring charges, given the need to protect highly sensitive sources and techniques'.[32] In other words, rather than adopt any of the measures recommended by either the Newton Committee or the Joint Committee to increase the use of criminal prosecutions, the government signalled its intention to move to the next most restrictive alternative to indefinite detention without trial.

The provisions of the 2005 Act

Much deserves to be written on the mercilessly swift passage of POTA through parliament in late February and early March, for it was an illustration of both the best and the worst aspects of parliamentary debate. However, in the space available here, it is possible only to deal with the provisions as they were finally enacted.

The scheme of the Act distinguishes between 'derogating' and 'non-derogating' control orders, the former of which can only be made where the Secretary of State for the Home Department (Secretary of State) has made a prior 'designation order', a statutory instrument designating the UK's derogation from the ECHR.[33] Since the Home Secretary indicated when introducing the bill that the government does not propose to derogate from the ECHR at this time,[34] this means the powers and procedures in relation to derogating orders are – in principle, at least – contingency powers only.

Although the Lords had repeatedly sought to amend the bill to establish a common set of procedures for both kinds of orders, the Act maintains distinct procedures for each. Thus, derogating orders can only be made by a court on application by the Secretary of State[35] (although this application can be made ex parte without notice[36] and the police have been granted powers to arrest and detain persons pending the determination of the application[37]). A preliminary

order can be made by the court ex parte, but there must be a subsequent inter partes hearing to confirm the order.[38] The test for confirming a derogating order is that the court must be satisfied on the balance of probabilities that the defendant is 'or has been involved in terrorism-related activity',[39] something which – at its most extreme – is defined to include 'conduct which gives support or assistance to individuals who are known or believed to be involved in terrorism-related activity'.[40]

As profoundly flawed as the procedures for making derogating orders are, they seem exemplary when considered alongside those for non-derogating orders – ie the kinds of orders that the Secretary of State most often intends to make and, indeed, has already made in respect of ten persons formerly detained under Part 4 of ATCSA.[41] A non-derogating order can be made by the Secretary of State in his own right, although he is normally obliged to seek the permission of the court first unless he decides 'the urgency of the case requires the order to be made without such permission'.[42] (Similarly, he was not required to seek permission for any control order made before 14 March in respect of anyone detained under Part 4 of ATCSA.[43]) Even where the Secretary of State does seek permission, the application can again be made ex parte without notice.[44] The test for the making of a non-derogating order is simply that the Secretary of State has 'reasonable grounds for suspecting' that a person has been involved in 'terrorism-related activity' – a standard below even the balance of probabilities and the same standard that applied to certification as a suspected terrorist under Part 4 ATCSA and which SIAC described as 'not a demanding standard for the Secretary of State to meet'.[45] The court, furthermore, may only refuse permission for a non-derogating order to be made where it considers that the grounds relied upon by the Secretary of State are 'obviously flawed'.[46] Where the court grants its permission or the Secretary of State makes an order without permission, the court is required to hold a subsequent inter partes hearing within seven days at which it can quash the order where it is satisfied that the Secretary of State's grounds for seeking the order were merely 'flawed'.[47] In doing so, the court 'must apply the principles applicable on an application for judicial review'.[48]

Although the scheme of the Act suggests a clear dividing line between derogating and non-derogating orders, any confidence that such a line can be neatly drawn seeps away when one considers the incredibly broad language describing the scope of obligations that may be imposed by way of a 'non-derogating' order. By way of an order, the Secretary of State can impose 'any obligation' that he considers 'necessary for purposes connected with preventing or restricting involvement by that individual in terrorism-related activity'.[49] Such obligations can include restrictions on:

- 'use of specified articles or substances';[50]
- 'use of specified services or specified facilities';[51]
- a person's 'work or other occupation, or in respect of his business';[52]
- a person's 'association or communications with specified persons or with other persons generally';[53]
- a person's 'place of residence'.[54]

The Secretary of State may also impose positive obligations, such as the requirement to:

- 'give access to specified persons to his place of residence or to other premises to which he has power to grant access';[55]
- 'allow specified persons to search that place or any such premises';[56] and
- 'comply with a demand made in the specified manner to provide information to a specified person in accordance with the demand'.[57]

The scheme of the Act seems to assume that the imposition of 'obligations that are incompatible with the individual's right to liberty under Article 5'[58] is somehow knowable a priori to any of the parties involved in proceedings. Although it may be possible to say with certainty that a particular requirement (eg reporting to a police station) does not breach Article 5, it is much less clear what the effect of multiple restrictions may be, particularly given the broad scope for serious interference with a person's enjoyment of several Convention rights. Contrary to the Home Office guidance on control orders released on 28 February 2005 for the benefit of members of parliament, it will not always be possible to say in advance whether 'the extent to which a person's physical liberty is curtailed is of a degree and intensity sufficient to justify a conclusion that liberty has been deprived and not merely restricted'.[59] Given the provision made for the use of closed proceedings and special advocates in control order hearings (originally made in the Schedule to the Act but now contained in the Civil Procedure (Amendment No 2) Rules 2005),[60] it is difficult to see how the guarantees required under Article 5 ECHR (in particular, the right to know the case against oneself)[61] can be provided in proceedings where the extent of interference with Article 5 remains wholly uncertain.

The necessity of the 2005 Act

Although a number of amendments were put forward in the course of parliamentary debate to improve the bill, to make it compatible with fundamental rights, it seems such efforts were ultimately bound to fail because they proceeded from a flawed premise, ie that the introduction of a scheme of control orders was somehow necessary to contain the threat of terrorism to the UK in the first place. This is not to downplay the seriousness of the actual threat

to the UK posed by terrorist attacks by Al-Qaeda and related groups. Rather, it is an argument about the extent to which the government's current claims that control orders are a necessary measure is consistent with its own previous statements on the issue.

Specifically, the claim that control order powers are necessary to address the threat posed by terrorist suspects who are UK nationals is difficult to square with the fact that it has not previously been thought necessary to seek such powers in the past three and a half years since the attacks of 11 September 2001. On this basis alone, it seems difficult to see how the interference with Convention rights posed by control orders under POTA could hope to survive judicial challenge. For, if it has been possible to adequately address the threat posed by terrorist suspects who are UK nationals *without* such powers for the past three and a half years, it seems difficult to see how the introduction of a power to place restrictions on a UK national without charge or conviction can now be justified as proportionate.

Similarly, in respect of the government's claim that provision for control orders was necessary to contain the threat posed by those previously detained under Part 4 of ATCSA, this ignores a wide array of immigration powers that already exist to place restrictions on those subject to immigration control. For instance, s36 Asylum and Immigration (Treatment of Claimants etc) Act 2004 alone contains powers for the Secretary of State to electronically tag persons subject to immigration control pursuant to paragraph 21 of Schedule 2 to the Immigration Act 1971 in order to monitor compliance with residence restrictions;[62] reporting restrictions;[63] employment restrictions;[64] and immigration bail.[65] Whether or not it would have been *proportionate* to use immigration powers to effect such restrictions, it certainly cannot be said that it was necessary to introduce fresh legislation to do so. If it is correct that the proposed non-derogating orders cannot be justified as necessary (because current law provides a sufficient range of powers adequately to address the threat of Al-Qaeda-related terrorism), then the same applies a fortiori to the provision for derogating control orders, as well as control orders applicable to non-Al-Qaeda-related terrorism.

The continuing failure of the government to adopt a proportionate response to the threat of terrorism – constantly seeking out the measure that most interferes with Convention rights, rather than the least restrictive – was underlined by the terms of its offer to break the parliamentary stalemate on 11 March 2005 by announcing it would seek to bring forward fresh counter-terrorism legislation in June 2006.[66] This would include, it suggested, provision for a new offence of 'acts preparatory to terrorism' – an alternative to indefinite detention under ATCSA proposed as long ago as 2002.[67] The government's promise not rush the 2006 legislation suggests that, at least in one respect, the passage of those laws

will not be merely a repeat of the events of 2001 and 2005. Whether by 2006 the government will have come to grips with the more substantive flaws in its approach to counter-terrorism legislation is something that remains to be seen.

Eric Metcalfe is director of human rights policy at JUSTICE.

Notes

1 This widely-reported quote is a paraphrase of the opening lines of Ch 1 of Marx's *The Eighteenth Brumaire of Louis Bonaparte* (1852): 'Hegel remarks somewhere that all great, world-historical facts and personages occur, as it were, twice. He has forgotten to add: the first time as tragedy, the second as farce'.
2 Ss21-23 of the 2001 Act (now repealed by s16(2)(b) of the 2005 Act).
3 The Human Rights Act (Designated Derogation) Order 2001 (SI 3644/2001), quashed by the decision of the House of Lords in *A and others v Secretary of State for the Home Department* [2004] UKHL 56.
4 S29(3)(b) of the 2001 Act (now repealed by s16(2)(b) of the 2005 Act).
5 *A and others,* note 3 above.
6 *Counter-Terrorism Powers: Reconciling Security and Liberty in an Open Society*, Cm 6147 (Home Office: February 2004).
7 Ibid, ii-iii.
8 Privy Counsellor Review Committee, *Anti-Terrorism Crime and Security Act 2001 Review: Report* (HC 100, 18 December 2003).
9 The committee's first conclusion was: 'terrorists are criminals, and therefore criminal justice and security provisions should, so far as possible, continue to be the preferred way of countering terrorism' (ibid, para 1).
10 Ibid, paras 208-215.
11 Ibid, paras 224-227.
12 Ibid, paras 236-239.
13 Ibid, paras 244-249.
14 Ibid, para 250.
15 Ibid, para 251.
16 See eg s36 of the Asylum and Immigration (Treatment of Claimants etc) Act 2004 which allows the Secretary of State to electronically tag persons subject to immigration control pursuant to paragraph 21 of Schedule 2 to the Immigration Act 1971 in order to monitor compliance with residence restrictions (s36(1)(i)(a)); reporting restrictions (s36(1)(i)(b)); employment restrictions (s36(1)(i)(c)); and immigration bail (s36(1)(i)(d)).
17 See eg the Crime and Disorder Act 1998 which alone makes provision for Anti-Social Behaviour Orders (s1), Sex Offender Orders (s2), Parenting Orders (s8) and Child Safety Orders (s11).
18 See eg s6 Football (Offences and Disorder) Act 1999.
19 [2002] UKHL 39.
20 Ibid, per Lord Steyn at para 37: 'in my view pragmatism dictates that the task of magistrates should be made more straightforward by ruling that they must in all cases under section 1 apply the criminal standard'. Note that this ruling is currently under appeal to the European Court of Human Rights who are likely to view the matter differently: see eg Andrew Ashworth QC, 'Social Control and "Anti-Social Behaviour": The subversion of Human Rights?' (2004) 120 LQR 263-291 at 290: 'In holding that the anti-social behaviour order is not a penalty, the House of Lords in the [*McCann*] decision attributed much less significance to the possible consequences of breaching the order than the Strasbourg Court might do'.
21 *Labita v Italy*, judgment of 6 April 2000 at para 195.
22 Note that the UK signed but never ratified the Convention rights under the 4th Protocol on the basis that the UK government asserts a possible conflict with the restriction on right of abode for British Overseas Nationals under the Immigration Act 1971 – see statement of the Home Office Minister, Baroness Symons of Vernham Dean, Hansard, HL Parliamentary Questions, 6 Nov 2003, col WA136.

23 Indeed, the applicant was acquitted on 12 November 1994 and his acquittal was upheld on 14 December 1995. See *Labita v Italy*, note 21 above, paras 10-26.
24 Law no 1423 of 27 December 1956.
25 See *Labita v Italy*, note 21 above, paras 103-109.
26 See *G v Secretary of State for the Home Department* (SC/2/2002, Bail Application SCB/10, 20 May 2004).
27 *A and others,* note 3 above, per Lord Bingham at para 35.
28 *Review of counter-terrorism powers*, 18th Report (HL 158/HC 713, 4 August 2004) paras 75-80.
29 Ibid, para 80.
30 Ibid.
31 Ibid, para 56.
32 Hansard, HC Debates, 26 January 2005, col 307.
33 S1(10)(b).
34 Hansard, HC Debates, 22 February 2005, col 153.
35 S1(2)(b).
36 S4(2).
37 S5(1)(a).
38 Ss4(1)(b), 4(5).
39 S4(7)(a).
40 S1(9)(d). The core of 'terrorism-related activity' is to be found in s1(9)(a): the 'commission, preparation or instigation of acts of terrorism'.
41 See eg 'New terror act hit by "teething troubles"', *The Guardian*, 14 March 2005.
42 S3(1)(b).
43 S3(1)(c).
44 S3(5).
45 *Ajouaou and others v Secretary of State for the Home Department* (SIAC, 29 October 2003), para 71. See also para 48: 'The test is … whether reasonable grounds for suspicion and belief exist. *The standard of proof is below a balance of probabilities* because of the nature of the risk facing the United Kingdom, and the nature of the evidence which inevitably would be used to detain these Appellants' [emphasis added].
46 S3(2)(a) and (b).
47 S3(10).
48 S3(11).
49 S1(3).
50 S1(4)(a).
51 S1(4)(b).
52 S1(4)(c).
53 S1(4)(d).
54 S1(4)(e).
55 S1(4)(j).
56 S1(4)(k).
57 S1(4)(o).
58 S1(2)(a).
59 O*fficial guidance on control orders proposed in the prevention of terrorism bill* (Home Office, 28 February 2005).
60 SI 2005/656.
61 See eg *Weeks v United Kingdom* (1989) 10 EHRR 293.
62 S36(1)(i)(a).
63 S36(1)(i)(b).
64 S36(1)(i)(c).
65 S36(1)(i)(d).
66 See eg 'Anti-Terror Bill: A deal claimed as victory by both sides', *The Independent*, 12 March 2005.

67 See eg Lord Carlile, *Anti-Terrorism, Crime and Security Act 2001 Part IV Section 28 Review 2002,* para 6.5: 'if the criminal law was amended to include a broadly drawn offence of acts preparatory to terrorism, [all those detained under Part 4 of ATCSA] could be prosecuted for criminal offences and none would suffer executive detention'. See also Lord Carlile's earlier report, *Report on the Operation in 2001 of the Terrorism Act 2000,* para 5.4: 'It remains a puzzle to some seasoned observers and experts to whom I have spoken as to why government has resisted unifying practice and principle by making it a specific offence to act as described in section 40(1)(b) [of the 2000 Act] , namely to be or to have been concerned in the commission, preparation or instigation of acts of terrorism … [T]he conduct described there falls comfortably within any empirical and logical category of criminality. I tend to agree with the view that making such conduct a specific criminal offence would tidy up the law and clarify an ECHR issue that has caused difficulty, without in any way weakening the effectiveness of [the 2000 Act]'.

Riding the push-me-pull-you in 2004: a year in the life of the Human Rights Act

Helen Mountfield

In this article, based on a speech given to the JUSTICE and Sweet & Maxwell Human Rights Conference on 15 October 2004, Helen Mountfield discusses the past year of the Human Rights Act: arguing that whilst the constitutional significance of the legislation is becoming apparent, there have also been a number of dangerous moments, particularly in the area of asylum and immigration and in relation to terrorism policy. The article considers the relationship between government and judiciary over human rights during the year, including the proposed ouster clause in the Asylum and Immigration (Treatment of Claimants) Bill and the Civil Contingencies Bill; the development of a human rights culture, the creation of a Commission for Equality and Human Rights and concludes with a case-law overview including A & others v Secretary of State for the Home Department, deemed to be the most important human rights case, not just from 2004, but arguably since Liversidge v Anderson.

Introduction

In many ways, the first decade of the 21st century is both the best and the worst of times for human rights. The existence and importance of human rights has seldom been so generally acknowledged; and seldom has human rights thinking been so universally debated and so often invoked. The basic principles of the Human Rights Act 1998 (HRA) are now well known and understood in our legal community, and are starting to seep into the national consciousness. But this is also a dangerous time, in which talk of human rights can be cynically discredited, and in which our civil liberties require staunch protection.

The Human Rights Act has now been in force for a little over four years, and – like all four-year-olds – it sometimes tries the patience of its parents. We too will need some patience before we really see how it will turn out. But I share the view of Vernon Bogdanor, writing in the latest *Law Quarterly Review,* that in the 'veritable era of constitutional reform' beginning in 1997, it is the Human Rights Act that will prove to transform most profoundly 'both our understanding of human rights and the relationship between government and the judiciary'.[1]

Looking back over the last year in the very young life of the HRA, the beginnings of this constitutional greatness are starting to show. Not only has there been a gamut of new and important judicial decisions concerning the scope and

application of the Act and many of the rights it protects, but there have also been moments of intense and unprecedented interaction between the government and the judiciary over human rights.

An overview of the HRA in 2004 must encompass both these aspects of its development. The image in my mind is the fabulous fictional beast from Dr Doolittle, the push-me-pull-you. Both in the jurisprudence dealing with the HRA, and in the actions taken by government, it is easy to discern the 'two steps forward, one step back' pattern that a push-me-pull-you takes – or, in its less optimistic moments, the reverse. This is scarcely surprising, given the times in which we live, and the relative youth of the HRA, but, for those who care about cultural as well as legal entrenchment of human rights values, it can make for a nerve-wracking ride.

The government and the HRA

Falling firmly in the two steps back category, there have been some dangerous moments for the HRA in the past year, particularly in the area of asylum and immigration. This has been the main arena in which the new form of interaction between the government and the judiciary has played itself out. The tension between these two branches over asylum and immigration stretches back to the decision in early 2003 by Mr Justice Collins in *Q v Secretary of State for the Home Department*,[2] which found that the Home Office was in breach of Article 6 ECHR in refusing asylum-seekers the right to have their individual circumstances examined in determining whether they required benefits, and that the courts could examine whether the circumstances of an individual case would lead to a violation of Article 3, if benefits were refused. The then Home Secretary, David Blunkett's hasty and dangerous response is well known, as is the Prime Minister's remark, on 'Breakfast with Frost', that the government was not prepared to discount '[looking] fundamentally at the obligations we have under the Convention on Human Rights' if measures designed to stop immigrants entering the country illegally did not work.

Such hazardous talk materialised again in November 2003, when the government introduced the Asylum and Immigration (Treatment of Claimants) Bill, which sought in the infamous clause 11 (later clause 14) to oust judicial review of immigration tribunal decisions and to abolish the second tier of immigration appeals. Lord Lester was very far from alone when he lambasted the bill as 'mean-spirited and reactionary', 'confirm[ing] the worst fears about the Government's lack of commitment to human rights and the rule of law'.[3] But, as JUSTICE pointed out in its briefing to the House of Lords in March 2004, clause 14 was more than a window on the troubled human rights soul of the government. The unprecedented attempt to comprehensively and exhaustively exclude the inherent jurisdiction of the higher courts to review decisions of the executive

and its administrative tribunals raised a matter of 'constitutional importance, independent of any disagreement over asylum policy'.[4]

The judiciary responded to this challenge, and the Lord Chief Justice used the occasion of a lecture at Cambridge University to launch a fierce attack against the plans, calling them 'fundamentally in conflict with the rule of law' and a 'blot on the reputation of the Government'.[5] In the wake of this, sustained criticism from the Home Affairs Select Committee, the Joint Committee on Human Rights, and the Constitutional Affairs Select Committee, as well as the expression of concern by very many lawyers who regularly act for the government, and in the face of universal condemnation from human rights organisations, the ouster provision was dropped from the bill. It seems that in this new constitutional era, if the judges are to properly safeguard our rights and the rule of law, they must sometimes be prepared to brave the political arena.

The rule of law was again under attack in January 2004, when the government introduced a Civil Contingencies Bill, which would have conferred an extraordinarily wide power to make emergency regulations, including requirements to violate human rights. And clause 25 of the draft bill provided that an instrument containing such draft regulations 'shall be treated as if it were an Act of Parliament'. Measures such as these show that important concepts such as the separation of powers and respect for the roles of constitutional actors are of far more than theoretical importance.

More political attacks on the HRA materialised in August 2004, when the Conservative shadow home secretary, David Davis, announced that his party was considering repealing the Human Rights Act as part of its manifesto for the next general election. He announced the formation of a commission to look at 'reform, replacement or repeal' of the Act, insisting that there were now 'too many spurious rights' as a result of the 'unintended consequences' of the Act.[6] He did not really elaborate which rights he considered to be spurious, although he did mention those accorded convicted prisoners and travellers.

It is reassuring to see that the courts, at least, do not share Mr Davis' view of the spuriousness of minority rights. As Lord Bingham recently observed in the Privy Council:[7]

Those who are entitled to claim this protection [the protection of human rights] include the social outcasts and the marginalized people of our society. It is only if there is a willingness to protect the worst and weakest amongst us that all of us can be secure that our own rights will be protected.

This is important. The case of *Youssef v Home Secretary*[8] serves to show that the four-year-old Human Rights Act may not even be safe in the hands of its parents. The case concerned the prospective deportation to Egypt of four members of Islamic Jihad. The four were held in detention pending removal, subject to attempts by the British government to obtain assurances from the Egyptian authorities that they would not be tortured if they were sent back. The British Embassy in Egypt made numerous attempts to secure the agreement of the Egyptian authorities to a list of assurances felt to be the minimum the British courts would require to avoid an argument against deportation based on Article 3. These included assurances that, should any of the men be imprisoned, arrangements would be agreed for regular access by British government officials and independent medical personnel, to ensure that they were not tortured. No such undertakings were forthcoming, and the matter came before the Prime Minister. Rather than seek to raise the diplomatic game, to attain such assurance, a memorandum before the court showed that the Prime Minister dubbed them 'a bit much' and sought to dilute the guarantees sought to a single promise that the men would not be tortured, and a statement from the Foreign Office that it was satisfied that this would be honoured. Only when the Foreign Office refused to give anything but an extremely guarded statement to this effect did the Home Office release them.[9]

These events certainly serve to remind the human rights community that the position of the HRA as the cornerstone of our new legal culture should not be taken for granted, and that the push-me-pull-you sometimes needs a severe yank in the right direction.

Such ignoble interludes in the relationship between the government, politicians and the HRA are, thankfully, not the full story. Firmly in the 'one step forward' category, the Lord Chancellor, Lord Falconer, has in several public addresses emphasised the need to entrench the Human Rights Act through fostering 'a human rights culture'.[10] One of the ways in which the government has chosen to concretise this amorphous notion of creating a human rights culture has been to accept the recommendation of the Joint Committee on Human Rights to create a Commission for Equality and Human Rights (CEHR). The proposed CEHR will perform the interrelated tasks of promoting equality and taking forward the human rights agenda that underpins the HRA.

The equality work of the CEHR alone will be a mammoth task, as it will replace the Commission for Racial Equality, the Equal Opportunities Commission and the Disability Rights Commission, and will take on new responsibility for new laws on age, religion and belief, and sexual orientation. But this difficult task provides a welcome platform from which to review our current equality laws, which developed in a rather piecemeal and haphazard fashion. Both JUSTICE[11]

and the Joint Committee for Human Rights[12] have pointed out that the CEHR's effectiveness will depend on 'levelling-up' the laws in all six equality strands. This will, hopefully, come in the form of an integrated legislative framework on equality: a single Equality Act. This indeed would be a giant step forward.

The other aspect of the CEHR's remit – promoting human rights – is also crucially important, to ensure that the push-me-pull-you goes forwards and not backwards. As part of this, it is mooted that the CEHR will have a freestanding power to bring applications for judicial review in respect of human rights cases. JUSTICE has rightly suggested, however, that this should be a remedy of last resort, limited to those cases in which there is a compelling public interest in initiating proceedings. In the main, it is hoped that the CEHR will perform its supportive function by way of amicus briefs and third party interventions, and the CEHR should thus have explicit power to intervene as appropriate in human rights cases. Such third party interventions can be extremely important, as was illustrated by the JUSTICE intervention in the case of *R (Ullah) v Special Adjudicator* [2004] 2 AC 323.

Case-law

The volume of case-law dealing with HRA arguments is now so very great that it would be impossible, in a paper of this length, to give a full overview of all, or even all the important cases arising under the HRA which involve individual human rights issues.

Without a doubt, however, the last important human rights decision of the year was of pre-eminent importance. The decision of the House of Lords in *A & others v Secretary of State for the Home Department*[13] on 16 December 2004 concerned one of the most fundamental issues to have come before a court, possibly since *Liversidge v Anderson*:[14] whether, in time of terrorist threat, foreign nationals suspected of terrorism could be held indefinitely without trial.

The first question in that case was the legality of the Human Rights Act 1998 (Designated Derogation) Order 2001, which proposed that the UK derogate from Article 5(1) of the Convention, so as to detain without trial, indefinitely, non-nationals whom the Home Secretary believed to be a risk to national security and who were suspected international terrorists. Such an order could only be made in the face of a 'public emergency threatening the life of the nation'. The second question was whether the provisions of s23 Anti-Terrorist, Crime and Security Act 2001, which only permitted such detention for non-nationals, violated Article 14.

The majority of the House of Lords were prepared to accept that the assessment of whether there was a public emergency threatening the life of the nation was

a political one, which the government was entitled to reach. Despite this view, however, they quashed the derogation order, holding it to be incompatible with Articles 5 and 14 of the Convention. They held that the internment measures in question, confined as they were to foreigners, were irrational and discriminatory, and so were not a necessary and proportionate response to the perceived state of emergency.

Lord Hoffman agreed with the conclusion of the majority, but rejected the premise from which they started, that it could be said that the 'emergency' condition was made out at all. In two rousing paragraphs,[15] he demonstrated the limits of deference (or gracious concession), by rejecting entirely the premise that there was an emergency threatening the life of the nation:

> *This is a nation which has been tested in adversity, which has survived physical destruction and catastrophic loss of life. I do not underestimate the ability of fanatical groups of terrorists to kill and destroy, but they do not threaten the life of the nation. Whether we would survive Hitler hung in the balance, but there is no doubt that we shall survive Al-Qaeda … Terrorist violence, serious as it is, does not threaten our institutions of government or our existence as a civil community.*
>
> *… The real threat to the life of the nation, in the sense of a people living in accordance with its traditional laws and political values, comes not from terrorism but from laws such as these. That is the true measure of what terrorism may achieve. It is for Parliament to decide whether to give the terrorists such a victory.*

Even in the shade left by the *A* decision, there have been important HRA cases decided in an enormous number of fields of law. This article touches on those concerning substantive rights only very briefly, before considering those which might be considered to affect the shape of judicial decision-making as to the scope of the HRA.

The interaction of Article 3 of the Convention with the limits imposed by s55 Immigration Nationality and Asylum Act 2002 upon support for the destitute, has kept the Administrative Court and the Court of Appeal busy.[16]

There have also been important decisions about Article 5 in the context of the right to protest.[17]

The extent of Article 6 has also given rise to some important judgments. A step backwards in that context was the decision of the majority of the Court of Appeal in *R (Kehoe) v Secretary of State for Work & Pensions,*[18] in which it was held that

the provisions which prevented a mother from taking enforcement proceedings against a husband who was defaulting on maintenance payments engaged public law, not civil obligations, and so did not engage Article 6. It is a pity that Waller LJ was not able to persuade at least one of his fellow judges to share his 'visceral' instinct that this was wrong. Certainly taking two steps forward, the House of Lords ruled in *Lawal v Northern Spirit*[19] that the long-standing practice of appointing leading counsel to sit as part-time judges in Employment Appeal Tribunals breached the right to a fair trial, given that the counsel could appear before a tribunal composed of lay members who previously had sat on the EAT with that same counsel in his role as judge.

Though there is still – as yet – no right to privacy as such,[20] the central role of Article 8 of the Convention is becoming increasingly clear. This is unsurprising. The concept of 'private life' goes to the core of what it is to be human, and the right to have that private life and personal sphere respected is the very essence of what it is to have `human' rights, by dint of one's very humanity. Its scope will inevitably be wide, and its nature protean.[21]

The importance of autonomy as an aspect of human dignity was the subject of the ground-breaking decision of Munby J in which he held that patients with degenerative disorders had the right to give 'advance directions' as to whether they wished artificial nutrition and hydration to be withdrawn at a later stage when they had become incompetent.[22] If these advance directions were made whilst the patient was competent, the decision as to where his or her best interests lay should rest with the patient. This decision was expected to come before the Court of Appeal early in 2005.

One of the most obvious applications of Article 8 is a countervailing value to the right to freedom of expression under Article 10 of the Convention. The interaction of Articles 8 and 10 gave the popular press a fine photo-opportunity – and a headache – when, in *Campbell v Mirror Group*[23] the House of Lords held that the courts will hold journalists strictly to account for every aspect of articles that they write on confidential subjects, particularly where the publication of intimate, personal information may lead to adverse consequences. (Slightly out of sequence, free speech purists were also dismayed by the important and controversial decision of the House of Lords in the *Pro-Life Alliance* case,[24] in which – deciding that this was a matter for the statutory regulator and not for them – the House allowed an appeal against the Court of Appeal's judgment that the ban on an election broadcast featuring images of aborted foetuses was an unacceptable limitation on the right of political expression which violated Article 10.)

Article 9, too, dragged courts into some enormously controversial social issues, such as a limit on the wearing of the jilbab by a Muslim girl at school[25] and whether the statutory ban on corporal punishment in schools unjustifiably infringes the philosophical conviction that `to spare the rod spoils the child'.[26] The approach in *Williamson* was clarified by the admirably clear judgment in the House of Lords early in 2005.

The scope of Article 14 has been the subject of a number of important cases. No less important than the *A* decision, in this field, have been cases like *Ghaidin v Godin Mendoza*,[27] the Gurkha pensions case *R (Purja) v Ministry of Defence*[28] and *R (Amicus) and others v Secretary of State for Trade and Industry*,[29] in which the court wrestled with the question of whether the Employment Equality (Sexual Orientation) Regulations 2003 discriminated between analogously situated couples on grounds of their sexual orientation. A whole series of cases relating to discrimination in the context of social security, tax and pensions occupied the Court of Appeal in 2003 and 2004[30] and four of them (*Hooper*, *Wilkinson*, *Carson* and *Reynolds*) went to the House of Lords in February and March 2005. By later in 2005, we may have a clearer understanding of the scope and operation of Article 14 and, in particular, what the courts regard as an 'analogous situation' for the purpose of invoking the protection of the anti-discrimination guarantee.

The circumstances in which a school exclusion would, and would not, amount to a deprivation of the right to education under Article 2 of the First Protocol were given a characteristically elegant analysis by Sedley LJ in *A v the Head Teacher & Governors of Lord Grey School*.[31]

So much (or so selective) for cases concerning the application of specific rights guarantees. The remainder of this section of the article is an analysis of cases which affect the shape of decision-making under the Human Rights Act: those which concern the scope of s3, those concerning the definition of a public authority and the development of positive obligations.

Given that the first section of this overview began with a 'two steps back' account, it seems fair to begin this section with one that is 'two steps forward'.

Developments of s3 HRA

S3 is arguably the most important tool of the HRA, imposing as it does on the judiciary an interpretative obligation to read and give effect to primary and secondary legislation in a way that is compatible with Convention rights. The only restriction on this obligation, says s3, is that it must be done only 'so far as is possible'. Early in 2003, in *Bellinger v Bellinger*,[32] the House of Lords endorsed

another restriction – that a statutory provision cannot be interpreted so as to fundamentally alter the statutory scheme.[33]

The two steps forward in relation to s3 came after *Bellinger*, in another House of Lords decision dealing with equality. In *Ghaidan v Godin Mendoza*[34] Lord Nicholls emphasised that s3 has an unusual and far-reaching character: it may require the court to depart from the unambiguous meaning that legislation would otherwise bear.[35] In examining what the restriction of 'the possible' is when interpreting legislation under the HRA, Lord Nichols dismissed one understanding: that it is only 'possible' to impose a Convention-compliant meaning where the words under consideration fairly admit of more than one meaning.[36] In rejecting this narrow version of s3, and squarely stating that the interpretative obligation may necessitate that courts depart from unambiguous meaning, the House of Lords has reinvigorated the interpretation of human rights. As Lord Roger pointed out, s3 will no longer be at the mercy of the linguistic choice of the individual who happened to draft the statutory provision in question, but is liberated to concentrate on the substance of the challenge.[37]

Indeed, Lord Steyn went even further in providing clear guidance as to the role of s3 in the scheme of the HRA. In an appendix to his opinion, he showed that the instances of courts making declarations of incompatibility were actually higher than instances where s3 was invoked once a breach had been found. Even though several of the declarations had subsequently been overturned, this merely meant they equalled the number of s3-based decisions. This, he stated, showed the law had 'taken a wrong turn', because s3 is meant to be the principal remedial measure under the HRA and declarations should be a measure of last resort.[38]

In examining why such a wrong turn had been taken, Lord Steyn broached the subject of the 'constant refrain that a judicial reading down, or reading in, under s3 would flout the will of parliament as expressed in the statute under examination'.[39] His response was that this position could not sensibly be held, as full weight had to be given to the countervailing will of parliament as expressed in s2 HRA. He also commented that there had been excessive concentration on the linguistic features of statutes and roundly rejected the literalist approach to the interpretation of human rights, recommending rather a 'broad approach', concentrating 'in a purposive way on the importance of the fundamental right involved'.[40] Such clear judicial guidance on the import and operation of s3 is greatly to be welcomed.

Deference, grace, and the role of the judiciary

Another important discussion about the application of the HRA came in the House of Lords decision in *Pro-Life Alliance v BBC*,[41] in which Lord Hoffmann addressed the notion of judicial deference. His comment deserves repetition:

> *Although the word 'deference' is now very popular in describing the relationship between the judicial and the other branches of government, I do not think that its overtones of servility, or perhaps gracious concession, are appropriate to describe what is happening.*[42]

Instead, he insisted that the question of which branch of government has decision-making power in any particular instance, and what the legal limits of that power are, is squarely a question of law, which must thus be decided by the courts. He was supported in this by Lord Walker,[43] and we can but hope that the ringing words of Lord Hoffmann will herald the demise (however slow) of the notion of judicial deference. It is a curiosity that this sound statement of principle was made in a case where, for many commentators, the judges set the line between executive and judicial decision-making too far in favour of the executive, affording too little protection of their own to the fundamentally important right to freedom of political expression.

Public authorities

Considerable steps forward have also been made in relation to the meaning of 'public authorities'. This question is, of course vital, because it is only such bodies upon whom the obligation not to act incompatibly with Convention rights is imposed by s6 HRA.

The difficulty and obfuscation arose in relation to one of the types of public authority envisaged by s6: functional or hybrid authorities. Although it was accepted from the outset of HRA interpretation that both 'public authority' and 'public function' should be given a generous interpretation,[44] the courts began to adopt an unfortunately narrow understanding of the terms. The infamous *Poplar Housing*[45] and *Leonard Cheshire*[46] cases focused the determination of whether a body was a functional public authority on an analysis of the body's administrative links with institutions of the state, rather than on the type of power being exercised, or its capacity to interfere with human rights.[47] The House of Lords began to address this problem in its decision in *Aston Cantlow Parochial Church Council v Wallbank*,[48] noting (without reference to the previous cases) that the narrow category of 'pure public authorities' should be counterbalanced by the 'much wider reach' of 'functional public authorities', and that it is 'the function that the person is performing that is determinative' of whether a body falls under s6(3)(b).

While this should have settled the matter, the Court of Appeal in the subsequent case of *R v Hampshire Farmers Market ex p Beer*,[49] instead resurrected the question of institutional relationship and restricted the generous approach taken by the House of Lords because *Aston Cantlow* did not expressly overrule the *Poplar* and *Leonard Cheshire* cases. This unfortunate push-me-pull-you turn of events so perturbed the Joint Committee on Human Rights that it published a highly critical report condemning the development of the case-law.[50] The report pointed out that the exclusion from the HRA's ambit of many privatised companies or bodies undertaking contracted-out work, which would have ordinarily been governmental activities, even though they are the exclusive providers of such services, seriously undermines the protection of human rights. The report went on to endorse the functional approach set out in *Aston Cantlow*, and to urge the government 'to intervene in the public interest as a third party in cases where it can press the case for a broad, functional interpretation of the meaning of public authority under the Human Rights Act'. To my knowledge, this step has not yet had to be taken, and it is hoped that the forward-looking determinations in *Aston Cantlow* will, without more prompting, be properly applied by the courts.

Positive obligations

There have been important cases about the positive obligations to protect human rights. Some, such as *Anufrijeva*[51] have taken a somewhat cautious and restrictive approach. But in another recent case – a victory in which JUSTICE can claim a small part – the House of Lords took the notion of a positive protective obligation a step further. That was the decision in *R (Ullah) v Secretary of State for the Home Department*.[52] Here the House unanimously overturned the Court of Appeal's decision that an individual seeking to block her removal from the UK because of a breach of a Convention right in the receiving country can only rely on Article 3 (the prohibition against torture, inhuman and degrading treatment). The Lords found this to be a misunderstanding of the Strasbourg jurisprudence, and held that possible flagrant breaches of the right to life; the prohibition against slavery and forced labour; the right to liberty; the right to a fair trial and the prohibition against retrospective punishment can also ground such a challenge. The majority felt the same to be true of the right to home and family life.[53] In relation to the Article 9 right to freedom of thought, conscience and religion, which was in point in *Ullah*, the House was more circumspect, suggesting that it was difficult to imagine an instance in which a person could successfully rely on Article 9 without being entitled to asylum either on the ground of a well-founded fear of persecution, or for possible breaches reaching the level of Article 3. This was followed by the majority in the *Razgar* case (heard by the House of Lords immediately after *Ullah*), who held that the foreseeable health and welfare consequences of removal from the United Kingdom could be held to engage Article 8 even when the removal did not violate Article 3, so that

Article 8 could be relied upon to resist expulsion to a third country, even in the absence of family or social ties, if the facts were sufficiently strong.

Ullah and *Razgar* admittedly set the bar quite high for reliance on a qualified right such as Article 8 or 9, endorsing the view that the right in question must be completely denied or nullified by the alleged breach in the receiving country in order to be relied upon.[54] Nevertheless the House of Lords is to be commended for reversing a decision that could have significantly limited the reach of the HRA in deportation and extradition cases.

Another important House of Lords judgment worthy of comment in this context relates to the positive duty imposed on the state under the right to life (Article 2) to conduct enquiries into killings. In *R (Middleton) v Coroner for the Western District of Somerset*,[55] the Lords decided that the traditional interpretation of the duties of juries in a coroner's inquest was not sufficient to satisfy the demands of Article 2. As a result, where the state was relying on the coroner's inquest to fulfil its obligation, the rules relating to such inquests have to be interpreted to allow the jury to decide not only 'by what means' the deceased met his death, but also 'in what circumstances'.

This builds on the strong jurisprudence relating to the duty under Article 2, encapsulated in the earlier decision of *R (Amin) v Secretary of State for the Home Department*,[56] which lays down a number of requirements that must be fulfilled in order for an Article 2 investigation to be effective.

Even in the arena of the House of Lords' explication of the right to life, there lurks a 'one step back' decision. In *Re McKerr*[57] the House held that the duties imposed by the HRA on the state to investigate deaths do not apply when those deaths occurred before the coming into force of the Act. The retrospective application of the HRA has been an area in which the courts have struggled, and it is regrettable that the House of Lords in *McKerr* declined to follow the decision of Jackson J in *R (Wright) v Home Secretary*[58] that a failure to investigate a pre-HRA death was a breach of a continuing procedural obligation. This approach is endorsed in the recent decision of the ECtHR in *Cyprus v Turkey*[59] (unfortunately not cited to the Lords) in which it was held that the state has a continuing obligation to investigate 'the whereabouts and fate of … missing persons who disappeared in life-threatening circumstances in 1974'.

A v Home Office – and a conclusion

I have said that, in my view, the decision of the House of Lords in *A v Secretary of State for the Home Department* was the most important human rights case, not only of 2004, but arguably since *Liversidge v Anderson*. But whither the push-me-pull-you? In early 2005, the full repercussions of the

case had still not been played out. The remaining detainees were still in Belmarsh until March 2005 when, apparently losing patience with the Home Secretary's procrastination, the Special Immigration Appeals Commission decided unilaterally to release them, albeit on stringent bail conditions. David Blunkett's successor as Home Secretary, Charles Clarke, had apparently accepted that the scale of the threat to the UK's security did not, at least at present, justify the use of his proposed form of house arrest, and had to accept parliamentary pressure for a review of the new legislation by November 2005. The House of Lords had still not addressed the second appeal by the detainees, concerning the question of whether they could be held on the basis of evidence obtained under torture. These are matters which go to the very heart of what it means to live in a democratic society governed by the rule of law. Perhaps when we have answers to some of these outstanding questions, we will be able to say whether, in 2004, the human rights push-me-pull-you was travelling forward, or in reverse gear.

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Notes

1 Vernon Bogdanor 'Our New Constitution' (2004) 120 *Law Quarterly Review* 242, 248.
2 [2003] EWHC 195 (Admin), later upheld on this issue, but partly reversed on the extent of the application of Article 3 by the Court of Appeal in *R (ota Q) v Secretary of State for the Home Department* [2004] QB 36 (more than a `real risk' of degradation necessary to constitute a violation).
3 'The Human Rights Act 1998 – Five Years On' [2004] 3 EHRLR 258, 263.
4 *Asylum and Immigration (Treatment of Claimants) Bill, Clause 14: JUSTICE Briefing for the House of Lords Second Reading* (March 2004) 2-3.
5 The Squire Law Library Centenary Lecture, Cambridge University Law Faculty (2004).
6 Matthew Tempest 'Tories may repeal Human Rights Act', *The Guardian*, 23 August 2004.
7 In *Reyes v The Queen* [2002] 2 AC 235 PC at para 26 (quoting the President of the Constitutional Court of South Africa).
8 [2004] EWHC 1884 (QB).
9 Ibid, para 15.
10 See, for example, speech at the Visions of Freedom Exhibition, International Human Rights Day (London, 10 December 2003), and 'Human Rights and Constitutional Reform', speech to the Law Society and Human Rights Lawyers' Association (London, 17 February 2004).
11 JUSTICE *Commission for Equality and Human Rights: Structure, Functions and Powers* (August 2004).
12 Joint Committee on Human Rights, *Commission for Equality and Human Rights: Structure, Functions and Powers*, Eleventh Report of Session 2003-04, HL Paper 78, 2004.
13 [2002] EWCA Civ 1502 [2004] QB 325 and [2004] EWCA Civ 1123.
14 [1942] AC 206.
15 96 and 97.

16 Eg *R (Q) v Secretary of State for the Home Department* [2004] QB 36; *R (ota S) v Secretary of State for the Home Department* [2003] EWCA Civ 1295, [2003] UKHRR 1321, and the controversial decision of Laws LJ in *R (Limbuela) v Secretary of State for the Home Department* [2004] EWCA Civ 540.
17 Eg *R (Laporte) v Chief Constable of Gloucestershire Constabulary* – on the power to return protesters – and *R(Gillan) v Metropolitan Police Commissioner & Others* [2004] All ER (D) 543.
18 *The Times 10 3 4*.
19 [2003] ICR 856.
20 *Secretary of State for the Home Department v Wainwright* [2003] 2 WLR 1137 HL.
21 Immigration – eg *R (Razgar) v Secretary of State for the Home Department* [2004] UKHL 27; housing – eg *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557 (right to inherit a tenancy) *Harrow LBC Qazi* [2003] 3 WLR 792, *Newham LBC v Kibata* (2004) 15 EG 106; police powers – *R (S) v Chief Constable of South Yorkshire* [2004] WLR 2196 HL (retention of finger print evidence and DNA), *R (Ellis)* [2003] 2FLR 577 – whether a proposed scheme to 'name and shame' offenders violated Article 8; planning *South Bucks DC v Porter* [2003] 2 AC 558, *Tonbridge & Malling BC v Davies;* positive obligations to provide support where private and family life are under attack – *Anufrijeva v London Borough of Southwark* [2004] 2 WLR 603, and even water – *Marcic v Thames Water* [2003] 3 WLR 1603.
22 *R (Burke) v GMC* [2004] EWHC 1879, especially para 130.
23 [2002] UKHL 22, [2004] 2 WLR 1234.
24 Cited below.
25 *R (on the application of SB) v Headteacher and Governors of Denbigh High School* [2005] EWCA Civ 199.
26 *R v Secretary of State for Education and Employment and others ex p Williamson* [2005] UKHL 15; see too H Mountfield 'Spare the Rod & Spoil the Child: A Philosophical Conviction?' in [2002] *Education Law* 9, analysing the interesting first instance decision of Elias J.
27 [2004] UKHL 30, [2004] 2 AC 557.
28 *R (Purja) v MOD* [2004] 1 WLR 289.
29 [2004] EWHC 860 Admin, (2004) IRLR 430.
30 *Secretary of State for Work & Pensions v M; Langley v Bradford Metropolitan Borough Council* [2004] EWCA Civ 1343; *Aston Cantlow* (see below), *Wilkinson v IRC* [2003] 1 WLR 2683, *R (Carson) v Secretary of State for Work and Pensions* [2003] 1 WLR 2683 and *R (Reynolds) v Secretary of State for Work and Pensions* [2003] EWCA Civ 797.
31 [2004] EWCA Civ 382, [2004] ELR 169.
32 [2003] 2 AC 467. See also *International Transport Roth v Secretary of State for the Home Department* [2003] QB 728.
33 Thus, the court held that the recognition of a transsexual as a female for the purposes of marriage had very wide ramifications, and raised issues not well suited for determination by court processes. Thankfully, the government took the hint, and The Gender Recognition Act 2004 received its Royal Assent on 1 July, to be implemented in early 2005. The Act will give full legal recognition to the acquired gender of post-operative transsexuals, including an entitlement to a new birth certificate reflecting the acquired gender and to marry in the acquired gender.
34 [2004] UKHL 30; [2004] 2 AC 557.
35 Ibid, para 30.
36 Ibid, para 28.
37 Ibid, paras 123-4.
38 Ibid, para 39.
39 Ibid, para 40.
40 Ibid, para 41.
41 [2004] 1 AC 185.
42 Ibid, para 75.
43 Ibid, para 144.
44 *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2002] QB 48, 67.
45 Ibid.
46 *R (Heather) v Leonard Cheshire Foundation* [2002] 1 AC 546.
47 See Helen Mountfield 'Public Authorities and the HRA' *The Lawyer* 22 March 2004.
48 [2004] 1 AC 546.

49 [2004] 1 WLR 233.
50 *The Meaning of Public Authority under the HRA*, Seventh Report of Session 2003-2004, HL Paper 39, 2004.
51 Note 21.
52 [2004] UKHL 26.
53 Lord Walker and Baroness Hale expressed concerns that the application of Article 8 required further analysis (paras 52 and 53 respectively), and discussed this in their opinions in *R (Razgar) v Secretary of State for the Home Department* [2004] UKHL 27.
54 Laid down in *Devaseelan v Secretary of State for the Home Department* [2003] Imm AR 1 2002.
55 [2004] 2 WLR 800.
56 [2004] 1 AC 653.
57 [2004] 1 WLR 807.
58 [2001] 1 Lloyd's Rep Med 478, 488.
59 (2002) 35 EHRR 30.

Equality and human rights

Henrietta Hill
Professor Aileen McColgan

Henrietta Hill and Aileen McColgan discuss developments since the introduction of the Human Rights Act 1998 in relation to Article 14 of the European Convention on Human Rights and other articles of the Convention which have been deployed to challenge discrimination.

Introduction

The shortcomings of the European Convention as it applies to issues of equality and non-discrimination are well known. As Lord Steyn put it in his 2002 lecture in honour of Lord Cooke: 'The anti-discrimination provision contained in Article 14 of the European Convention is parasitic in as much as it serves only to protect other Convention rights. There is no general or free-standing prohibition of discrimination. This is a relatively weak provision'. The UK government has set its face against signing up to Protocol 12, which includes a free-standing prohibition on discrimination on the Article 14 grounds (this on the rather unlikely ground that it might prevent the government from taking positive measures to reduce inequality). This is not to say, however, that the incorporation of Article 14 and various of the other Convention rights has been without significance. Here we will set out some of the developments which have occurred post implementation of the Human Rights Act 1998 both in relation to Article 14 and to other articles of the Convention which have been deployed to challenge discrimination.

The domestic courts' approach to Article 14

For practical purposes the three defining features of Article 14 are perhaps (i) that it does not provide a free-standing right to discrimination; (ii) that it is open-ended in terms of the grounds on which discrimination in the enjoyment of Convention rights is prohibited; and (iii) that both direct and indirect discrimination under Article 14 are capable of justification.

The domestic courts have grappled with Article 14 in a significant number of cases, the most notable of which has been the House of Lords in *Mendoza* in which their Lordships ruled that discrimination in the housing context between same-sex and heterosexuals breached Article 14 when read with Article 8 of the Convention. That decision will be returned to below. But it is useful first to consider the general approach adopted by the courts in Article 14 cases.

The starting point of the story tends to be taken as the decision in *Michalak* v *London Borough of Wandsworth*[1] in which the Court of Appeal (*per* Brooke LJ) adopted the approach to Article 14 suggested by S Grosz, J Beatson and P Duffy in *Human Rights: The 1998 Act and the European Convention*, in posing four questions. According to his Lordship:

> *If the answer to any of the four questions is "no", then the claim is likely to fail, and it is in general unnecessary to proceed to the next question. These questions are:*
>
> *(i) Do the facts fall within the ambit of one or more of the substantive Convention provisions (for the relevant Convention rights see HRA, section 1(1))?*
> *(ii) If so, was there different treatment as respects that right between the complainant on the one hand and other persons put forward for comparison ('the chosen comparators') on the other?*
> *(iii) Were the chosen comparators in an analogous situation to the complainant's situation?*
> *(iv) If so, did the difference in treatment have an objective and reasonable justification: in other words, did it pursue a legitimate aim and did the differential treatment bear a reasonable relationship of proportionality to the aim sought to be achieved? …*

The court in *Michalak* accepted, in a case involving discrimination between different categories of tenants, that Article 8 was implicated and that there was different treatment as between the claimant – a person subject to the Rent Act 1977 – and his comparators – those whose tenancies were subject to the Housing Act 1985. Under the latter the claimant would have been entitled to succeed to the secure tenancy of the flat which he had shared with the recently deceased tenant (a distant cousin with whom he had lived for a number of years). But the claim failed at the third hurdle, the Court of Appeal ruling that the differences between the Rent Act and Housing Act regimes were such that someone to whom the latter applied was not in a comparable position with the claimant for the purposes of an Article 14 claim. In many other cases claims have fallen at the first hurdle.

Historically it has been understood that the requirement that complainants must show that the discrimination of which they complain falls within the 'ambit'[2] or the 'subject-matter'[3] of another Convention right is to be afforded a relatively generous interpretation. Until recently the courts were minded to accept the view expressed by the editors of Grosz, Beatson and Duffy, para C14, that 'even the most tenuous link with another provision in the Convention will suffice for Article 14 to enter into play' (see, for example, the statements to that

effect in *Mendoza*). However some more recent examples suggest that this trend may be being reversed.

In *R (Neckeesha Erskine) v London Borough of Lambeth and Deputy Prime Minister (Interested Party)* [2003] EWCA 2479 QBD, for example, Mitting J considered an allegation that a local authority landlord had failed to repair a flat alleged to be unfit for human habitation, that neither Article 8 nor Article 14 were engaged. He held that the decision in *Mendoza* went too far insofar as it held that 'even the most tenuous link' with another Convention right would suffice for Article 14 to come into play. Rather he considered that the Strasbourg jurisprudence (*Petrovic v Austria* (2001) 33 EHRR 14: *Xenis Larkos v Cyprus* (1999) 30 EHRR 597 and *Lopez Ostra v Spain* (1994) 20 EHRR 277) and domestic authority indicated that a stronger link was required and in those circumstances did not consider himself bound by *Mendoza*. This decision was closely followed by *Douglas v North Tyneside Metropolitan Borough Council* (2004) 1 All ER 709 in which the Court of Appeal held that although tertiary or higher education fell within the meaning of 'education' in Protocol 1 Article 2, the claimant had failed to establish that the loan arrangements under the Education (Student Support) Regulations 2002 SI 2002/95 were within the scope of Protocol 1 Article 2, such that Article 14 was not engaged.

More recently, in *X v Y* [2004] IRLR 625, the Court of Appeal also appeared to evidence a rather more restrictive view. X had been dismissed for gross misconduct when his employer, Y, discovered that some time previously, whilst off duty and away from his place of work, X had engaged in consensual sex with another man in a toilet which was open to the public, for which he had accepted a caution for gross indecency. X argued that the tribunal had not appreciated the importance of s3 Human Rights Act 1998 in interpreting s98 Employment Rights Act 1996 (which provides for protection from unfair dismissal). It was submitted that, as a consequence, the tribunal had not properly considered the question of whether the dismissal amounted to an interference with X's rights under Articles 8 and 14. While the Court of Appeal made some helpful observations as to the interrelationship between Article 8 and the law of unfair dismissal, the court (Brooke LJ dissenting) went on to find that Article 8 was not engaged in X's case, as his conduct had occurred in a place to which the public had access; it was a criminal offence which was normally a matter of legitimate public concern; it led to a caution for the offence which was relevant to X's employment and should have been disclosed to his employer as a matter of legitimate concern. As the court concluded that X's case did not fall within the ambit of Article 8, it did not need to go on to look at the Article 14 arguments (which would have involved consideration of whether, had X not been a homosexual, he would have been dismissed).

The European Court has generally acknowledged that Article 8 is of broad application to sexual acts, even those which are criminal,[4] and for the Court of Appeal to conclude that X's complaint was not even within the ambit or subject-matter of Article 8 does seem problematic. It may be that the court would have concluded that had a heterosexual also accepted a caution for an offence of gross misconduct, and failed to disclose the same, he or she could have been fairly dismissed, so that there was no discrimination operative here, but to avoid dealing with the issue head on was a lost opportunity. The same is all the more disappointing, given the historical cases where employers have been able to justify dismissals based on reasons that were driven by sexual orientation discrimination (such as *Saunders v Scottish National Camps Association Ltd* [1980] IRLR 174, where the employee was dismissed from his job as a maintenance handyman at a children's camp when it was discovered that he was homosexual and had been involved in a homosexual incident, though not one involving children).

In *Michalak* Lord Justice Brooke stressed that the four questions there outlined were 'only a framework,' that considerations relevant to them overlapped (especially as between (iii) and (iv)) and that 'there may sometimes, therefore, be a need for caution about treating the four questions as a series of hurdles, to be surmounted in turn'.[5] Nevertheless, and leaving aside the question of discrimination being within the scope of a substantive Convention right (above) the *Michalak* framework has been subsequently applied by the Court of Appeal and the lower courts to defeat discrimination claims on 'threshold' grounds in a number of cases. In *Purja (R on the application of) & Ors v Ministry of Defence*,[6] for example, in which Gurkhas challenged discriminatory treatment in relation to pay, pensions and family accompaniment, the Court of Appeal ruled that Gurkhas and British troops were not analogously situated either during service or after retirement, and so the different pay and conditions provided to them could not form the basis of a discrimination claim.

The difficulty with the 'threshold' question of comparability has dogged statutory discrimination law in the UK.[7] The House of Lords attempted to grapple with it in their decision in *Shamoon* v *Chief Constable of the RUC (Northern Ireland)*[8] in which Lord Hope recognized that:

> *… the choice of comparator requires that a judgment must be made as to which of the differences between any two individuals are relevant and which are irrelevant. The choice of characteristics may itself be determinative of the outcome … This suggests that care must be taken not to approach this issue in a way that will defeat the purpose of the legislation, which is to eliminate discrimination against women on the ground of their sex in all the areas with which it deals ...*

Lord Nicholls noted that the general practice of tribunals was to ask, first, 'whether the claimant received less favourable treatment than the appropriate comparator (the "less favourable treatment" issue)', and to treat this question effectively as a 'threshold which the claimant must cross before the tribunal is called upon to decide' the second question – 'whether the less favourable treatment was on the relevant proscribed ground (the "reason why" issue)'.[9] He accepted that this practice could be 'convenient and helpful' but stressed that there was 'essentially a single question: did the claimant, on the proscribed ground, receive less favourable treatment than others?'. The 'sequential analysis' could 'give rise to needless problems', 'especially where the identity of the relevant comparator is a matter of dispute. Sometimes the less favourable treatment issue cannot be resolved without, at the same time, deciding the reason why issue. The two issues are intertwined'.

In *Carson & Reynolds v Secretary of State for Work & Pensions* [2003] EWCA Civ 797 the Court of Appeal recognised that questions relating to comparability were sometimes intertwined with those concerning whether differential treatment could be justified. The issue there related to the refusal of the UK government to uprate the state pensions payable to expatriate Britons living in South Africa, whereas those in the UK and in a large number of other countries were entitled to the uprate. According to the court (*per* Laws LJ), factors differentiating claimants and potential comparators might be relevant *both* to the third and the fourth *Michalak* questions, there being 'some fragility in the separation between' them.

> *A possible approach, as it seems to me, is to ask a compendious question in place of (iii): are the circumstances of X and Y so similar as to call (in the mind of a rational and fair-minded person) for a positive justification for the less favourable treatment of Y in comparison with X? This provides a relation between questions (iii) and (iv) and avoids any tight adherence to a rule requiring the 'impugned characteristic' to be ignored.*[10]

Lord Justice Laws went on to answer the reformulated third *Michalak* question in the negative, relying on factors such as the differences in the different social and economic circumstances of pensioners living in South Africa and the UK and the different tax and social security regimes involved. The claimant had argued that these factors 'were functions or consequences of the difference in place of residence between them', and that 'place of residence was the "impugned characteristic" for the purpose of the discrimination complaint'. Her attempt to rely on the decision of the Court of Appeal in *Aston Cantlow* v *Wallbank* to the effect that this factor ought to have been left out of account in dealing with the third *Michalak* question was rejected by the court (*per* Laws LJ) which took the view that the court in *Aston Cantlow* had not intended to establish 'a general

principle' that the 'impugned characteristic' had to be ignored in selecting the appropriate comparator(s) in an Article 14 claim. (In any event the decision of the Court of Appeal in *Aston Cantlow* was subsequently overruled on this issue by the House of Lords [2004] 1 AC 546.) According to Laws LJ: any such principle would 'generate both conceptual and practical difficulties' and factors differentiating claimants and potential comparators might be relevant *both* to the third and the fourth *Michalak* questions.

The reformulation of *Michalak* (iii) by Laws LJ in *Carson* appears to avoid the worst flaws of the comparator approach. The discrimination there at issue, being on the ground of residence, was perhaps not such as to attract the most intense scrutiny either of the domestic courts or the European Court of Human Rights itself. In such a case the range of associated differences between the claimant and her comparators may readily be such as to alleviate the necessity for any intense scrutiny of the justification question. On the other hand, the factors upon which the Court of Appeal in *Carson* relied in finding that the claimant and her comparators were not analogously situated (and which it found were factors *potentially* capable of justifying a difference in treatment between them), were not those which were in fact put forward by the defendant to justify their differential treatment (historical accident and the cost of rectification).

It is clear from the Article 14 jurisprudence that the burden is on the defendant to justify discrimination within Article 14. To the extent that justification is subsumed within the third *Michalak* question, this burden is removed. Further, the *Carson* approach permits a defendant to avoid scrutiny of the *reasons* for which differential treatment occurred. The difficulty with this is clear. If an employer chooses a white engineering graduate over an Asian law graduate for a management consultancy position, and does so *because* the latter candidate is Asian, it should not be an answer to a race discrimination claim for the court to find that the choice of the successful over the unsuccessful candidate *could potentially* have been justified by the former's engineering qualification.

This is particularly clear in a case in which the employer has not relied on the candidate's different qualifications to justify the difference in their treatment. If *in fact* the employer had made the selection on this basis, direct race discrimination would not have occurred. The point is, however, that s/he did not. In reality, of course, an employer whose actual motivation was discriminatory may be able to disguise this fact by pointing to a variety of differences between the claimant and his or her comparator. Equally, proof of discrimination will be much easier in a case in which the claimant can point to a comparator, identical but for the factor on the basis of which discrimination is alleged, who has been treated more favourably then s/he. But any differences between the claimant and comparator should not be permitted to block a claim

where an intention to discriminate on prohibited grounds is established. This was recognised by the House of Lords in *Shamoon*.[11]

In *Ghaidan* v *Gadin-Mendoza* [2004] 3 WLR 113 the House of Lords was not concerned with the threshold questions. The discrimination there was between heterosexual and same-sex couples – the former but not the latter being entitled to succeed each other to secure tenancies under the provisions of the Housing Act. The only Law Lord who mentioned the *Michalak* test was Baroness Hale who expressed it as including a fifth question: 'whether the difference in treatment is based on one or more of the grounds proscribed – whether expressly or by inference – in article 14'.[12]

The open-ended nature of Article 14 does also make it a potentially valuable tool to complainants. 'Other status' in Article 14 has been interpreted to include sexual orientation,[13] age,[14] illegitimacy,[15] marital status,[16] trade union status,[17] poverty,[18] and disability.[19] Military status, conscientious objection to military service, professional status and imprisonment are also covered.[20] Arguments can also be made, for example, that discrimination by reason of physical attributes, geographical location, or education is also within its scope. Two cases under the HRA perhaps illustrate the potential breadth of this aspect of Article 14.

In *Pretty v United Kingdom* (2002) 2 FCR 97 the claimant, a sufferer of motor neurone disease who had only a short time to live and wished to die, was concerned that should her husband assist her to take her own life (which she was unable to do herself) he might face a prosecution under s2(1) Suicide Act 1961, whereas those who were capable of taking their own lives could do so without such criminal sanctions following. Mrs Pretty argued that she was being discriminated against in the enjoyment of her rights under Articles 2, 3 and 8, and specifically the right to end her own life, on the basis that she was not capable of taking her own life. Although ultimately the government was able to show that insofar as there was such discrimination, it had an objective and reasonable justification for it, the domestic courts and the European Court did not appear troubled by the creative use to which the open-ended nature of Article 14 was being put,[21] with Lord Hope appearing to regard the same as a logical and acceptable extension to the prohibition on discrimination on the grounds of physical and mental capacity recognised protected elsewhere.[22]

Similarly, in *Newham London Borough v Kibata* (2004) 1 FLR 690, the Court of Appeal considered an argument that a council had discriminated against one of its tenants in the application of its re-housing policy. The council had let the flat on an introductory tenancy to a Ms Nkurkiye. She lived there with her son and Mr Kibata, who she then married. The introductory tenancy duly became a secure tenancy within the meaning of Part III Housing Act 1985. Ms

Nkurkiye then left the flat with her son and applied to be re-housed, making serious allegations of domestic violence against Mr Kibata, which he disputed. Mr Kibata remained in the property. Under the council's policy, where a tenant had to be re-housed on the ground of domestic violence, the tenant would only be permitted to hold one tenancy. The council advised Ms Nkurkiye that she would be required to serve a notice to quit in respect of the original tenancy. The notice was duly served and the tenancy was terminated. The council then sought possession of the flat from Mr Kibata. Although Mr Kibata ultimately failed in his arguments, the court did not appear to object in principle to his arguing that he was being discriminated against because accusations of domestic violence had been made against him.

Returning to the *Michalak* (iii)/(iv) overlap, in *Mendoza* Baroness Hale went on to state that:

> *In my view, the Michalak questions are a useful tool of analysis but there is a considerable overlap between them: in particular between whether the situations to be compared were truly analogous, whether the difference in treatment was based on a proscribed ground and whether it had an objective justification. If the situations were not truly analogous it may be easier to conclude that the difference was based on something other than a proscribed ground. The reasons why their situations are analogous but their treatment different will be relevant to whether the treatment is objectively justified. A rigidly formulaic approach is to be avoided.*

Baroness Hale noted the respondent's claim that the survivors of unmarried heterosexual and homosexual couples were not in an analogous situation: 'But it is impossible to see what else the difference can be based on if not the difference in sexual orientation. Everything which has been suggested to make a difference between the appellant and other surviving partners comes down to the fact that he was of the same sex as the deceased tenant. It is the decisive factor'.

Lord Nicholls, who with Baroness Hale considered the Convention point in the case, did not deal with the *Michalak* questions as such but dealt with the comparability point as follows. In response to the submission for the respondent that 'there is a relevant distinction between heterosexual partnerships and same sex partnerships [in that t]he aim of the legislation is to provide protection for the traditional family. Same sex partnerships cannot be equated with family in the traditional sense. Same sex partners are unable to have children with each other, and there is a reduced likelihood of children being a part of such a household'. He said the following:

> *My difficulty with this submission is that there is no reason for believing these factual differences between heterosexual and homosexual couples have any bearing on why succession rights have been conferred on heterosexual couples but not homosexual couples. Protection of the traditional family unit may well be an important and legitimate aim in certain contexts … But it is important to identify the element of the 'traditional family' which [the legislation], as it now stands, is seeking to protect. Marriage is not now a prerequisite to protection under [the legislation]. The line drawn by Parliament is no longer drawn by reference to the status of marriage. Nor is parenthood, or the presence of children in the home, a precondition of security of tenure for the survivor of the original tenant. Nor is procreative potential a prerequisite. The survivor is protected even if, by reasons of age or otherwise, there was never any prospect of either member of the couple having a natural child.*
>
> *What remains, and it is all that remains, as the essential feature … is the cohabitation of a heterosexual couple. Security of tenure for the survivor of such a couple in the house where they live is, doubtless, an important and legitimate social aim. Such a couple share their lives and make their home together. Parliament may readily take the view that the survivor of them has a special claim to security of tenure even though they are unmarried. But the reason underlying this social policy, whereby the survivor of a cohabiting heterosexual couple has particular protection, is equally applicable to the survivor of a homosexual couple. A homosexual couple, as much as a heterosexual couple, share each other's life and make their home together. They have an equivalent relationship. There is no rational or fair ground for distinguishing the one couple from the other in this context …*

Lord Nicholls, like Baroness Hale, ruled that the discrimination could not be justified in the absence of a legitimate aim. The rest of the House of Lords agreed but focused their remarks on s3 Human Rights Act 1998.

Mendoza is perhaps the most significant domestic case to date under Article 14, illustrating as it does the potential of that provision (there read with Article 8). But it remains to be seen whether the courts will rescue the provision from the stranglehold of the threshold questions and focus on the core questions: (i) (as expressly asked by Baroness Hale in *Mendoza*) was the less favourable treatment at issue based on a protected ground, and (ii) was it justified. The House of Lords heard *Carson* in February/ March 2005 but has yet to give judgment. Watch this space.

Relationship between Article 14 and the substantive violation alleged

Historically, the European Court has often held that where a substantive violation is made out, it is no longer necessary to go on to consider the Article 14 argument (as in *Dudgeon* and *GL* above, for example). However in the recent case of *Kunchova v Bulgaria* (Application Nos 00043577/98 and 00043579/98, 26/2/2004) the court appeared to adopt a more generous approach. In that case two Roma men had been shot and killed by the Bulgarian military police as they sought to abscond from military service. Their families alleged violations of the Article 2 right to life and Article 14 before the European Court. The court held that there had been a breach of both the substantive and the procedural obligation under Article 2 (ie in both the taking of the men's lives and the defective state investigation into the same), but then went on to conclude that Article 14 had also been breached.

The decision is, therefore, interesting in showing perhaps a new willingness by the court to find a violation of Article 14 when it has already found a breach of the substantive article. It is also notable as it is understood to be the first case where a breach of Article 2 and Article 14 taken together has been found, and for the fact that the court appeared to impose a reverse burden of proof on the respondent state, to show that the violations of Article 2 were not caused by a racial motive. *Kunchova* also appears to build on earlier European Court jurisprudence stressing the importance of non-discrimination in the investigation into a death or violence which is said to be racially-motivated. In *Menson v UK* (Application No 47916/99, ECHR, 6 May 2003), for example, the court had held that where an attack is racially motivated, it is particularly important that the investigation is pursued '… with vigour and impartiality, having regard to the need to reassert continuously society's condemnation of racism and to maintain the confidence of minorities in the ability of the authorities to protect them from the threat of racist violence …' (pages 13-14).

Challenging discrimination by using the other Convention articles

It has long been acknowledged that the prohibition on discrimination is a 'thread' which runs through human rights jurisprudence, so that, in fact, attempting to achieve equality and seeking to assert human rights are often one and the same thing. It is, therefore, perhaps not surprising that the substantive Convention articles themselves have been used to try and challenge serious or systemic discrimination.

Article 3 has been deployed in a stream of immigration cases where claimants have alleged that should they be returned to their country of origin, they

would suffer extreme hardship due to the discriminatory regimes in place there. However the courts appear to have required a very high threshold to be met in order for such claims to succeed. In *R (on the application of Bazdoaca) v Secretary of State for the Home Department* [2004] EWHC 2054 (Admin), for example, the claimant applied for judicial review of the Home Secretary's decision to certify his asylum and human rights claims as clearly unfounded pursuant to s94(2) Nationality, Immigration and Asylum Act 2002. He argued that his home town was a provincial town in Moldova. B was a homosexual and claimed that if he was returned home he would be persecuted and his rights under Article 3 infringed. However, Stanley Burnton J held that it was not sufficient to establish that there was 'a risk of isolated acts of violence' nor to show that there was 'general discrimination or intolerance on grounds of sexual orientation' in order to found a claim under Article 3.

Article 8 has also proved a valuable tool in the fight against discrimination. It has, for example, led directly to the recognition of the rights of gays and lesbians and transsexuals by the Strasbourg court, in *Smith and Grady v UK* (1999) 29 EHRR 548 (acknowledging the rights of gays and lesbians in the military) and *Goodwin v UK* (2002) 35 EHRR 18 (dealing with the need to afford transsexuals legal recognition). In both these cases, the court reached its conclusion based on Article 8 alone, without recourse to Article 14. Domestic law has now stepped into the breach as far as these issues are concerned, providing at least some protection to gays, lesbians and transsexuals in the form of the Employment Equality (Sexual Orientation) Regulations 2003, the Sex Discrimination (Gender Reassignment) Regulations 1999 and the Gender Recognition Act 2004, but Article 8 may still be a valuable tool in cases not covered by these provisions.

In addition, several cases, such as *Connors v UK* (2004) TLR 10/6/04 and *The First Secretary of State, Doe, Yates, Eames v Chichester District Council* [2004] EWCA Civ 1248, have seen Article 8 being utilised to recognise the rights of gypsies, another frequently marginalised minority group. In *Connors* the Strasbourg court held that Article 8 had been violated where the eviction of the applicant and his family from a local authority site had not been carried out with the requisite procedural safeguards, commenting at paragraph 84 that 'the vulnerable position of gypsies as a minority means that some special consideration had to be given to their special needs'; and in the *Chichester* case, the decision of a planning inspector to grant planning permission for a private gypsy site was upheld by the Court of Appeal, partly in reliance on Article 8, and the court's finding that the inspector had correctly directed himself to and applied the balancing exercise inherent within Article 8.

Article 9 formed part of the argument in *Copsey v WBB Devon Clays* (EAT 0438/03, 13/2/04). In that case, the respondent employer had introduced a seven-day shift system after a surge in demand, following consultation with the unions and with the support of a majority of the employees. Mr Copsey refused to work on Sundays, and was dismissed after he rejected offers of alternative employment that did not have a working pattern requiring Sunday work. The employment tribunal found that this was a fair dismissal on the ground that the employee would not agree to work a seven-day shift. Before the EAT it was argued on Mr Copsey's behalf that the real reason for dismissal was his religious beliefs.

The EAT (Rimer J presiding) rejected this, saying that there was no evidence that the employers did not respect Mr Copsey's religious beliefs; rather the evidence was that they had tried to offer him other alternatives which he did not accept. It was also argued that whether the employers acted reasonably in dismissing now had to be interpreted in light of the right to freedom of religion under Article 9. The EAT said that even if that were the case, account had to be taken of the decision of the European Commission on Human Rights in *Stedman v United Kingdom* (1997) 23 EHRR CD 168. In *Stedman*, a case in which a Sunday working requirement was also challenged, the European Commission on Human Rights took the narrow view that the employee's rights under the Convention were not infringed because she could seek alternative employment elsewhere that would allow her to observe the Sabbath. Disappointingly, the EAT said that it considered *Stedman* '… sound in principle …' and therefore that as Mr Copsey, if he took the view that his employer's work requirements were incompatible with the due exercise and manifestation of his religious beliefs, was able to resign, there was no infringement of his Article 9 rights. Although in *Copsey* the EAT followed Strasbourg jurisprudence (admittedly a controversial decision in itself), it did not have to – the obligation under the HRA only being to 'have regard' to such decisions and not to follow them slavishly. This decision is also contrary to the intention of the 2003 Religion and Belief Regulations, and it is to be hoped that the EAT does not take a similarly restrictive approach to cases thereunder.

Article 9 was also considered in the widely publicised case of *R (on the application of SB) v Headteacher and Governors of Denbigh High School* [2004] EWHC 1389 (Admin) and [2005] EWCA Civ 199. Ms B, a 15-year old Muslim female, sought judicial review of her school's uniform policy which meant that she could not wear a jilbab (a dress that leaves only the hands and face exposed). The school was 79 per cent Muslim, had a headteacher who was born into a Bengali Muslim family, and had arrived at its uniform code in consultation with parents and local mosques. The policy was that female Muslim pupils who did not wish to wear the traditional school uniform should wear the shalwar kameeze, a tunic and trousers. Ms B and her family maintained that she needed to wear

the jilbab for religious reasons because the shalwar kameeze does not cover the arms and legs; the school maintained that its uniform policy made appropriate accommodation for female Muslim pupils and was reasonable.

The main issue before the High Court had been whether the school had unlawfully excluded Ms B. Bennett J held that she had not been excluded at all, in that the school wanted her to attend. However he held that even if Ms B had been excluded, there was no violation of the freedom to manifest religion or belief within the meaning of Article 9. Disappointingly, he again relied on *Stedman*, holding that there was no breach of Article 9 because Ms B chose to enter a school outside her catchment area knowing what the school uniform policy required.[23] Moreover, Bennett J went on to hold that even if there was a violation of the right to freedom of religion, it would be lawful because it would fall within Article 9(2) as being 'necessary in a democratic society … for the protection of the rights and freedoms of others', including other Muslim female pupils who did not wish to wear the jilbab but who did, or would feel pressure on them, either from inside or outside the school, to do so if the policy were changed in Ms B's favour.[24]

On 2 March 2005, the Court of Appeal allowed Ms B's appeal. Brooke LJ concluded that she had been excluded because the school had effectively told her not to return to the school unless she was willing to comply with the discipline of wearing the prescribed school uniform. Moreover, Strasbourg case-law[25] dictated that, but for very exceptional cases, it was not for the state to determine whether the religious beliefs relied on or the means used to express those beliefs were legitimate. On that basis, it had to be accepted that Ms B's beliefs were genuine, and she plainly had been excluded because her freedom to express her religion or beliefs under Article 9(1) was being limited.

Moving on to the Article 9(2) argument, Brooke LJ held that the limitation on Ms B's Article 9(1) rights was one that was prescribed by law in the Convention sense in that the governors were entitled by law to set a school uniform policy provided it was clear and accessible in Strasbourg terms. He then went on to consider head-on the Strasbourg cases on similar facts which had failed, namely *Dahlab v Switzerland* (15 February 2001, Application No 42393/98) where the Strasbourg court declared inadmissible a complaint by a primary school teacher who had been prohibited from wearing an Islamic headscarf at her school; and *Sahin v Turkey* (29 June 2004, Application No 44774/98) where the court dismissed a complaint by an applicant who had been denied access to written examinations and to a lecture at the University of Istanbul because she was wearing an Islamic headscarf. However, in a considered judgment, Brooke LJ felt able to distinguish *Dahlab* and *Sahin* on the basis that Switzerland had a recognised principle of denominational neutrality in its schools, and Turkey's

Constitution was fundamentally secular, neither of which considerations applied to the UK.

On that basis Brooke LJ concluded that in order to show that it was Convention-compliant, the decision-making of the school in relation to Article 9 had to follow a rigid structure, namely:

> *(i) Has the Claimant established that she has a relevant Convention right which qualifies for protection under Article 9(1)?*
> *(ii) Subject to any justification that is established under Article 9(2), has that right been violated?*
> *(iii) Was the interference with her Convention right prescribed by law in the Convention sense of that expression?*
> *(iv) Did the interference have a legitimate aim?*
> *(v) What are the considerations that need to be balanced against each other when determining whether the interference was necessary in a democratic society for the purpose of achieving that aim?*
> *(vi) Was the interference justified under Article 9(2)?*

The court held that the school had not approached the matter in this way at all. It had not started from the premise that the claimant had a right to have her religion recognised by English law, but from the premise that its uniform policy was there to be obeyed and if the claimant did not like it, she could go to a different school. On that basis, Ms B succeeded in her claim and obtained a declaration that she had been denied her right to manifest her religion.

The judgment in *SB* is a very important one for several reasons, which may apply well outside the Article 9 framework. Firstly, the court felt able to approach Strasbourg case-law, which may have led the claimant to consider that her claim was in real difficulties in a considered and reasoned way, and distinguish it, effectively by applying the margin of appreciation at the domestic level. Secondly, the court confirmed that it was not appropriate to apply the harsh *Stedman* approach to cases of this nature. Thirdly, Brooke LJ's clear exposition of a decision-making framework for Article 9 cases (an approach resonant of the one he had propounded in *Michalak* in relation to Article 14 itself) gives complainants and state bodies alike a concise and accessible sounding board against which to test alleged interferences with the right to religion, which, in the current social and political climate is, arguably, the substantive right most closely linked with the Article 14 protection from discrimination.

The implementation of the EU discrimination directives

Practitioners will also know that the government has now implemented all the 'strands' of the EU Race Directive 2000/43[26] and the EU Framework Directive 2000/78,[27] save for that relating to discrimination on the ground of age which does not need to be implemented until October 2006. However, real problems have been created by the manner in which the government has decided to implement the directives, namely by regulations made under s2 European Community Act 1972 rather than by primary legislation which has to pass through the usual parliamentary process. The key consequence of this is that the regulations can go no further than is required to implement the EU directives, so that discrimination outside the sphere of employment and vocational training (the scope of the relevant directives) could not be dealt with by the regulations. Accordingly, in those areas not covered by the directives and regulations, complainants may need to have recourse to Article 14 and the HRA. A gay person who seeks to challenge discrimination in services (the same not being covered by Employment Equality (Sexual Orientation) Regulations 2003 (SI 2003/1661)) would, therefore, need to squeeze the claim into the ambit of one of the other Convention rights and Article 14. Similarly, a Muslim or Rastafarian who alleged discrimination on grounds of religion by a public authority outside the employment sphere, perhaps by the police, would not be able to bring a claim under the Race Relations Act 1976 (as Muslims and Rastafarians do not qualify as a 'racial group' for such purposes – see *Tariq v Young* COIT 24773/88 and *Dawkins v Department of Environment* [1993] IRLR 284 respectively) or the Employment Equality (Religion or Belief) Regulations 2003 (SI 2003/1660) (as discrimination by public authorities outside the employment sphere is outwith the scope of the directive and therefore the regulations). The same would apply to an individual alleging age discrimination prior to October 2006. In those situations, despite the difficulties outlined herein, Article 14 remains of vital importance. The fact that it is of limited assistance perhaps illustrates more than ever the need for a Single Equality Act, or for the government to ratify Protocol 12.

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Notes

1 [2002] 4 All ER 1136, though note the earlier decision of the Court of Appeal in *Nasser v United Bank of Kuwait* [2002] 1 WLR 1868; [2002] 1 All ER 401 to which Brooke LJ referred in *Michalak*.
2 See *Rasmussen v Denmark* (1985) 7 EHRR 371; *Family K and W v Netherlands* No 11278/84, 43 DR 216 (1985).
3 See *X v Germany* (1976) 19 Yearbook 276.

4 In *Dudgeon v United Kingdom* (1982) 4 EHRR 149, for example, the court accepted that the imposition of laws criminalising homosexual behaviour in Northern Ireland and not in the rest of the United Kingdom was a breach of Article 8; and more recently in *GL, AV and SL v Austria* (2003) 37 EHRR 799, the court held that a provision that criminalised homosexual acts of adult men with consenting adolescents between 14 and 18 years of age violated Article 8 taken in conjunction with Article 14.
5 Citing *Nasser v United Bank of Kuwait*, note 1 above, *per* Mance LJ.
6 [2003] EWCA Civ 1345.
7 See, for example, the pre-*Webb (No 2)* pregnancy cases and the decision of the Court of Appeal in *Dhatt* v *McDonalds Hamburgers* [1991] ICR 238, [1991] IRLR 131.
8 [2003] ICR 337, [2003] 2 All ER 26, [2003] IRLR 285.
9 Lord Hutton also agreed that 'making too rigid a distinction between the question (a) has there been less favourable treatment and (b), if so, has it been on the ground of sex, has tended to create difficulties in deciding who are the appropriate comparators in particular cases', but was content to follow this practice in the instant case because of his recognition that 'the splitting of the question into two parts has been done in many cases and has certain advantages for the purposes of analysis'.
10 The *Carson* decision predated the House of Lords decision in *Aston Cantlow*.
11 [2003] 2 All ER 26.
12 As Stanley Burnton J had done at first instance in *Carson*.
13 *Dudgeon v UK* (1981) 4 EHRR 149 and *Sutherland v UK* [1998] EHRLR 117. The United Nations Human Rights Committee had indicated its willingness to regard sexual orientation as being included in the reference to 'sex' in Article 26 of the International Covenant on Civil and Political Rights since *Toonen v Australia* [1993] IHRR vol 1, no 3, p105.
14 *N v UK* App No 11077/84, 49 DR 170.
15 *Inze v Austria* Series A, No 126 (1988) 10 EHRR 394 and *Marckx v Belgium* (1979-1980) 2 EHRR 330.
16 *Rasmussen v Denmark* (1985) 7 EHRR 371.
17 *National Union of Belgium Police v Belgium* Series A, No 19 (1975) 1 EHRR 578.
18 *Airey v Ireland* (1979-1980) 2 EHRR 305.
19 *Malone v UK* [1996] EHRLR 440.
20 See Harris, O'Boyle and Warbrick, *Law of the European Convention on Human Rights* (Butterworths, 1995, p470).
21 See, for example, the reasoning of Lord Bingham at paras 35-6 and Lord Steyn at para 64, and the European Court of Human Rights (which determined the Article 14 argument solely on the basis of objective and reasonable justification and did not seem concerned at Article 14 potentially applying to prohibit discrimination between those who are and those who are not physically capable of committing suicide).
22 Such as section 15(1) of the Canadian Charter – see para 105 of the House of Lords judgment.
23 See para 74 of Bennett J's judgment – 'If, contrary to my finding, the Claimant was in some way excluded, she was excluded for her refusal/failure to respect the school uniform policy. Although her refusal was motivated by religious beliefs, she was excluded for her refusal to abide by the school uniform policy rather than her religious beliefs as such'.
24 See paras 90-91 of Bennett J's judgment.
25 Namely *Hasan and Chaush v Bulgaria* (26 October 2000, Application No 30985/96).
26 Council Directive of 29 June 2000, 'implementing the principle of equal treatment between persons irrespective of racial or ethnic origins' (2000/43/EC).
27 Council Directive of 27 November 2000, 'establishing a general framework for equal treatment in employment and education' (2000/78/EC).

EU partnerships under the Hague Programme: trading immigration controls for refugee needs

Anneliese Baldaccini

In addition to its efforts to harmonise policies within Europe, the EU has become increasingly preoccupied with the management of asylum processes globally. The emerging focus on the external dimension of asylum is particularly evident in the Hague Programme – the new multi-annual programme for justice and home affairs adopted in November 2004. While outwardly presented as a gesture of solidarity with over-burdened developing countries, EU institutions and member states are forging partnerships with third countries which have the underlying objective of containing refugees in transit countries and regions of origin and creating the conditions for returning those who are within their jurisdiction. This paper argues that the external dimension of asylum is yet another aspect of the architecture of exclusion, one that has generated less attention, but which poses nonetheless a serious challenge to the international refugee protection regime.

Introduction

The integration of concerns related to asylum and migration within the EU's relations with third countries is a relatively new trend. Until recently, much of the EU's policy on asylum was concerned with 'harmonising' member states' laws and practices building on the legal and operational framework created by the 1997 Amsterdam Treaty and the Conclusions of the 1999 European Council in Tampere. While the Tampere European Council underlined that partnership with the countries of origin and transit of asylum- seekers would be a key element in the external policies of the EU in the area of migration, the Conclusions laid little stress on the broader external migration agenda, apart from drawing attention to the contribution which the EU's various external policies (in aid, trade etc) could make in addressing the underlying causes of migration flows and in encouraging the conclusion of readmission agreements.[1]

Focus on integrating asylum and immigration into the EU's broader external policies was stepped up at the Seville European Council in 2002, which sought to add a complementary approach to that of root causes advocated at Tampere. At Seville, heads of state and government urged that 'any future cooperation, association or equivalent agreement which the European Union or the European Community concludes with any country should include a clause on joint

management of migration flows and on compulsory readmission in the event of illegal immigration'.[2] Most noteworthy, the Council introduced the concept of negative migration conditionality, ie the threat to reduce the level of EU relations with a third country in cases of 'an unjustified lack of cooperation in joint management of migration flows'.[3] Talk had been of reducing development aid to countries that did not co-operate with EU demands on immigration but this was objected to by a group of member states.[4] There remained, however, political ambiguity in the Conclusions as regards the measures that might be taken, the legal base for deciding on whether a state had failed to co-operate and the substantive grounds for concluding that there had been such a failure.

The Thessaloniki European Council in June 2003 reiterated the need to monitor third countries' co-operation in the field of illegal migration and called for the development of an evaluation mechanism. This was to include the participation of third countries in relevant international human rights and refugee protection instruments; their co-operation in readmission and return of their nationals and of third country nationals; efforts in border control and interception of illegal immigrants; the creation of asylum systems, with specific reference to access to effective protection; and efforts in re-documentation of their nationals.[5] The practical consequences of inadequate co-operation on these issues were still not addressed. Notably absent was also any residual reference to addressing the root causes of migration flows within the Union's relations with third countries. Instead, further scope for developing external policies on cross-border co-operation was provided by the Thessaloniki summit's endorsement of the conclusions of the June 2003 General Affairs and External Relations Council calling for intensified partnership with the EU's eastern and southern neighbours.[6] A new framework for relations with neighbouring countries was to provide the basis for developing a new range of policies with the aim of bringing those countries closer to the EU.

A different strategy for engaging with third countries on issues around immigration and asylum was offered by the UK government early in 2003 when it presented to its EU partners ideas on new international approaches to asylum.[7] Purportedly designed to support the creation of an equitable asylum system globally, the UK proposals advocated regional protection areas and processing centres in transit routes to Europe. The latter were unambiguously to be holding camps for extraterritorial processing of asylum-seekers, who either had made it to the territory of the EU or had been intercepted en route to the EU. Regional management involved long-term action in the source regions to address root causes of migration through effective use of development assistance, to increase protection capability, and to develop resettlement routes. Regional intervention also included inducing source countries to accept returns, via the conclusion of readmission agreements, with the additional enticement that returnees might

include asylum-seekers from Europe for external processing (in the same way as transit centres), temporary protection or on a return route.

These proposals raised a variety of legal, practical and ethical concerns and were roundly condemned by human rights and refugee advocacy groups.[8] They also failed to receive unanimous support from EU member states. However, subsequent debate in the Council highlighted interest in the regional management aspect of the proposals and a mandate was given to the Commission to explore the idea further. The Commission's proposals for EU Regional Protection Programmes, submitted to the Council in June 2004, incorporate the essence of the UK ideas. Along with partnership agreements underway with EU neighbouring countries, they have come to define the EU's external approach to immigration and asylum.

In November 2004, the European Council adopted the Hague Programme setting out the Union's aims and priorities in the area of justice and home affairs for the next five years. In the asylum and immigration field, aims and priorities evolve mostly around the development of partnerships with countries in regions of origin and transit of asylum- seekers. In the UK, the government's original vision for a new approach to asylum has transmuted into that of 'migration partnerships'. Despite their purported protection focus, these are mainly concerned with gaining the collaboration of third countries in the task of managing migration flows. In the same vein, at EU level, partnerships with third countries, seemingly inspired by a quest to attend to refugee needs in distant regions and transit countries, appear primarily intended to function as bargaining chips for achieving immigration management objectives. They engage third countries in the implementation of border control measures which ultimately result in containing refugees in transit countries and conflict areas; they aim to secure agreements with the countries concerned on the issue of return and readmission; they entail the prospect of creating, in time, protected areas for external processing on the line first advocated by the UK.

The external dimension of asylum and immigration in the Hague Programme

At a time when member states are starting to implement the Community asylum instruments on minimum standards that were adopted within the five-year programme agreed by the European Council at Tampere (1999-2004), the Hague Programme contributes little to the consideration of where the development of a common European asylum system might be taken. It relies uncritically on existing measures, few of which are widely perceived as far-reaching or even satisfactory, and is disturbingly unconcerned with ensuring the long-term credibility of EU asylum policy and its compliance with international norms.[9] Instead, it signals that over the next five years there will be an increased

focus on international protection challenges beyond the EU borders. Member states are called upon to 'contribute in a spirit of shared responsibility to a more accessible, equitable and effective international protection system in partnership with third countries, and to provide access to protection and durable solutions at the earliest possible stage'.[10]

The Union's priorities in the context of the external dimension of asylum and migration are to develop partnerships with third countries to assist them 'in their efforts to improve their capacity for migration management and refugee protection, prevent and combat illegal immigration, inform on legal channels for migration, resolve refugee situations by providing better access to durable solutions, build border-control capacity, enhance document security and tackle the problem of return'.[11] Specific actions envisaged come under four headings dealing with: partnership with third countries; partnership with countries and regions of origin; partnership with countries and regions of transit; and return and re-admission policy. Within these, the core elements of the external asylum and immigration agenda are: (i) the development of Regional Protection Programmes; (ii) intensified co-operation with countries on the southern and eastern borders of the EU in the framework of the EU Neighbourhood Policy; (iii) the development of minimum standards for return procedures; (iv) and the timely conclusion of Community readmission agreements, to be aided by the appointment of a Special Representative for a common readmission policy.[12]

This paper will examine the developing partnership policy in the framework of the proposed Regional Protection Programmes (RPPs) and the EU Neighbourhood Policy (ENP).

Protection in the region

The Hague Programme endorses the idea of EU Regional Protection Programmes (RPPs) and tasks the Commission with their development, in partnership with the third countries concerned and in close consultation and co-operation with UNHCR. RPPs are to incorporate a variety of relevant instruments, primarily focused on capacity building, and include a joint resettlement programme for member states willing to participate in it. The Commission is asked to produce an action plan before June 2005 for one or more EU pilot RPPs to be launched in December 2005.

Proposals for RPPs were first advanced by the Commission in its communication on improving access to durable solutions.[13] The communication responded to the Thessaloniki European Council invitation, in June 2003, to submit a detailed report examining the legal implications and the measures that had to be taken to advance the idea, first stirred by the UK, of new approaches to asylum that may provide better and more equitable protection to refugees.

'New approaches to asylum' has come to epitomise a set of policies which ought to address the serious and structural deficiencies of the current international protection regime. These deficiencies, presented from the perspective of EU policymakers, lie firstly, in the inescapable reality that developing states host the largest number – some 70 per cent – of the world's refugees.[14] Secondly, a disproportionate amount is said to be spent in the developed world on processing claims the majority of which do not meet the criteria for international protection while the majority of refugees remain for protracted periods in poorly resourced countries in their regions of origin.[15] Thirdly, the asylum system in western countries is such that refugees who travel to Europe to seek protection have no option but to do so illegally, often paying large sums of money to human smugglers and traffickers. The final argument is that those found not to be in need of international protection are often not returned to their country of origin. EU member states' interception practices and deterrence policies, and their restrictive interpretation and application of the 1951 Refugee Convention, are not contemplated as part of the problem.

Encouragingly, the Commission's contribution to the discussion on 'new approaches' is firmly premised on the principle that 'any new approach should be complementary rather than substituting the Common European Asylum System, called for at Tampere.'[16] It, however, accepts that there is a crisis in the global protection system and a need to devise policies which can both enhance protection capacity in regions with protracted refugee situations and ensure that refugees arriving in the EU from that region do so in an orderly and managed manner. EU Regional Protection Programmes and EU Resettlement Schemes are the short to mid-term elements identified by the Commission for achieving both objectives.[17] Discussions among government officers that followed the Commission's proposal indicated widespread support for RPPs but little enthusiasm for an EU Resettlement Scheme.[18] The Council Conclusions on durable solutions, adopted on the eve of the Hague Programme, reflect this lack of commitment towards resettlement by endorsing its 'targeted use' to 'encourage [countries in regions of origin] to take part in Regional Protection Programmes'.[19] Rather than an end in itself, and one that in a concrete and viable way can ease the burden in countries of origin and address protracted refugee situations, a residual commitment to resettlement is retained on account of its importance in securing targeted countries' participation in RPPs. Moreover, member states are to be allowed to choose whether or not to participate in the scheme. The Commission has been invited to present a proposal for a resettlement scheme by July 2005 but, in the absence of a genuine and unanimous commitment from member states, there is little prospect that such a scheme will lead to a sizeable caseload of refugees being resettled to Europe.[20] This casts a dubious light on the entire scheme of RPPs.

According to the Commission's proposal, EU RPPs should be situation-specific and elaborated in full partnership with the third country for which they are intended. They would be formulated in conjunction with the Regional and Country Strategy Papers, drawn up by the Commission's Development and External Relations Directorates. This is meant to ensure consistency with the EU's overall strategy towards the country or region in question in areas such as good governance, judiciary reform, institution building, democratisation and human rights. The Commission contemplates EU RPPs as a 'tool box' of mainly 'protection oriented' measures with some 'migration related' ones, in consideration of 'the need to balance and assess all interests concerned'.[21] The measures suggested range from assistance to enhance protection capacity, action to establish registration and resettlement schemes, assistance in improving local integration and infrastructure, to co-operation on legal migration, action on migration management, and return. The implementation of these measures will rely on the financial assistance and expertise of the EU.

The inclusion of non-protection-oriented measures in the 'tool box', ie action on migration management and return, raises doubts as to the true motivation at the heart of these proposals. The EU premises its preoccupation with enhancing protection in the region on the principle of international solidarity and fair sharing of responsibility. It is indeed a fundamental principle of the international protection regime set up by the 1951 Refugee Convention that states have an obligation to co-operate in order to find permanent solutions to the problems of refugees.[22] However, EU action is also presented as providing a clear dividend for Europe: it would assist in creating the conditions where there is no need for refugees to move beyond their regions of origin and seek asylum in Europe.

Member states cannot realistically expect any short to medium term impact of RPPs in significantly reducing onward movements of refugees from these countries to the territory of the EU. The European Commission itself accepts that building the institutional and infrastructural capacity to the standards required to ensure effective protection in current refugee hosting countries in the regions of origin is a long process, which in some cases may even take decades.[23] Migration management tools, on the other hand, may in relatively short timescales have a positive impact in reducing migration flows to the EU and in encouraging returns. The overarching interest in this latter aspect is discernable in bilateral partnership initiatives, such as the one promoted by the UK, and in Community and member states' 'safe third country' arrangements.

The UK migration partnership initiative

UK policy offers an example of partnership initiative which, while purportedly aimed at enhancing protection capacities in countries and regions of origin,

is largely driven by 'migration management' priorities. According to the government, this initiative is 'seeking to assist countries in regions of origin to develop their own abilities to host refugee populations and provide asylum'.[24] In reality, the information available suggests that migration partnership is about enhancing third countries' border controls through the provision of training and technical assistance, and about negotiating returns.

Migration partnership arrangements are currently being pursued with the governments of Tanzania and South Africa. The current initiative with Tanzania has so far focused on training Tanzanian immigration officers in detecting fraudulent documents and in supplying forgery detection equipment. Tanzanian officials were also invited to the UK to help establish the nationality of asylum-seekers in disputed cases. This appears to have led to the identification of two failed Tanzanian asylum-seekers posing as Somalis and their subsequent return to Tanzania. UK officials envisage that in the future the migration partnership with Tanzania may involve the 'return' of non-Tanzanians. The relatively significant scale of overseas development aid to this country makes the issue of the use of 'financial clout' to obtain agreement on this issue a distinct possibility.[25]

Discussions with the South African authorities are still at an early stage, but are focused on how the UK may be able to help the South Africans to enhance the capacity and effectiveness of its immigration service. UK policymakers maintain that in responding to requests for assistance from the immigration authorities of these countries they have focused on areas where the UK has relevant in-house expertise which can be brought to bear in relatively short timescales. As is the case with Tanzania, readmission and returns of non-nationals may also be part of the partnership package. In relation to both countries, negotiations are conducted at a highly confidential diplomatic level and whatever operational measures flow from these initiatives there is very little in the way of accountability. Migration partnerships are likely to be shifted into higher gear as part of the government's new five-year asylum and immigration strategy, which includes plans to place immigration at the heart of its relationship with asylum source countries to secure more returns.[26]

There has not been, as yet, serious parliamentary scrutiny of the UK migration partnership policy.[27] The House of Commons International Development Committee dealt with the issue in the context of a wider inquiry on migration and development. The committee questioned the notion of partnership that forces development countries to spend scarce resources on border controls rather than on poverty reduction. It also warned against the adoption of policies that make aid conditional on measures which aim to limit outward migration.[28] The government's ambiguous response to this warning was to assert, on one hand, that poverty reduction is firmly at the centre of the UK's

approach to development; on the other, it '*expects* co-operation on return of a country's own nationals and on the management of migratory flows'.[29] The idea of tying development aid to co-operation on migration management had been floated by the UK government at the time of the Seville Summit in June 2002 and is currently alive again in Denmark where the government is examining ways of targeting development assistance to 'regions of origin measures' and punish those countries that refuse to take back asylum-seekers with the loss of development aid.[30] This could provide a model for other European governments to follow. Although member states are mindful that such moves would be politically controversial within the donor community internationally, more subtle approaches of persuasion via financial incentives are likely to produce the same end result.

Making third countries 'safe' for returns

The return element in the 'tool box' for RPPs is one of the most critical in the entire scheme. The Commission indicates that returns to third countries could be aimed not only at nationals of the country in question but to 'other third country nationals for whom the third country has been or could have been a country of first asylum, if this country offers effective protection'.[31] Thus, RPPs could potentially form the backdrop to large-scale 'safe third country' removals which will be allowed under Community law when the directive on minimum standards on procedures for granting and withdrawing refugee status is finally adopted.[32]

The procedures directive creates a detailed legislative scheme at EU level governing third country removals by member states to countries outside the EU.[33] In recent years, the notion of a 'safe third country' has increasingly been relied upon by member states as a mechanism to determine whether or not they have responsibility for asylum- seekers. The concept, developed in state practice, is used to justify removals of refugees who are deemed to have improperly moved from a country where they had found protection or *could have* found protection to a final country of destination. Important safeguards, which govern the transfer of responsibility under international law, such as ascertaining a 'meaningful connection' of asylum-seekers with the country in question and ensuring that their protection needs are properly assessed, have been progressively diluted.[34]

The procedures directive codifies in EU law this restrictive practice. Under the terms of the directive, the 'safe third country' concept allows member states to remove asylum-seekers to any country willing to accept them, often without any consideration of the merits of their claims and without sufficient safeguards. Member states will have considerable latitude in setting down rules under which the presumption of safety can be challenged in individual cases and they will not be obliged to obtain assurances that the third country

concerned will process the asylum claim.[35] In effect, the wide scope of application of the concept in Community law allows member states to shift responsibilities for a potentially large group of asylum-seekers to third (often poorer) countries without ensuring that these countries required to accept responsibility for refugees have the capacity to do so. The 'safe third country' provisions in the directive were severely criticised by UNHCR and the agency remains concerned that, when implemented by member states, it could lead to violations of international law.[36]

EU governments are mindful that the concept of a 'safe third country' has a considerable bearing on their relations with third countries and on the international protection regime.[37] During negotiations on the directive, attempts to link the 'safe third country' concept to the provision of 'effective protection', however, led nowhere due to lack of agreement on the content of 'effective protection'. The directive now envisages that the concept may be applied where member states' authorities are satisfied that a person seeking asylum will be treated in accordance with the following principles in the third country concerned:

> *(a) life and liberty are not threatened on account of race, religion, nationality, membership of a particular social group or political opinion; and*
> *(b) the principle of non-refoulement in accordance with the Geneva Convention is respected; and*
> *(c) the prohibition on removal in breach of the right to freedom from torture and cruel, inhuman or degrading treatment as laid down in international law is respected; and*
> *(d) the possibility exists to request refugee status and, if found to be a refugee, to receive protection in accordance with the Geneva Convention.*[38]

The application of these rules does not guarantee access to effective protection. While there is no internationally agreed definition of effective protection, according to UNHCR, effective protection connotes not only protection against refoulement, ie the removal to another country where asylum-seekers face persecution or breaches of human rights, but access to determination procedures based on due process of law and to conditions of stay which match up to basic human rights standards and allow a life of self-sufficiency and dignity.[39] The concept is ultimately linked to the availability of well-resourced asylum infrastructures which cover all stages of a refugee situation: from initial reception to status determination and adequate support, to the ultimate resolution of their situation (ie voluntary repatriation, local integration in the host country or resettlement to a third country).

Returning asylum-seekers to countries targeted by RPPs which have not yet developed a sustainable protection system would be unsafe for asylum-seekers and would undermine the EU's effort to support the creation of such a system in the first place. The implementation of RPPs necessarily requires EU member states to agree a benchmark against which the protection capacity of a host country can be assessed. This has yet to be worked out. In an opinion on RPPs delivered by the European Economic and Social Committee, the following are suggested as suitable indicators of protection capacity and as orientations for a benchmark of effective protection:

- accession and adherence to refugee instruments, including regional refugee instruments and other human rights and international humanitarian law treaties;
- national legal frameworks, such as adoption/amendment of refugee and asylum legislation;
- comprehensive and systematic registration and documentation of refugees and asylum-seekers;
- admission and reception of asylum-seekers;
- support for self-reliance and local integration.[40]

According to the Commission, indicators of effective protection should be drawn from EU standards agreed as part of development of the common European asylum system. They should focus on respect of non-refoulement, access to a legal procedure, and the possibility of adequate subsistence 'taking into consideration the relevant socio-economic conditions prevailing in the host country'.[41] However, as mentioned above, Community law standards enable some of the important safeguards that attach to asylum claims made in the member states to be dispensed with and have been criticised for falling short of international law. EU instruments and policies as such have a negative export value. If they are to serve as standards for other states seeking to develop their national asylum systems, they will allow for provisions which enable responsibility for assessing protection needs to be shifted on to other countries, regardless of their capacity to do so. This will have far-reaching consequences for the international refugee protection regime.

UNHCR has warned EU member states that the establishment of such programmes with specific countries in the region should not lead to 'any precipitous initiatives to declare such countries safe in the absence of acceptable protection safeguards'.[42] However, member states' 'safe third country' practices, and their restrictive interpretation of 'effective protection', entail the disturbing possibility that RPPs may become a reason for refusing asylum claims received in EU member states and for large-scale returns to the countries concerned. This would negate the potential use of such initiatives to strengthen the international

protection regime, and undermine the claim that such initiatives will represent genuine sharing of responsibility by the EU.[43]

The EU Neighbourhood Policy

Along with EU Regional Protection Programmes in distant areas, the seeds of an opportunity for enhanced co-operation on asylum and immigration with countries closer to Europe have been sown into the framework of the EU's Neighbourhood Strategy. The Hague Programme underlines the need for intensified co-operation with countries in regions of transit, particularly with those on the southern and eastern borders of the EU. Partnership with countries of transit is to enable them 'better to manage migration and provide adequate protection for refugees'.[44] Support will be provided to those countries 'that demonstrate a genuine commitment to fulfil their obligations under the Geneva Convention on Refugees'.[45] The appropriate framework for these partnerships is to be provided by the European Neighbourhood Policy (ENP). Subsequent discussion in justice and home affairs meetings indicates that EU support measures for countries of transit could be similar to those included in protection programmes for regions of origin.[46]

EU policymakers have been keen to integrate migration and asylum concerns into relations with their neighbours as a way to address the large-scale immigration flow to Europe through North Africa and the countries of Eastern Europe. The volume of illegal human traffic from these regions to the EU is not only perceived as a substantial drawback to their attempts to 'manage' migration. Member states are also aware of the cost in human lives such trafficking incurs. Non-governmental organisations document that, in the past decade, some 5,000 refugees and migrants have died while attempting hazardous journeys to Europe.[47]

The European Neighbourhood Policy (ENP) was first outlined by the Commission in its Communication on Wider Europe of March 2003.[48] It is meant to provide a framework for a new range of policies in the EU's relations with countries at the east and south of Europe. Neighbour countries identified are those on the new land borders of the enlarged EU – Ukraine, Moldova and Belarus – and the southern Mediterranean countries of Algeria, Egypt, Israel, Jordan, Lebanon, Libya, Morocco, Palestinian Authority, Syria, and Tunisia. The ENP was further extended to the countries in the southern Caucasus (Armenia, Azerbaijan, and Georgia).[49] The EU has existing agreements and relations with most of these countries. Many of them are also major transit countries for migrants to the EU.

The overall goal of the ENP is to work with the partner countries to reduce poverty and create an area of shared prosperity and values based on free trade, deeper economic integration, intensified political and cultural relations, enhanced cross-border co-operation and shared responsibility for conflict

prevention and resolution. The strategy worked out by the Commission is to offer various incentives (such as preferential trading relations and a stake in the EU internal market) in return for concrete progress made by partners in the field of political and economic reform, and for enhanced co-operation in defined areas, such as justice and home affairs.[50] A set of priorities within key areas are set out in action plans agreed with each partner country and will guide the financial support provided by the EU to the relevant countries. Action plans are also to contain a number of priorities intended to strengthen commitment to shared values. These include strengthening democracy and the rule of law, and respect for human rights and fundamental freedoms – the key objectives of the EU's external policies.[51] Existing financial assistance to these countries will be complemented from 2007 onwards by the European Neighbourhood and Partnership Instrument.[52]

The Commission indicates that, within the area of justice and home affairs, 'border management is likely to be a priority in most Action Plans' and that such plans 'should also reflect the Union's interest in concluding readmission agreements with the partner countries'.[53] Joint measures to strengthen the refugee protection capacity of the countries in question are not identified as a priority issue. This was, however, identified as a clear problem area in earlier reports by the Commission on the state of co-operation and dialogue with specific countries in the neighbourhood and has been a constant source of concern for international human rights organisations.[54] Some of the countries concerned never acceded to the Refugee Convention,[55] other countries, although parties to the Convention, lack a basic protection mechanism, which implies that almost any asylum-seeker will move on from those countries to seek protection elsewhere. Co-operation on migration is seen by the EU as an essential area of interaction, for instance, with Libya and the reason for its prospective inclusion in the ENP. Several organisations have reported that asylum-seekers and migrants, who live or are in transit in Libya, particularly if they come from sub-Saharan Africa, suffer violence by the police, arbitrary detentions and deplorable detention conditions. It is frequent for people to be turned away or expelled to countries like Somalia or Eritrea, where their lives are at risk.[56] The Italian government's collective removal in October 2004 of several hundred migrants and asylum-seekers to Libya, without an individual examination of their case, has appalled organisations in Europe and triggered a request to the Commission to open proceedings against Italy for alleged violation of Community law.[57] The fate of sub-Saharan Africans is also of grave concern in respect of Morocco[58] – a recipient of a substantial EU grant of €50million in the framework of the AENEAS programme for financial and techn ical assistance to third countries for co-operation in controlling immigration flows.[59] It is deplorable, therefore, that the refugee and human rights dimension of transit migration should be ignored in the development of action plans.

In December 2004, the European Commission approved agreements with countries in eastern Europe and the southern Mediterranean: Israel, Jordan, Moldova, Morocco, the Palestinian Authority, Tunisia, and Ukraine.[60] In addition, action plans with Egypt and Lebanon are expected to follow in 2005.[61] The action plans proposed all include measures in the field of immigration control. None address the lack of asylum capacity. In seeking assurances from countries around the EU that they enforce border controls so as to contain migration to the EU and take back persons no longer wanted in the EU, the Union plays an ambiguous role: on the one hand it considers democratic principles and the respect for human rights as a central component of the dialogue with neighbouring countries and as a condition for developing further relations with them. On the other hand, by requiring these countries to filter migration it runs the risk of favouring the adoption of undemocratic control policies and of prompting violations of human rights law.

The result of these policies may well be to fuel corruption and political unrest and destabilise countries on the EU's borders. By urging governments to police the movements of their own population, they have the effect of delegitimising national authorities in neighbouring countries which, in too many cases, are already weak and lacking of popular support. They potentially expose refugees and migrants in transit countries, where they have no political voice, to serious human rights violations. International protection is at risk when migration control is delegated to weak, non-democratic governments without adequate technical training and supervision.[62] This is the situation in most countries on the irregular migration routes to Europe.

The European Union's co-operation and support is vital in developing protection capacities in transit countries. For this reason it is important that the action plans issued in the framework of the European Neighbourhood Policy include substantial components on both asylum and migration. The effects of policies that focus exclusively on border control measures and return, without providing safeguards for refugees and asylum-seekers and without prior efforts to strengthen third countries' often drastically underdeveloped protection capacity, is potentially capable of frustrating the EU's external policy objectives of fostering stability, rule of law and human rights protection in the regions around the EU.

Conclusion

The Hague Programme takes asylum and immigration further into the realm of the EU's relations with third countries by calling for the development of partnerships with countries in transit and source areas of migrants and refugees. Partnerships are meant to address both the management of migration flows and the lack of protection capacity for refugees in the countries concerned. However,

the focus so far has been almost exclusively on immigration control measures. In return for trade and aid concessions and through various other incentives, they attempt to establish a series of concentric circles in which states outside the EU play an ever-increasing role in assisting the application of the EU migration management priorities.

The prevailing attitude of encouraging third countries to co-operate in border enforcement measures and to accept returns, particularly of non-nationals, contradicts the premises on which EU partnerships with third countries are supposedly built. Far from contributing to durable solutions for refugees, they constitute in all but name a measure of containment and a form of burden-shifting which seriously undermines the international refugee protection regime. Moreover, by policing the EU's border from the outside against asylum-seekers and their own population, third country governments risk political backlash and breaches of international law which negate the key objectives of the EU's external relations of strengthening democracy, the rule of law and respect for human rights. The consequences and contradictions of EU policymaking in the external dimension of asylum and immigration need to be squarely faced and urgently addressed. Efforts and funding invested by the Community and EU member states should primarily be directed to help the countries of origin and transit establish an institutional framework that respects human rights and meets the needs of refugees, rather than to ensure co-operation in keeping migrants and asylum-seekers out of Europe.

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Notes

1 Tampere European Council, 15 and 16 October 1999, Presidency Conclusions.
2 Seville European Council, 21 and 22 June 2002, Presidency Conclusions, para 33.
3 Ibidem, para 36.
4 See 'EU rejects Blair's line on asylum', *The Observer*, 23 June 2002.
5 Thessaloniki European Council, 19 and 20 June 2003, Presidency Conclusions, para 19.
6 General Affairs and External Relations Council, Conclusions on a Wider Europe – New Neighbourhood, 16 June 2003.
7 *New international approaches to asylum processing and protection*, paper submitted by Prime Minister, Tony Blair, to the Greek Presidency of the EU, 10 March 2003. Available at http://www.statewatch.org/news/2003/apr/blair-simitis-asile.pdf.
8 See, amongst others, Human Rights Watch, *An unjust 'Vision' for Europe's Refugees: Human Rights Watch commentary on the UK's 'New Vision' proposals for the establishment of refugee processing centres abroad*, 17 June 2003; Amnesty International, *Unlawful and Unworkable: Amnesty International's views on proposals for extra-territorial processing of asylum claims*, 18 June 2003; UK Refugee Council, *Unsafe Havens, Unworkable Solutions*, May 2003. See also counsel's opinion on the legality of the UK's proposals obtained by JUSTICE and available at www.justice.org.uk/asylum/index.html.
9 For an analysis of Community asylum instruments, see Anneliese Baldaccini, 'Refugee Protection in Europe: reconciling asylum with human rights', *JUSTICE Journal*, Vol 1, No 2, 2004.
10 The Hague Programme, annexed to the Presidency Conclusions, Brussels European Council, 4 and 5 November 2004, para 1.6.1.

11 Ibidem.
12 Ibidem, paras 1.6.1 to 1.6.4.
13 Communication from the Commission to the Council and the European Parliament on the managed entry into the EU of persons in need of international protection and the enhancement of the protection capacity of the regions of origin: *Improving access to durable solutions*, COM (2004) 410 final, 4 June 2004.
14 UNHCR, *2003 Global Refugee Trends*, 15 June 2004.
15 UNHCR counts 38 protracted refugee situations worldwide – involving more than 6 million people – and not including the Palestinian refugees. Protracted refugee situations are those involving refugee populations of over 25,000 people, who have been in exile in a developing country for more than five years and have no prospect of a durable solution, whether voluntary repatriation, integration in their host country, or resettlement. See, Executive Committee of the High Commissioner's Programme, Doc EC/54/SC/CRP.14, 10 June 2004.
16 Communication from the Commission to the Council and the European Parliament, *Towards more accessible, equitable and managed asylum systems*, COM (2003) 315 final, 3 June 2003, p12.
17 COM (2004) 410 final, supra note 13.
18 See House of Commons, *Hansard*, 9 December 2004: col 738W. Discussions take place in the EU's High Level Working Group on Asylum and Immigration – a cross-pillar group attended by the officials from the member states' home, foreign and development departments.
19 General Affairs and External Relations Council, 2 November 2004, *Conclusions on improving access to durable solutions*, para 7.
20 In January 2005, the then High Commissioner for Refugees, Ruud Lubbers, addressing the informal meeting of Justice and Home Affairs devoted to the external dimension of the European asylum policy, called for a broader commitment to resettlement. He highlighted that, in 2004, only around 4,700 places were made available by the half-dozen European countries that offer resettlement. In contrast, Australia, Canada, New Zealand and the United States together offered 100,000 places for refugee resettlement. See UNHCR, *United Nations High Commissioner for Refugees, Mr. Ruud Lubbers, Talking Points for the Informal Justice and Home Affairs Council (Luxembourg, 29 January 2005)*, 1 February 2005.
21 COM (2004) 410 final, para 51.
22 The preamble to the 1951 Convention relating to the Status of Refugees affirms that '[T]he grant of asylum may place unduly heavy burdens on certain countries, and [...] a satisfactory solution of a problem of which the United Nations has recognized the international scope and nature cannot therefore be achieved without international co-operation'.
23 COM (2004) 410 final, para 41.
24 Home Office's Response to the 11th Report of the House of Lords Select Committee of the European Union, *Handling EU Asylum Claims: New approaches examined*, 29 June 2004, para 145.
25 For an excellent account of the links between migration partnership and the UK's policies on development and trade, see Don Flynn's United Kingdom report in Jan Niessen and Yongmi Schibel (eds) *International migration and relations with third countries: European and US approaches,* Migration Policy Group, 2004.
26 See the Home Office's five-year strategy for asylum and immigration, *Controlling our border: Making migration work for Britain*, February 2005. Also, Home Office press release, *Asylum applications continue to fall*, 22 February 2005.
27 The House of Lords European Union Committee conducted an inquiry into the UK's original proposals for zones of protection, as detailed in the concept paper submitted to the Greek Presidency, and into the Commission's response to it. See House of Lords European Union Committee, *Handling EU asylum claims: new approaches examined*, 11th Report of Session 2003-04, HL 74. As noted in the introduction, following widespread criticism, the UK proposals lapsed into the concept of 'migration partnership'.
28 House of Commons International Development Committee, *Migration and Development: How to make migration work for poverty reduction,* Sixth Report of Session 2003-04, HC 79-I.

29 House of Commons International Development Committee, *Migration and Development: How to make migration work for poverty reduction: Government response to the Committee's Six Report of Session 2003-04*, HC 153, para 58 (emphasis added).
30 Liz Fekete, 'New Danish government will link development aid to asylum', *IRR news*, 17 February 2005.
31 COM (2004) 410 final, para 51.
32 See Article 27 of the amended proposal for a Council Directive on minimum standards on procedures in member states for granting and withdrawing refugee status, Doc 14203/04, ASILE 64, 9 November 2004 (hereafter, the 'procedures directive'). The directive is scheduled for adoption in spring 2005.
33 Procedures for third country transfers within the EU are covered by the Dublin II Regulation but do not address the issue of safety of member states as they are presumed safe.
34 The European Human Rights Court in Strasbourg has clarified that the application of safe third country procedures does not absolve the country of asylum of its duties under Article 3 European Convention on Human Rights (ECHR). The *TI case* clearly illustrates that transfers to third countries, where sufficient safeguards are not in place, are not compatible with the ECHR. Thus, international law places the responsibility for the asylum applicant on the country where the application is lodged. Accordingly, that state is only entitled to transfer responsibility where four conditions are fulfilled: (i) the criteria for the determination of countries as safe must be adequate; (ii) the third country must be safe for the individual applicant and the burden of proof on safety of the third country lies with the country of asylum; (iii) the third country agrees to admit the applicant to a fair and efficient determination procedure; (iv) a meaningful link between the applicant and the third country can be established. *TI v UK,* Application No 43844/98, 7 March 2000.
35 Article 27(2) of the directive provides that: 'The application of the safe third country concept shall be subject to rules laid down in national legislation, including: (c) rules, in accordance with international law, allowing an individual examination of whether the third country concerned is safe for a particular applicant which, as a minimum, shall permit the applicant to challenge the application of the safe third country concept on the grounds that he/she would be subjected to torture, cruel, inhuman or degrading treatment or punishment'.
36 UNHCR, *The European Union, Asylum and the International Refugee Protection Regime: UNHCR's recommendations for the new multiannual programme in the area of freedom, security and justice*, September 2004.
37 See, for instance, the Irish Presidency discussion paper on the application of the safe third country concept prepared for the informal meeting of Justice and Home Affairs Ministers, 22/23 January 2004.
38 Procedures directive, Article 27(1).
39 See minutes of evidence by Erica Feller, Director of International Protection, UNHCR, to the House of Lords European Union Committee, 22 October 2003 (Q35).
40 Opinion of the European Economic and Social Committee, SOC/184 *Managed entry of persons/international protection*, 15 December 2004, para 1.6.
41 COM (2004) 410 final, para 45.
42 'Lubbers outlines ways to better manage refugee problems in EU', *UNHCR news*, 29 January 2005.
43 For an excellent and comprehensive analysis of the links between the EU's external asylum policy and the realities on the ground in refugees' regions of origin, see *Foreign Territory: The Internationalisation of EU Asylum Policy*, Oxfam, 2005 (forthcoming).
44 Hague Programme, para 1.6.3.
45 Ibidem.
46 See Press Release, Informal JHA: *The external dimension of European Asylum Policy*, 29 January 2005.
47 See United for Intercultural Action, Information Leaflet No 24, 16 June 2004.
48 Communication from the Commission to the Council and the European Parliament, *Wider Europe Neighbourhood: A New Framework for Relations with our Eastern and Southern Neighbours*, COM (2003) 104 final, 11 March 2003.
49 See Brussels European Council, 17 and 18 June 2004, Presidency Conclusions, para 64.

50 Commission Communication, European Neighbourhood Policy: Strategy Paper, COM (2004) 373 final, 12 May 2004.
51 COM (2004) 373 final, p13.
52 *Proposal for a Regulation of the European Parliament and of the Council laying down general provisions establishing a European Neighbourhood and Partnership Instrument*, COM (2004) 628 final, 29 September 2004.
53 COM (2004)373 final, p17.
54 See, for instance, in relation to Tunisia, the Commission staff working paper on intensified co-operation on the management of migration flows with third countries, SEC (2003) 815, 9 July 2003.
55 As of 15 February 2005, Jordan, Lebanon, Libya and Syria had acceded to neither the 1951 Convention nor the 1967 Protocol. See states parties to the Convention and the Protocol at www.unhcr.ch.
56 *Libya Blocks Visit by Rights Group – Torture, Political Trials, Treatment of Migrants Remain Major Concerns*, Human Rights Watch press release, 7 December 2004.
57 *Italian associations file a complaint with the European Commission against Italy's collective expulsion of hundreds of migrants to Libya*, Statewatch news, available at www.statewatch.org/news/2005/feb/04italy-expulsion-complaint.htm.
58 See appeal issued on 17 February 2005 by two Spanish organisations in relation to the violation of the rights of would-be migrants at the hands of the Moroccan military, translated by Statewatch at www.statewatch.org/news/2005/feb/14sp-morocco.htm.
59 Regulation (EC) No 491/2004 of the European Parliament and of the Council of 10 March 2004 establishing a programme for financial and technical assistance to third countries in the areas of migration and asylum (AENEAS). The regulation establishes a five-year instrument (2004-2008), with an overall indicative budget of 250 million. See also Ferruccio Pastore, 'The challenge of trans-Mediterranean migration', *Media Monitoring Network,* 20 March 2004.
60 *European Neighbourhood Policy: the first Action Plans*, IP/04/1453, Brussels, 9 December 2004.
61 Communication from the Commission to the Council on the Commission proposal for action plans under the European Neighbourhood Policy (ENP), COM (2004) 795 final, 9 December 2004, p5.
62 See Ferruccio Pastore, *Cooperation with Sending and Transit Countries: Beyond Sticks and Carrots?*, paper presented at the Dutch Presidency Conference on Asylum, Migration and Frontiers, September 2004.

Fundamental Rights Agency: utility or futility?

Marilyn Goldberg discusses the proposal to establish a Fundamental Rights Agency.

The idea behind establishing a Fundamental Rights Agency within the EU arose in the run-up to the 50th anniversary of the Universal Declaration of Human Rights, when the advisability of setting up a Union agency for human rights and democracy was suggested.[1] Two different models were put forward at the time. One model suggested the setting up of a reporting and/or advisory agency and the other the setting up of an 'implementing agency'. But neither of these models was ultimately implemented. It was only in 2003 that the decision was taken to expand the remit of the European Monitoring Centre on Racism and Xenophobia (EUMC) and to convert it into a Fundamental Rights Agency.

The decision to extend the mandate of the EUMC is regarded as a logical consequence of the growing importance of fundamental rights issues within the European Union. It results from the proclamation of the Charter of Fundamental Rights in 2000 and its incorporation into the Constitutional Treaty, accompanied by the provision on the accession of the Union to the European Convention on Human Rights. But this decision has, however, sparked a debate between the main human rights stakeholders in the EU (eg the Council of Europe, the Network of Independent Experts, NGOs, etc) on the necessity of the establishment of such an agency.

Purpose

There is one question, above all, that must be asked in the debate on the Fundamental Rights Agency: 'what is its purpose'? Should it monitor the activities of the European institutions or take a broader role in overseeing the compliance of member states with the principles that they are committed, through their membership of the ECHR and via Article 6 TEU, to upholding? This important question remains unanswered and it is still unclear today what kind of role the Fundamental Rights Agency will actually play.

Fears over human rights duplication

One of the reasons for the difficulties in outlining the specific role for this agency is that there already exist a wide constellation of national and international instruments, organisations and bodies which operate in the human rights arena. There are growing fears that this Fundamental Rights Agency will duplicate the work already carried out by these other agencies

and international organisations. There is, for instance, the Council of Europe (CoE) which, over the past 55 years, has been busy developing a considerable human rights acquis, encompassing not only standards on civil and political rights, social rights, minority rights, treatment of persons deprived of their liberty and the fight against racism, but also active European monitoring in respect of these standards by its member states.[2] Over the past five decades the CoE has developed, a broad arsenal of human rights mechanisms, functioning with recognised expertise and professionalism.[3] Through all these monitoring activities, the CoE clearly demonstrates its pre-eminent position as regards the protection and promotion of human rights in Europe. It identifies issues of non-compliance, addresses recommendations to member states and issues binding judgments on state parties whenever these standards are not respected.

The Secretary-General of the CoE, Terry Davis, has even said 'With the best will in the world, I can't figure out what it [the agency] is going to do'. A multiple of European institutions in the field of human rights will not necessarily mean better protection of those rights. On the contrary, creating institutions whose mandates overlap with those of existing ones could, in practice, lead to a dilution and weakening of the authority of each of them, which in turn will mean a lesser, not a stronger, protection of human rights to the detriment of the individual. The risk of duplication is, therefore, real and needs to be addressed accordingly by the European Commission.

The desired mandate of the Fundamental Rights Agency?

From the EU Commission's public consultation document[4] it is clear that it does not yet have a clear idea of what or how the Fundamental Rights Agency should fulfil its role.

The Fundamental Rights Agency must draw on the concept of the EU as a union of values, focus on human rights within the EU and be seen as an independent and transparent body with an adequate structure and budget. Preferably the agency should champion the Charter of Fundamental Rights proclaimed in 2000 and help give real effect to what is one of the most ambitious human rights texts in the world.[5]

Identifying 'gaps'

The establishment of such an agency should play an important role in identifying 'gaps' in the development of a coherent and robust EU human rights policy agenda.

Until today, the EU has lacked an adequate mechanism to monitor the application of fundamental rights in practice and to evaluate how the policies

and actions of its institutions promote and protect fundamental rights in the EU. Hitherto the EU has had a somewhat ad hoc approach to human rights. There is no body or institution especially in charge of monitoring human rights violations in the EU. The EU institutions mostly rely on reports drawn up by the United Nations, the Council of Europe, the Network of Independent Experts (NIE) and a variety of other international NGOs.

This is a serious gap which undermines the strong human rights guarantees proclaimed in the treaties. The establishment of a Fundamental Rights Agency with an effective mandate covering all the rights contained in the EU Charter of Fundamental Rights holds the potential to redress this shortcoming.

Monitoring, data collection and investigation

Ideally this new Fundamental Rights Agency should focus on the human rights situation within the EU and actively monitor human rights practice on the ground rather than only collecting data as stipulated in the Commission's proposal. A clear mandate should be given to allow the agency to respond to the problems where they occur. At the moment, there are no EU agencies or bodies that are tasked with monitoring the EU's human rights situation within EU borders. There is a Network of Independent Experts (the NIE)[6] that assesses the fundamental rights situation on the basis of an analysis of the legislation but this network lacks a monitoring capacity on the ground.

The importance of data collection should, however, not be overlooked. Data collection has played an important role in the success of the EUMC. The EUMC succeeded, through data collection, in providing objective and reliable data that helps in formulating policies against racism, xenophobia and related intolerance in the EU. The experience and expertise gained by the EUMC should be transferred to the agency and be used to provide reliable data relating to the enjoyment of fundamental rights in the EU. Data collection from government sources alone would be insufficient, and must be supplemented by independent bodies and experts to ensure that the agency has a holistic and reliable understanding of the situation.

Finally, the Fundamental Rights Agency should not be seen as an agency conceived only 'to help ensure compliance with fundamental rights of both Community law and policies and implementation of the latter by Member States'.[7] This specific task is the responsibility of the Commission and should not be delegated to this Fundamental Rights Agency. The parliamentary committees of the European Union (and domestic scrutiny committees such as the House of Commons European Scrutiny Committee and the House of Lords Select Committee on the European Union) should be the ones ensuring that the legislation proposed by the Commission complies with fundamental rights.

However, the agency could provide information to these committees, be invited as a matter of course to experts' meetings at the European Commission during the pre-legislative phase and be entitled to have access to relevant legislative documents and pre-draft papers.

Close collaboration with other organisations and bodies

In order to advance the protection and promotion of human rights within the EU, close partnerships with other inter-governmental organisations such as the United Nations and the CoE should be established. Especially, close co-operation and synergy with the CoE will be a key factor in the agency's success. The agency's mandate should contain a general provision to the effect that its tasks and activities shall not duplicate the role and functions of Council of Europe institutions and mechanisms operating in the human rights field but, on the contrary, co-operate actively with them.

Not only close partnerships but also appropriate contact points should be set up with relevant bodies and institutions in member states in order to facilitate collaboration and identify violations of human rights on the ground.

Close collaboration and partnership should be seen as a way to avoid the risk of producing duplicate reports and analysis on the promotion and protection of human rights. It is extremely important that the agency's work focuses on areas where monitoring is not being undertaken elsewhere.

Recommendations

Aside from monitoring the human rights situation on the ground, the Fundamental Rights Agency should be given the power to make recommendations so that improvements could be made at EU level in the area of fundamental rights protection and promotion. The recommendations made by this agency should be practical and widely distributed in order to reach a large audience. Its recommendations should be followed up in successive reports to the EU institutions.

Conclusion

The creation of a Fundamental Rights Agency within the EU could make a helpful contribution, provided that a useful role and field of action is defined for it – one which genuinely 'fills a gap' and which thus presents added value and complementarity in terms of promoting respect for human rights. Defining such a role presupposes careful reflection within the EU about the aims, content, scope, limits, and instruments of its own internal human rights policy. Conversely, there is no point in re-inventing the wheel by giving the agency a role which is already performed by existing human rights institutions and mechanisms in Europe.

Thus, a Fundamental Rights Agency should be created to help close a major credibility gap for the European Union – between high-sounding ideals and low-level implementation. Sensitively established, it should give more bite to EU legislation; make use of local expertise and agencies; complement the Council of Europe; avoid being a toothless bureaucracy and advance the project of developing a Europe that demonstrates its commitment to the values of its charter.

Marilyn Goldberg is a legal officer at JUSTICE working on a project on the EU charter of fundamental rights and freedoms which is the subject of a website just published by JUSTICE – http://www.eucharter.org.

Notes

1 Para 46 of the Cologne Conclusions of June 1999 'The European Council takes note of the Presidency's interim report on human rights. It suggests that the question of the advisability of setting up a Union agency for human rights and democracy should be considered'.

2 *Practical impact of the Council of Europe human rights mechanisms in improving respect for human rights in member states*, DG-II(2004)018.

3 The European Convention on Human Rights and its Protocols; the Revised European Social Charter; the European Convention for the Protection of Torture and Inhuman or Degrading Treatment or Punishment; the European Commission against Racism and Intolerance; the Framework Convention for the Protection of National Minorities.

4 Communication from the Commission – *The Fundamental Rights Agency Public consultation document*, COM (2004) 693 final.

5 While the Charter is not yet formally binding per se, the European Parliament, the Council and the Commission have committed themselves to observing its standards and it has already started to play a certain role in the case-law of the European Court of Justice, the Court of First Instance as well as the European Court of Human Rights. The Charter has now been integrated into the Treaty establishing a Constitution for Europe, which was signed in Rome on 29 October 2004.

6 The NIE has been set up by the European Commission upon request of the European Parliament. It monitors the situation of fundamental rights in the member states and in the Union, on the basis of the Charter of Fundamental Rights. It issues reports on the situation of fundamental rights in the member states and in the Union, as well as opinions on specific issues related to the protection of fundamental rights in the Union. The content of this opinion does not bind the European Commission. The Commission accepts no liability whatsoever with regard to the information contained in this document.

7 Communication from the Commission – *The Fundamental Rights Agency Public consultation document*, COM (2004) 693 final.

The biometrics behind the Bill: an overview of the technology and identity cards

Annabella Wolloshin's article focuses on three key issues in relation to the use of biometrics in the identity card scheme proposed by the government:

- a brief look at basic characteristics of facial recognition, iris recognition and fingerprints;
- the inherent weaknesses of each biometric; and
- performance issues including accuracy, 'enrolment' (ie comparison of images with those on a database); and scale of implementation.

It ends with an expression of concern over the likely real cost of systems which will meet the requirements for success set out in the government's own feasibility study ie: operation of the system without human intervention; the degree of 'uniqueness' of the biometric and any consequent likelihood of confusion; technical factors such as security and robustness; and social factors such as public acceptability. The likely expense of a system that meets these conditions is likely to be significantly more than the government's current estimate of a card that will cost £85. What is more, there remain questions about the adequacy of the current technology and also whether public support will continue.

Introduction

In January 2005, the Identity Cards Bill (the Bill) reached the committee stage in its journey onto the statute book. The Bill will establish a National Identity Register. This will contain personal information and biometric information[1] for each UK resident. The government plans that such biometric information will help prevent people's identities from being stolen and will securely confirm a person's identity when a card is checked.

In its current form, the Bill permits the taking of 'fingerprints and other biometric information'.[2] 'Biometric Information' is defined in the Bill as 'data about external characteristics, including, in particular, the features of an iris or any other part of the eye'.[3] This definition has caused much debate in the standing committee[4] and has raised concern about the reliability, effectiveness

and cost of biometrics on a national scale. Just how many biometric identifiers will a person be required to provide? A feasibility study commissioned by the government,[5] found that in order for a scheme to work at a national level[6] a fingerprint system should use 'at least' four fingers per person, preferably eight, in order to avoid false matches.[7] If iris recognition is chosen, both eyes[8] should be scanned. This will add time and cost to the implementation of the scheme. The main cost of a national identity register lies in the use of biometrics. This means that the more biometrics required for a card, the more it will cost.

The current cost estimates stand at £85[9] per person with the main cost element being 'the resources expended in collection of the images for biometric enrolment'.[10] This works out at £500 million over the originally estimated ten-year roll out period.[11] However, it is unclear if this only takes into account the cost of including one biometric on the card or multiple biometrics. Will the inclusion of all three biometrics (facial, iris and fingerprint) increase the cost exponentially to £150 million over ten years taking the costs over the government's budgeted plan? Before embarking upon an uncertain and costly project, can we be certain how safe and reliable the technology is behind the biometrics? The government is currently looking at three biometrics for use in the ID card scheme, namely facial, iris and fingerprint recognition. The UK Passport Office already plans to introduce facial recognition biometric for British passports in late 2005 – early 2006.[12] In addition to the consideration of cost, there is the vast question of just how effective the proposed biometrics will be. Not only do the inherent advantages and disadvantages of each biometric identifier need to be considered, but consideration must also be given to the purpose for which they are being used. For example, there is an argument that some biometrics are more suitable for checking a unique identity while some are more suitable for checking the identity on a card against a watch list.[13] There are further procedural and performance issues which are key to the successful implementation of a biometric ID card scheme together with fundamental enrolment concerns to ensure the system is set up correctly from the outset.

What are biometrics?

Biometric identification systems measure 'physiological and behavioural characteristics of a person'[14] with the aim of providing a reliable means to distinguish one person from another. Biometric identification has three potential uses in an 'entitlement scheme'[15] such as the proposed ID card scheme. It can:

- ensure a unique identity by checking to prevent duplicate applications;
- verify that the person presenting an entitlement card is the person to whom it was issued; and
- check the identity on the card against a 'watch list' of a selection of facial or fingerprint images.

Each of these purposes has different performance requirements.[16] The best way to use any biometric, and to some extent the reliability of a biometric, will depend on which of these three applications is being used.

Facial recognition

Facial recognition systems use computer programs which analyse facial images. The programs measure characteristics such as nose length, distance between eyes and jaw angle. Using this data, the program creates a unique file called a 'template'. This template can then be compared against other templates in a database to check to see how closely they match.[17] Alternatively, a template stored electronically in a passport, for example, can be compared against a newly-taken image, to verify that the person presenting the document is its rightful owner.

Facial recognition systems are currently used in several US airports (Logan Airport in Boston, TF Green Airport in Providence, RI, San Francisco International Airport and Fresno Airport in California) and have been used in Northern Ireland by the security services. Many countries are now also moving towards biometric passports,[18] and the key biometric identifier chosen for this (by the ICAO[19]) is the face (with a fingerprint or iris scan as a secondary identifier for countries to chose from if they wish).

Iris recognition

Iris recognition also works by scanning an image and then storing it in template format. A monochrome camera scans the iris using both visible and infrared light which picks out the iris's characteristics in great detail.[20] Not all of the iris is used: a portion of the top, as well as 45° of the bottom, are avoided to account for eyelids and camera-light reflections. The image of the iris is then converted by algorithms into a template known as an IrisCode™ which is stored for future identification attempts. This allows for massive storage on a computer's hard drive and means that very large databases can be searched very quickly (it is capable of matching over 500,000 templates per second). To date, the most reliable[21] of these algorithms are those invented by Dr Daugman OBE, and one specific algorithm patented by Dr Daugman is currently the most accepted and widely used in iris code recognition systems.

Iris recognition has an attractive performance track record and the iris has many inherent advantages in being used as a biometric identifier. To name but a few, it is the most individually distinctive feature of the human body – statistically more accurate than DNA. No two irises are alike, not even among twins; not even the left and right iris of one individual is the same. The iris does not change over time – compare this to fingerprints which can be damaged by manual labour, for example, where it may be difficult to obtain a clear print

if the finger is cut or dirty. For the purpose of ensuring a unique identity, the iris has the added advantage that its pattern variability (or 'degrees of freedom') among different persons is enormous. This means that there is less chance of a false match occurring. As is explained further on (see Performance issues), this is crucial to the deployment of a system using biometric methods.

Fingerprints

Fingerprint recognition is probably what one thinks of first when using the term 'biometrics' and it is arguably the oldest biometric out of the three proposed by the government (if one does not include our automatic ability to check the identity of a person by looking at him/her or a photograph of him/her which is a basic form of facial recognition). Large-scale fingerprint applications operate using the co-ordinates of points on the fingerprint where ridges end or are split. There are also systems that use the whole of the fingerprint pattern. Pattern-based systems can be less costly and may have performance advantages for one-to-one verification, but the minutiae-based approach is preferred for 'one-to-many' matching.

Practical problems associated with individual biometrics

Biometric methods do not offer 100 per cent certainty in authenticating individuals.[22] Each biometric identifier has its own inherent weaknesses which means that on its own it may not provide an adequate method of authentication and may need to be combined with another biometric – although this causes its own problems, as is explained below.

Facial recognition

There are many problems associated with the practicalities of facial recognition technology, relating to the images taken and changes to the subject. The International Biometric Group[23] has listed the following as aspects which work against a successful verification: change in facial hair; change in hairstyle; adding/removing hat; adding/removing glasses; change in weight; change in facial aspect (angle at which facial image is captured); and 'loud' clothing that can distract face location.

Unlike fingerprints and irises, people's faces change over time. The systems can be confused by everyday changes in hairstyle, facial hair, weight gain or loss, simple appearance-changing features such as glasses, varying expressions and the effects of ageing.

A further practical problem is that if images are being collected by video-surveillance operators, they may be subject to the exercise of the operators' own prejudices. Camera operators in Britain have been found to focus

disproportionately on people of colour and women. Further, the technology requires a view of the full face, something which may be difficult for religious reasons (eg such as women who wear a hijaab). However, under the new guidelines issued for passport photographs, people are already required to have pictures taken without anything covering the face.[24]

On its own, facial recognition is neither advanced nor accurate enough to identify one person in 50 million. The Feasibility Study reported that recent trials show poor identification performance.[25] In addition face images are genetically determined and cannot be relied upon to distinguish between identical twins (which iris and fingerprint recognition are capable of doing). However facial recognition has proved useful in finding duplicate enrolment in the system.[26]

Iris recognition

One of the major problems with iris recognition is not so much the reliability of the science behind the technology, but rather the quality and the operation of the hardware. There are many cameras on the market which can be used for iris recognition, Panasonic, Oki and LG being the main producers. Iridian Technologies Inc which holds the patents behind iris recognition technologies has a certification program for hardware which assures that certified iris cameras and software meet certain standards for performance, interoperability, safety (this means Iridian's Proof Positive iris cameras have met stringent government and industry standards for eye safety), and security (assures compliance with Iridian and industry standards for cryptographic and physical security, as well as countermeasure protection). Panasonic, Oki, and LG all use Iridian technology. The only industry standard that is publicly available is BioAPI.[27] This is an application programming interface standard and Iridian will be releasing products compatible with BioAPI. One such approved camera was the Panasonic BM-ET300, yet this is one of the less costly models and one which is being employed by the UK in the ID card trials. Dr Daugman has raised concerns over the quality of some of the hardware[28] which could impact upon the iris scan and therefore the IrisCode™.

Even though it is recognised that iris recognition is one of the safest and most secure of the biometrics, it is still susceptible to fraud. As well as exploring ways to deceive fingerprinting technology (see the gummy fingers below), Tsutomu Matsumoto, professor in Cryptography at Yokohama University, has also explored ways of deceiving iris recognition systems[29] by creating 'artificial irises'. Artificial irises are created from pieces of paper with printed monotone colour patterns similar to irises, based on the eye pictures captured by an iris image capture device used in an iris recognition system or by an infrared camera on the market. Such artificial irises are accepted at a certain rate with a certain

matching time by some three models of commercially available iris recognition systems supplied by plural vendors. Two of them are designed typically for PC-login and contain portable iris image capture devices, and the other is a gate control system equipped with a relatively large stationary iris image capture device. These results imply the necessity of enhancing the 'liveness' detection function at least for a certain class of iris recognition systems.

Fingerprints

Other than the problem of damaged prints and enrolment issues discussed further below under 'Enrolment', the principal problem associated with fingerprint recognition is the ease with which a false identity can be registered.

In August of last year, it was reported[30] that two computer hackers claimed to have developed a technique to defeat biometric fingerprint scanners used to authenticate electronic purchasing systems. The system they developed involves the use of latex fingertip patches designed to be used whilst under observation. This method involves taking a digital picture of the fingerprint image produced by the graphite powder and adhesive tape, enhancing this image with graphical software, printing it onto foil and transferring it to a photosensitive circuit board. The board is then exposed and etched to create the three dimensional structure of the fingerprint. It is then transferred on to liquid latex which is dried to create a thin material similar to the consistency of a latex glove. This small piece of latex is attached to a person's fingertip prior to using the scanner. One of the hackers is quoted as saying, 'Most of the fingerprint systems are attackable and too weak to be used … this is a very simple and low cost attack and if you have more money and more time, you can find other ways to attack it'. No data appeared to be forthcoming with respect to the success of their attack and which systems were most easily defeated.

An award for 'most amusing innovation' should be given to four Japanese students who developed a method[31] in 2002 for creating artificial fingers easily made of cheap and readily available gelatine. The students used $10 worth of gelatine bought in a local supermarket and moulded an artificial finger in the equivalent of a home kitchen. They say that these 'gummy' fingers can even fool sensors being watched by guards as the clear gelatine finger can be formed over your own which lets you hide it as you press your own finger onto the sensor. Further, the gelatine is edible, so evidence is easily destroyed. They state that these artificial fingers were 'accepted [by] extremely high rates by particular fingerprint devices with optical or capacitive sensors'. They report that they could enrol the 'gummy' fingers in all of the 11 types of fingerprint systems that they tested[32] and further that all of the fingerprint systems accepted the 'gummy' fingers in their verification procedures with a probability of 68-100 per cent.

One of their recommendations is that fingerprint systems should take 'live and well detection' measures to examine features intrinsic to live fingers (such as temperature and moisture levels) in order to ensure that artificial/cadaver fingers are not used in an effort to defeat the detection systems. However, they reported that even devices with these 'live and well' features supposedly installed were easily fooled by simply moistening the 'gummy' finger before imprinting it onto the sensor.

There are other pitfalls associated with long-term use of fingerprints as a means of identification.[33] In their article, Uludag, Ross and Jain highlight that:

> *The matching accuracy of a biometrics based authentication system relies on the stability (performance) of the biometric data associated with an individual over time. In reality, however, the biometric data acquired from an individual is susceptible to changes due to improper interaction with the sensor (e.g., partial fingerprints), modifications in sensor characteristics (e.g. optical vs. solid-state fingerprint sensor), variations in environmental factors (e.g. dry weather resulting in faint fingerprints) and temporary alterations in the biometric trait itself (e.g. cuts/scars on fingerprints). In other words, the biometric measurements tend to have a large intra-class variability. Thus, it is possible for the stored template data to be significantly different from those obtained during authentication resulting in inferior performance (higher false rejects) of the biometric system.*

In order to account for the above variations, multiple templates, that best represent the variability associated with a user's biometric data, should be stored in the database. For example, one could store multiple impressions pertaining to different portions of a user's fingerprint in order to deal with the problem of potentially overlapping fingerprints '… [However] there is a trade-off between the number of templates, and the storage and computational overheads introduced by multiple templates.'

Performance issues: accuracy and 'enrolment'

According to the Feasibility Study, current biometric systems are not designed for use on the scale envisaged by the government. In order for the roll out process to begin in 2007, the study estimates that background work would need to have commenced in early 2003. It is debatable whether this target will have been reached with the government's pilot running from April to December 2004.[34] The success of the system will be dependent on many technical and social factors. It is these factors which will need to be tested effectively before the system is rolled out. Set out below are some of the technical factors which would need to be considered in the implementation of an ID card scheme.

The effectiveness of biometric systems depends on the accuracy of 'non-match' and 'false non-match' rates. If the error rate in either of these is too high, a system will simply be unworkable. A false match rate measures the probability that a person's biometric matches the enrolment template of another person. The false non-match rate measures the probability that a person's biometric fails to match his/her own enrolment template. Since the UK database will perform a one to many comparison – ie a person will present a biometric for comparison against all the templates registered in the database – a false match rate must remain very low as each case will require manual checking which will be costly.[35] The Feasibility Study, based on a throughput of several thousand applications a day, found that 'a target of less than 1 in 1,000 for the false alarm rate offers a reasonable compromise'. Anything above this would make the system unworkable.[36] Problems may also arise in the error rate setting unless the system operators are adequately trained since it is they who set the decision threshold. The 'decision threshold' determines the degree of similarity required between the captured biometric and the stored template before the similarity is deemed matched. If this is set too high or too low, it could yield too many 'false non-match rates' or too many 'false match rates' respectively.

A person's ability to enrol into the database or a submission of a poor quality image may also affect the reliability of the system. This is also termed as a 'failure to acquire rate' where the system is unable to capture or locate an image of sufficient quality. This can happen on enrolment or when presenting a captured image to be compared against one on the database. The failure to acquire rate may depend on adjustable thresholds for image. There are ways to prevent or at least reduce failure to acquire problems but this will depend on the equipment which is being used and the particular problem involved. In most cases, operator instructions and assistance should reduce instances of failure to acquire rates. For example, in iris recognition, any illumination sources which would cause a reflection on the iris should be eliminated. If a person is blind in one eye, it may be difficult for him/her to position his/her good eye correctly. In such circumstances he/she will need assistance. Again, each biometric identifier presents its own problems in this area.

Facial recognition

Problems are likely to occur if there is too much or too little movement by the subject. The quality of the capture device can also affect enrolment as would a change between enrolment and verification cameras (quality and placement).

Differences in lighting, background, camera angle and the camera used can all affect the image, which is a problem unless all images are to be taken in set conditions. An evaluation by the Biometrics Working Group[37] found that the level of performance realised under ideal lighting conditions and with subjects

directly facing the camera and with test images taken one to two months after enrolment was unacceptably low.[38] The false non-match rate was found to be as high as 6 in 10 with a longer time span between enrolment and verification attempts and with less ideal illumination.

Iris recognition

Because the iris is a small target scanning will need to be done at close quarters (no more than three feet)[39] and, therefore, requires the subject's co-operation. The iris is located behind a curved wet reflecting surface and can be partially hidden by eyelids. This may mean that some subjects will have to draw back their eyelids in order for an accurate image to be taken. There will also be a small percentage of the population that will be unable to be enrolled under this system and in such cases identity will need to be checked using the current processes rather than through the use of the biometric database.

The false match rate for iris recognition, however, is significantly better than that for facial recognition with fewer than 1 in 1 million false-matches and a false non-match rate of below 1 in 100.[40] This, however, was based on an evaluation using a large database by the principal technology supplier, Iridian Technologies Inc. Furthermore, the technology used is dependent upon the co-operation of the subject. This can cause problems and 'many users struggle to interact with the system until they become accustomed to its operation. This is more of an issue where use of the technology is infrequent such as in national ID projects.'[41] The Feasibility Study covers precisely this issue and states that 'We envisage that in cases of difficulty some operator assistance will be needed and it may be necessary to use a modified system for collecting the biometric.'[42]

Fingerprint recognition

In the case of fingerprint registration, different sensors are used at the registration and verification stages which can impact upon the ability to match the stored template with the new image to be compared against it. In an article entitled 'Biometric Sensor interoperability' Ross and Jain comment[43] that 'most biometric systems operate under the assumption that the date (viz, images) to be compared are obtained using the same sensor and hence, are restricted in their ability to match or compare biometric data originating from different sensors'. They go on to say that optical sensors and solid-state capacitive sensors record significantly different images 'due to variations in imaging technology, resolution of the acquired image, area of the sensor, position of the sensor with respect to the user etc'. However, if sensor software is updated periodically, there would have to be a corresponding re-enrolment of all individuals previously enrolled using the old sensor. This could be extremely time-consuming, expensive and would defeat the purpose of the fingerprint identification system. They state:

> *Almost every biometric indicator is affected by the sensor interoperability problem. However, no systematic study has been conducted to ascertain its effect on real world systems. Normalization at the raw data and feature set levels of a biometric system may be needed to handle this problem. There is also a definite need to develop matching algorithms that do not implicitly rely on sensor characteristics to perform.*

The Federal Bureau of Investigation (the FBI) have been using fingerprints as a means of identification for almost a century and currently hold approximately 70 million fingerprints within their database.[44] However, there are still substantial problems inherent in the system, namely that the final decision as to whether a print constitutes a match is subjectively determined using human judgement. The database sorts through the prints held on file and then narrows the search. Then a fingerprint examiner makes the actual match by eye, which can be a long and arduous process. It has been reported[45] that recent miscarriages of justice resulting from incorrectly matched fingerprints have led to the discovery that there has never been a study of the reliability of crime scene fingerprint matching and furthermore, there are no agreed-upon standards for what constitutes a match. The report highlights the fact that there is no global standard for declaring a match, for example, fingerprint examiners in Italy look for 16 or 17 points of similarity, those in Brazil look for 30, those in Sweden look for 7, those in Australia look for 12 and in the US, most examiners do not even use a point system. If serious flaws are still being uncovered in well-established fingerprint matching systems such as that used by the FBI, then surely this does not bode well for the accuracy or reliability of fingerprint technology within identity schemes.

Scale of implementation

The main reason for using biometrics in an identity card scheme is to establish a unique identity. This means that one template is searched against all the templates on the database. In the case of the UK, this would mean that the database for this identification application would eventually contain 50 million biometric identities once the entire UK population was enrolled. According to the Feasibility Study, because of the size of the database, 'the stringent performance requirements rule out most biometrics other than fingerprint or iris recognition'.[46] One of the principal concerns in a UK identity card scheme, is that the current technology will be unable to cope with a scheme this size and that no biometric identification system has yet been tested on a population this large.

China is in the process of developing a similar scheme but has abandoned[47] the biometric element, since the technology has proved unworkable with large populations, in favour of a microchip system.[48] During the third sitting of the

standing committee[49] it was asserted that iris recognition had only been used in limited trials, the largest in Afghanistan which involved 60,000 refugees.

However, according to Dr Daugman OBE,[50] the largest current deployment is in the United Arab Emirates (UAE). The UAE Ministry of Interior requires iris recognition tests on foreigners entering UAE from all 17 air, land, and sea ports. Each traveller is compared against each of 544,000 expellees (foreign nationals expelled for various violations) via internet links, whose IrisCodes™ were registered in a central database upon expulsion. This would correspond to the use where a person is checked against a 'watch list'. On an average day, 7,000 arriving passengers are compared against the entire watch list of 544,000 in the database; this is about 3.8 billion comparisons per day. A total of 22,634 matches have so far been found between persons on the watch list and persons seeking re-entry. According to the UAE Ministry of Interior, all of these matches have ultimately been confirmed by other records. The time required for an exhaustive search through the database is about one second. So far 3,428,000 exhaustive searches against that database have been done; thereby approximately 840 billion iris comparisons have been performed. Admittedly, the number 544,000 remains a long way off 50 million and the type of use is different, but it provides some information as to the effectiveness and speed of iris recognition.

Conclusion – are biometrics a good idea?

According to the Feasibility Study, an ID card system on the scale contemplated by the government would be groundbreaking. The key to a successful use of biometric identification depends on four factors.[51] These are:

- the extent to which the system operates without human intervention;
- the degree of 'uniqueness' of that feature and any resulting confusion with other identities in the group;
- technical factors such as security, robustness, cost and reliability; and
- social factors such as acceptability and trust in the operators of the system.

Only the second of these limbs appears to be met to any degree of satisfaction with iris recognition technology and to some extent with fingerprinting. However, most authorities seem to agree that multiple biometrics would provide further certainty although interoperability issues would need to be resolved. Before any of these issues can really be looked at in detail the true cost of the project needs to be ascertained – an area on which the government has provided scant information. This leads one to a 'chicken and egg' situation since the costs cannot be properly assessed until the technological aspects are looked at in detail, yet these are irrelevant if the project is too costly to implement. It is more likely that the government will fudge the issue of cost, as was thought

by standing committee. There is potential for some of the cost to be hidden if there is no clear separation of costs between those associated with the ID cards and those associated with passports.[52] Even once the cost concerns are met, there remains the question of the adequacy of the current hardware and 'image capture devices' which appear to be far from ready for use at a national level. In the face of all these factors remains the fickle issue of public acceptability.

Annabella Wolloshin is a solicitor at Clifford Chance and a member of a group of its trainees and solicitors who worked with JUSTICE in researching issues relating to identity cards.

Notes

1 Schedule 1 to the Bill sets out the information to be held on the register.
2 Clause 5(5)(b) Identity Cards Bill, as amended in standing committee B 20 January 2005.
3 Clause 43(1) of the Bill.
4 Committee stage, third sitting, col 137, per Mr Allan (Sheffield, Hallam) (LD).
5 *Feasibility Study on the Use of Biometrics in an Entitlement Scheme*, (the Feasibility Study) National Physical Laboratory, (NPL) by Tony Mansfield of NPL and Marek Rejman-Greene of Btexact Technologies.
6 The Feasibility Study is based on the premise that if the system is rolled out nationwide, this would mean approximately 50 million persons would be registered on the database. Para 11.
7 False match rate is when a person's biometric matches the enrolment template of another person.
8 *Feasibility Study on the Use of Biometrics in an Entitlement Scheme*, February 2003, p16, para 57, recommendations 5 and 6.
9 Committee stage, third sitting, col 136, per Minister for Citizenship and Immigration, Mr Desmond Browne. 'As for costs, the hon. Gentleman is right that the Government have published only a revised figure, which is £85 for a combined passport and ID card that lasts for 10 years.'
10 Para 105 of *Feasibility Study on the Use of Biometrics in an Entitlement Scheme*, February 2003.
11 Idem.
12 http://www.ukpa.gov.uk/identity.asp.
13 Feasibility Study para 11.
14 *Feasibility Study on the Use of Biometrics in an Entitlement Scheme*, para 22.
15 Para 22.
16 Feasibility Study, para 22.
17 'Q&A On Face Recognition' http://www.aclu.org/Privacy/Privacy.cfm?ID=13434&c=130.
18 Due to the requirements of the US. Although the deadline for biometric passports for travellers from visa-waiver countries to the US has been extended to October 2005 as most countries were having trouble complying by the original October 2004 deadline. The EU Commission has adopted a proposal for the inclusion of facial biometric in EU passports, and this is due to go before the European Parliament for consideration. The UK passports office ran a trial of biometric technology earlier this year, and the Australian government has passed legislation to allow for biometric passports. The USA, Belgium, Denmark, Germany, Ireland, Italy, Japan, The Netherlands, France, Canada and New Zealand have all announced plans for, or trials of, biometric technology in travel documents. See Hansard, Australian House of Representatives, 4 August 2004, pp31963-4; *Proposal for a Council Regulation on standards for security features and biometrics in EU citizens' passports* COM (2004) 116 final; *Biometric Passports in 2005 as Trial for UK National ID Cards* (5 December 2003) http://www.findbiometrics.com/viewnews.php?id=665;*The UKPS biometrics enrolment trial* http://www.ukps.gov.uk; *New high-tech passports with facial recognition on distant horizon* (28 June 2004) http://www.realcities.com; *Face recognition passports expected by December*

(15 June 2004) http://www.cnn.com; *Canada to introduce biometric passport despite privacy concerns* (21 July 2004) http://www.canada.com.
19 International Civil Aviation Organisation, *Biometrics Deployment of Machine Readable Travel Documents: Technical Report Version 2*, 21 May 2004.
20 The American Academy of Ophthalmology uses similar ranges in their studies of macular cysts.
21 *Iris Recognition Results and Conclusion* by Paul Robichaux and Dmitry Khabashesku: http://cnx.rice.edu/content/m12495.
22 Feasibility Study para 4.
23 http://www.biometricgroup.com/reports/public/reports/biometric_failure.html.
24 Head coverings may only be worn in passport photographs if they are worn for religious reasons, and in any event, may not be worn so as to cover the face. This complies with the directions for passport photographs given by the ICAO (in preparation for the introduction of biometric passports). Open mouth smiles are also not allowed, as smiling distorts the face – a neutral expression must be assumed.
http://www.ukpa.gov.uk/_2_howtoapply/2_photographs.asp ; see also ICAO report.
25 *Feasibility Study on the use of Biometrics in an Entitlement Scheme*, February 2003, para 35.
26 Facial recognition was used in the 2000 presidential elections in Mexico to detect duplicate voter registration when name and other details were suspiciously similar. (Para 37 of the Feasibility Study).
27 http://www.bioapi.org/. The BioAPI Consortium was formed to develop a widely available and widely accepted API that will serve for various biometric technologies. The intent is to: (i) work with industry biometric solution developers, software developers, and system integrators to leverage existing standards to facilitate easy adoption and implementation; (ii) develop an OS independent standard; and (iii) make the API biometric independent.
28 In my interview with him on 21 July 2004 he intimated that this was a less sophisticated machine than the Panasonic BM ET500 or OKI IRISPASS - WG which have zoom lenses and which are adjustable in height. Use of this camera has led to high failure to match rates at airports.
29 http://www.biometrics-2004.com/abs_matsumoto.htm.
30 In an article by Ann Harrison in *Security Focus* 13 August 2003, www.securityfocus.com/news/6717.
31 See article entitled *Impact of Artificial 'Gummy' Fingers on Fingerprint Systems* by Tsutomu Matsumoto, Hiroyuki Matsumoto, Koji Yamada and Satoshi Hoshino January 2002, www.cryptome.org/gummy.htm.
32 The fingerprint devices tested include those manufactured by Sony, Fujitsu, Compaq, Mitsubishi and NEC.
33 Article by Uludag, Ross and Jain entitled *Biometric template selection and update: a case study in fingerprints* dated 23 June 2003 -. http://www.csee.wvu.edu/~ross/publications.shtml.
34 See *Identity cards and biometric passports* at http://www.ukpa.gov.uk/identity.asp, the UKPS website.
35 Para 55 of the Feasibility Study.
36 Idem.
37 *Biometric Product Testing Final Report*, report for CESG and Biometrics Working Group, March 2001.
38 Namely, a false match rate of 1 in 1000 with a false non-match rate of 1 in 10.
39 http://www.findbiometrics.com/Pages/iris_articles/iris_1.html.
40 *Biometric Product Testing Final Report*, report for CESG and Biometrics Working Group, March 2001.
41 Source: International Biometric Group Reports and research, technology reports, iris recognition, issues.
42 Feasibility Study para 26.
43 In their article entitled 'Biometric Sensor Interoperability: A Case Study In Fingerprints' which appeared in *Proc. Of International ECCV Workshop on Biometric Authentication (BioAW)*, Prague, May 2004.
44 See *Fingerprint Identification* by Salil Prabhakar and Anil Jain, www.biometrics.cse.msu.edu/fingerprint.html.

45 See article entitled '*Fingerprints: Infallible Evidence?*' dated 6 June 2004 at www.cbsnews.com/stories/2003/07/16/60minutes/printable563607.shtml.
46 Para 29.
47 Standing committee third sitting, col 143 per Mr Humphrey Malins (Woking) (Con).
48 http://europa.eu.int/idabc/en/document/2365/355.
49 Col 145 per Mr Allan.
50 Extract from Dr Daugman OBE, website. Paper entitled *Largest current deployment of iris recognition*. See http://www.cl.cam.ac.uk/users/jgd1000/deployments.html.
51 Para 15.
52 Standing committee, third sitting, per Mr Allan, col 132.

The right to trial by jury in serious fraud cases

Powers exist in the Criminal Justice Act 2003 to remove trial by jury in cases that are complex or long. They can be brought into effect by a resolution of both houses of parliament. Kay Everett considers what alternatives have been suggested and procedural improvements which could shorten and simplify trial by jury. She concludes that effective trial case management provides a way forward which should allow retention of the jury in complex or long cases. This approach has been echoed in the recent guidance issued by the Lord Chief Justice emphasising the need for efficient and effective trial management.[1]

Introduction

The right to a trial by jury in 'complex serious fraud' cases has been under consideration for nearly two decades. Naturally, not every fraud is serious nor is every serious fraud complex and there are relatively few cases that meet both criteria. However, proposals for this small group of cases are perhaps disproportionately important in terms of the challenge that they make to the system of jury trial.

The first significant report that considered the issue of whether it is appropriate for persons accused of serious and complex fraud to be tried by a jury of 12 people was the Roskill Report which was published in 1986.[2] The Roskill committee proposed changes to the normal jury system with a powerful dissent by one member, Walter Merricks, that carried the day. Subsequently, Jack Straw, then Home Secretary, presented the Criminal Justice (Mode of Trial) Bill[3] but this failed to get through a sceptical parliament. Lord Justice Auld's Review of the Criminal Courts followed in 2001.[4] Finally, there was the government's white paper *Justice for All*[5] in 2002. In spite of the continued widespread opposition to any restriction of an accused's right to a jury trial, clauses to restrict that right were included in what became the Criminal Justice Act 2003 (CJA).[6]

S43 CJA provides for certain fraud cases to be conducted without a jury on application by the prosecution. However, s43 has not been implemented and cannot be without an affirmative resolution of both houses of parliament. The government was forced into this concession to get the clause through but grows restive that s43 remains unimplemented. Following the recent acquittal of the defendants in the 24-month Jubilee line trial, the topic of long fraud trials and the difficulties they give rise to is now firmly in the spotlight. It is generally accepted that long trials, whether dealing with fraud or other offences, do

not represent a fair and just process. It is also almost invariably true that the investigation and trial of serious fraud will be time-consuming and expensive. Given these factors, s43 may not bring us any closer to achieving a just and fair procedure.

In fact, s43 leaves open the criteria to be fulfilled for a fraud trial to be conducted without a jury. It provides that the judge must be satisfied that '… the complexity of the trial or the length of the trial (or both) is likely to make the trial … burdensome to the members of a jury hearing the trial …' The judge must also be satisfied '… that the interests of justice require that serious consideration should be given to the question of whether the trial should be conducted without a jury'. How a court should interpret these terms is not clear from the legislation and may cause great difficulties. Many of the terms used are extremely broad when used in everyday speech and no guidance is provided as to their interpretation.

Furthermore, s43 does not specify what type of tribunal will hear a case if the judge decides these criteria are satisfied. Many consider that the section implies that if an order is made under s43 then the trial would be heard by the judge alone but this is not explicit. It, therefore, takes us back to the question posed by a JUSTICE Working Party on serious fraud trials over ten years ago: given that cost is a consideration and that the public purse is not bottomless, how can the present system best be used or adapted to ensure a fair procedure and verdict?[7]

In examining this question, it is helpful to recall the alternatives proposed by the Roskill Report and the Auld Review. It is also necessary to pay due regard to the following factors:

- Will the defendant will have a fair trial? This must include the right to be tried by an independent and impartial tribunal.
- Will the public have confidence in the process?
- Is there is any tangible advantage in lessening the burden on the participants in the proceedings?
- Are there really likely to be substantial savings to public purse?

Any alternatives to a jury trial fundamentally change an accused's right to the traditional safeguard long accepted as the fairest way of dealing with serious criminal cases. When commenting on the alternatives, experts outside government tend to refer to 'least bad' solutions and 'most acceptable'. Few support the idea of an alternative to the right to trial by jury. The greatest reason for this lack of support is the absence of empirical evidence to substantiate the government's claims that juries are unrepresentative of the community, unable to comprehend the complex issues before them and unnecessarily burdened

in cases of a long and complex nature. Without evidence to show what the problems really are, it is impossible to know how to take action to improve the situation. In this respect at least there is a glimmer of hope as the Department for Constitutional Affairs has issued a consultation paper to assess options for allowing research into jury deliberations and to consider investigations into alleged jury impropriety.[8] If it is decided as a result of this consultation to relax existing legislative provisions prohibiting research into the jury process then any research may help in assessing what the real issues are for juries in serious fraud cases and what steps can be taken to deal with these.

S43(6) CJA provides an interesting adjunct obliging the judge to have 'regard to any steps which might reasonably be taken to reduce the complexity or length of the trial'. One of the most fundamental concerns of practitioners is that insufficient resources and attention have been given to trial management powers. If the pre-trial and trial processes were thoroughly overhauled, this might well result in significant reductions to the length of the trial. The reality is that trial management is poor and causes considerable delays to trial after a jury has been empanelled. Procedural overhaul could allow the jury to continue to play its central role in the criminal justice system but not penalise jurors by making them hear a trial lasting up to 12 months.

Jury trial: alternatives on offer

The six alternatives to a trial by 12 jurors previously proposed are:

- a judge alone;
- a panel of judges;
- special juries;
- a judge plus a jury for key decisions;
- a judge plus a number of lay assessors who are experts; and
- a judge plus a number of lay assessors who are not experts.

Trial by judge alone

The Roskill Report suggested that this would be less costly than trial by jury but would place a greater burden on the judge as the sole decision-maker. This alternative continues to attract a lot of support. Judges and practitioners acknowledge that it has some merit. However, the assertion that judges are more likely to quickly understand the complex issues before them and impose tough time limits on counsels' speeches and cross-examination is easily undermined as the incentive to simplify issues and to keep trials short because the jury would be removed. Arguably, the assigned judge should be able to impose strict time limits on the speeches and cross-examination in a traditional jury trial.

Perhaps of greatest concern is that judges are not unanimous in their support of this proposal expressing in particular their reticence to act as sole fact finders. This echoes the fears of some practitioners who feel that judges may become case hardened by their constant exposure to criminal cases which may lead to subconscious cynicism.

A panel of judges

There has been little recognition of or comment on this proposal no doubt due to the obvious strain on judicial resources and resulting costs. Given the other alternatives, no reasons have been presented as to why such a panel would be of assistance, as it would only provide additional judicial expertise not supplementary knowledge and experience of the business world.

Special juries

Similarly, the proposal regarding special juries has been discounted as impractical. The special jurors were to be, for example, people with above average education, lay magistrates and those versed in trade or finance. Special jurors existed prior to the enactment of the Juries Act in 1949 but they were only used about three times.

A judge plus a jury for key decisions

This is perhaps the most procedurally radical of all the proposals, requiring a judge to hear the evidence alone and then present the factual issues to the jury for their determination. The jury would not, therefore, see or hear the witnesses and would receive the judge's versions of the facts.

A judge plus a number of lay assessors who are experts

This model was favoured by the Roskill Report. It suggested that two lay assessors would be drawn from a panel from the world of 'business and finance'. More than two assessors would be too difficult to select and could result again in an inability to find sufficient assessors who would be available. The Auld Review expressed caution that experts would judge not only the experts on trial but the expert evidence called during the trial. They could appear to act as untested expert witnesses, undermining the role of independent experts called during the trial to assist the court. To counter this difficulty, assessors could be drawn from different disciplines to those in issue in a particular trial. This proposal has received a high level of support overall.

The practicalities of empanelling lay assessors have not been examined in detail. This model would also have to overcome the difficulties that are already experienced when seeking to empanel a jury, such as appraising whether they are able to form a balanced view, ensuring that they would be able to devote adequate time to the case and establishing their level of remuneration. This last factor may negate any supposed cost efficiencies in removing the jury.

Additionally, there may be several disciplines in issue in one trial and it is unclear how two assessors would be selected in that situation.

A judge plus a number of lay assessors who are not experts

This proposal envisages a judge sitting with lay persons with no particular commercial or financial expertise but possibly with some judicial experience, such as JPs. This has not been a popular suggestion, as it seems it would create a smaller, less representative tribunal with little benefit.

The use of any of these alternative tribunals in only a small number of serious fraud cases with broad criteria to determine whether the jury should be removed may result in challenges under the Human Rights Act 1998 because of the distinction with the majority of criminal cases heard by a jury. None of these proposals tackle the pressing need for substantial overhaul of the trial management of serious fraud cases.

Procedural reforms

The procedural aspects of jury trials have not been comprehensively reviewed or reformed. Reforms of current trial procedure as well as pre-trial improvements could result in a substantial reduction in the length of the trial. Simple but thorough implementation could bring the correct balance between efficiency and fairness closer to becoming a reality. Whilst many of the procedural changes proposed below have been aired before,[9] there has never been a strong enough effort for them to be implemented. In addition, trial management powers are available under the Criminal Justice Act 1987 but are not utilised effectively to ensure that trials are efficiently managed. The forthcoming implementation of the new Criminal Procedure Rules will provide an opportunity to see how much these can assist in meeting one of their objectives: more effective case management.

The following are among the procedural rules that might assist.

Pre-trial: out of court meetings

The prosecution and defence should be required to have out of court meetings from the outset to reduce time and costs of attending directions hearings and/or preparatory hearings. The parties would be required to communicate with each other about case preparation and to establish the facts in issue. Currently, the parties seem to be unable to reach agreement without judicial intervention but if this process was mandatory and sanctions were applied to parties that behaved unreasonably then this position might change.

Pre-trial: preparatory hearings

These hearings would be expected to take place a set time after the initial meetings between the parties. This would allow the assigned trial judge to have the opportunity to review the papers and the parties would have identified the factual and legal issues in dispute. The assigned judge would then address any issues in dispute and resolve them by judicial determination if necessary, to avoid unnecessary delays once the jury had been empanelled. Although the judge already has these powers they are not exercised effectively in all cases. Further, consideration must be given to how these powers can be effectively applied as a matter of course.

Pre-trial: preparatory hearings – expert evidence

As suggested by the Fraud Advisory Panel Working Party,[10] parties should be obliged to agree their evidence and present the assigned trial judge with an agreed summary. Any differences not resolved by experts or counsel should be the subject of rulings by the trial judge at the preparatory hearing. If these issues were resolved by the judge before the trial began then this would again reduce delays once the jury had been empanelled.

Pre-trial: the allegations

Perhaps the most contentious proposal is to give the assigned trial judge more encouragement and the necessary powers to sever counts on the indictment or to restrict the ambit of the indictment in order to ensure that there is a manageable trial. Prosecuting agencies object to this proposal, arguing that it would not allow them to put the full alleged criminality before the jury. However, this results in unmanageable and extended trials which deal with large numbers of similar witnesses and evidence which must all be tested. Such restrictions would undoubtedly significantly alter the length of trials and lead to a manageable system which allows the jury to deal with the core of the criminal allegations.

Jury selection

The issue of complexity could be tackled by introducing jury questionnaires. These would be introduced to identify and excuse jurors with obvious literacy problems. In the Roskill Report,[11] the Maxwell trial was cited as having used a jury questionnaire to enable jurors to put forward any personal hardships for excusal and to ensure that no bias or knowledge existed in relation to the defendants. The questionnaire also served to identify serious literacy problems. The argument that excusal of jurors leads to an unrepresentative jury is not sustainable and seems an odd argument when the alternative tribunal proposed to replace the jury is not intended to be representative of the community. Juries do not provide a complete cross-section of the community and typically include

persons with higher education qualifications. Basic literacy must be seen as necessary in trials of this nature.

Identification of issues for the jury

The framework of agreed facts should be presented to the jury. Further, in the pre-trial meetings and hearings, the parties should draft a list of factual issues for the jury to determine. The jury should then be given an opportunity to review these documents prior to the start of the trial. Whilst the framework of agreed facts can be presented at the moment, this does not always take place and certainly, when it does, it only occurs orally. There is no evidence to support the argument that there is a risk that the jury will be 'over-influenced' by a written summary from the parties or, for example, act on the basis that the true facts are as set out in documents provided by prosecution or defence summarising the submissions. This is certainly a proposal which would benefit from jury research.

Speeches

Rules of court should be amended to set time limits for speeches. These would apply to both the prosecution and defence opening and closing speeches. If the issues have been fully identified in the pre-trial process, realistic time limits could be set by the judge particular to each case.

Adoption of appropriate information technology

Appropriate information technology can improve the presentation of information to the jury to enable them to understand issues more easily, for example, through charts and hyperlinks. The use of live-note can significantly reduce the length of trials. This is becoming increasingly common and is assisting the court, the defendants and lawyers, but the jury is not given access to this useful aid. It is arguable that the jury would not know what to do with such a volume of information so it would be the responsibility of counsel and the judge to have the evidence put into context.

Summing up

The jury should receive a written copy of the judge's directions on matters of law. Although this can occur, it is not routine. This must become part of the standard procedure.

Remuneration

Further research should be undertaken to learn what improved arrangements could be made for meeting the lost earnings of jurors. The financial burden on jurors should not be underestimated and needs to be addressed.

Conclusion

The suggestion that jurors do not have the ability to deal with a serious fraud case is mere supposition. When the trial judge had received a verdict from the jury in the Wickes case, which lasted for ten months, he commented: 'Those who may hereafter criticise juries' appreciation of lengthy and complex fraud cases would have done well to see the care and attention that as I say you have given to this case throughout'.[12] While it is undoubtedly in all parties' interests to ensure that trials take place in the shortest possible time, there is no evidence to show that juries are unable to comprehend the issues in a serious, complex fraud case.

A clear trial management strategy could significantly reduce the current length of the small number of serious and complex fraud trials. Simple but progressive changes to the presentation and structure of the information made available to jurors can reduce not only the length of the trial but the complexity of the issues. Although these may be changes to the current procedure, they are in a way as dramatic as removing the fundamental right to jury trial.

As recognised in most of the reports and reviews, the jury is usually being asked to decide questions of dishonesty and, therefore, the reliability and credibility of the witnesses. These changes to the structure of the trials are not novel, having been proposed time and time again. It must be better to revisit procedural development rather than implement the root and branch reform proposed by s43. At the very least there should be research to assess whether there is any need for this change. The onus of proof remains with those who wish to abolish the jury to demonstrate, as they have not done so far, that there is something demonstrably wrong with the system.

Kay Everett is a solicitor who volunteered with JUSTICE.

Notes

1 *Control and Management of Heavy Fraud and Other Complex Criminal Cases*; A Protocol issued by the Lord Chief Justice of England and Wales, 22 March 2005 http://m1e.net/c?39279322-2ZMDjnAzuan/E%40905504-doBiNjyZP3Cpo.
2 *The Fraud Trials Committee Report* ('the Roskill Report'), 1986.
3 The government presented the Criminal Justice (Mode of Trial) Bill in 1999 but after opposition withdrew this bill and brought forward the Criminal Justice (Mode of Trial) (No 2) Bill in 2000 which also was not enacted by parliament.
4 *Review of the Criminal Courts of England and Wales* (the Auld Review), September 2001.
5 Cmd 5563, 17 July 2002.
6 Criminal Justice Act 2003 Chapter 44.
7 JUSTICE Working Party Report, *Serious Fraud: Securing a fair trial*, 1993
8 *Jury Research and Impropriety Consultation Paper* CP 04/05 21/01/05.
9 See, for example, 'Fraud Advisory Panel Working Party Proposals for procedural reform in cases of serious fraud pre-trial procedures', *New Law Journal*, 17 March 2000.
10 Ibid.
11 At p21 para 4.4.
12 *R v Sweetbaum & others* (unreported) 25 November 2002.

Anti-social behaviour orders: a nail in the coffin of due process?

Sally Ireland discusses whether the increasing use of anti-social behaviour orders will lead to an interference with due process and a reduction in individual human rights.

Introduction

Since its creation in the Crime and Disorder Act 1998, the public profile of anti-social behaviour orders has been heightened by a series of news stories about bizarre prohibitions being imposed on a wide range of people, from boys in baseball caps to sarcastic old men. These stories create the perception that something quite radical has occurred in the policing of behaviour, and they are not wrong in doing so. The anti-social behaviour order (ASBO) took its name from the Housing Act 1996 and its template from previous statutory injunctions. However, both in form and in fact, the ASBO is something quite new. Statutory injunctions have been applied to many different types of behaviour in the past, but never before has such a wide range of conduct come within the remit of a single statutory order.

This change is particularly important because, unlike most statutory injunctions, the applicant for an ASBO is a public (or quasi-public) authority, acting on behalf of the local community. The ASBO has become a key weapon for the Home Office in extending state regulation of the behaviour of its citizens. It has also become the template for a proliferation of copycat orders contained in current bills before parliament. Each one further undermines the position of the criminal prosecution as the primary method used by the state to control unwanted behaviour. Each extends the range of circumstances where regulation will apply. ASBOs are perceived as a venial method of countering minor but persistent nuisance behaviour, but they have very serious consequences, both for those subject to them, and for the future of the criminal law and due process guarantees.

This article will focus on the following aspects of ASBOs:

- the concept of 'anti-social behaviour';
- the scope of the orders that can be imposed and the problems with general preventative orders;
- why the applicants for ASBOs are inappropriate parties;

- problems with the use of magistrates' courts for ASBO hearings;
- the use of ASBOs in cases where breach is almost inevitable; and
- new proposals for orders with ASBOs as their template.

In all cases it will concentrate on potential (and actual) interferences with Convention rights occasioned by these aspects of the legislation. Since restrictions imposed by ASBOs clearly engage Convention rights – notably the right to freedom of expression – adequate safeguards should be in place to prevent those rights from being interfered with arbitrarily, and the prohibitions should be necessary to achieve the aim of preventing crime or disorder.

The form of the ASBO

S1 Crime and Disorder Act 1998 reads:

> *1(1) An application for an order under this section may be made by a relevant authority if it appears to the authority that the following conditions are fulfilled with respect to any person aged 10 or over, namely –*
>
> *(a) that the person has acted, since the commencement date, in an anti-social manner, that is to say, in a manner that caused or was likely to cause harassment, alarm or distress to one or more persons not of the same household as himself; and*
> *(b) that such an order is necessary to protect persons in the local government area in which the harassment, alarm or distress was caused or was likely to be caused from further anti-social acts by him;*
> *…*
> *If, on such an application, it is proved that the conditions mentioned in subsection (1) above are fulfilled, the magistrates' court may make an order under this section (an 'anti-social behaviour order') which prohibits the defendant from doing anything described in the order.*
>
> *(5) For the purpose of determining whether the condition mentioned in subsection (1)(a) above is fulfilled, the court shall disregard any act of the defendant which he shows was reasonable in the circumstances.*
>
> *(6) The prohibitions that may be imposed by an anti-social behaviour order are those necessary for the purpose of protecting from further anti-social acts by the defendant –*
>
> *(a) persons in the local government area; and*
> *(b) persons in any adjoining local government area specified in the application for the order; …*
> *…*

> *(10) If without reasonable excuse a person does anything which he is prohibited from doing by an anti-social behaviour order, he shall be liable … [on conviction on indictment, to a maximum of five years' imprisonment. Breach is an offence triable either way].*

The 'freestanding' (as opposed to the 'post-conviction') ASBO is triggered by a civil application by a 'relevant authority' – now comprising police, local authorities and housing action trusts. Orders are imposed for a minimum of two years, and may not be discharged before two years have elapsed except with the consent of both parties.

Precedents for ASBOs

The ultimate precedent for the ASBO is of course the common law injunction, by which a civil wrong can be restrained by court order either while or before it is committed, as an interim measure or as part of a final judgment. Injunctions are usually granted where an award of damages would not provide adequate compensation for the wrong threatened or committed. Failure to comply with the terms of such an injunction is punishable as a contempt of court.

In addition, '[b]efore 1998,' as Lord Steyn said in the leading case on procedure for applying for an ASBO, 'Parliament had, on a number of occasions, already used the technique of prohibiting by statutory injunction conduct deemed to be unacceptable and making a breach of the injunction punishable by penalties.'[1] Lord Steyn gave the examples of disqualification from acting as a company director under the Company Directors Disqualification Act 1986, the prohibition of trespassory assemblies under s14A Public Order Act 1986, residence and non-molestation orders under the Family Law Act 1996, injunctions against anti-social behaviour under the Housing Act 1996 and injunctions against harassment under the Protection from Harassment Act 1997.

However, ASBOs differ from all these common law and statutory precedents in several important respects. In most cases, the scope of the conduct that can trigger the jurisdiction of the court to grant an ASBO is very much wider. In all cases, the scope of the ASBO that can be granted is again, very much wider. Thirdly, the consequences for breach of an ASBO are in most cases, much more severe. Fourthly, in most cases the applicant is usually a public authority acting in a representative capacity, rather than a public authority. Finally, features of the hearings of applications for ASBOs render them quasi-criminal in fact, if not in theory.

Anti-social behaviour

A recent article by Ross Cranston MP described 'anti-social behaviour' as a phrase that had been introduced by the 1998 Act and had since 'slipped into

everyday usage'.[2] The former assertion is not strictly correct. The phrase comes from the Housing Act 1996, but had there a very different and much more specific meaning, involving a use or threat of violence against a person lawfully in premises to which the section applied.[3] However, it was given a much wider definition in the 1998 Act, and has since been marketed by the Home Office as a type of crime.[4] This is good politics, but bad law, since, of course, some conduct that falls within s1(1) of the 1998 Act is not a crime of any kind.

The range of conduct to which the phrase applies is in theory unlimited, since it qualifies under the section by virtue of its effect or likely effect on others, rather than by its nature. Previously, most statutory injunctions had represented responses to specific, identified types of conduct. Where this was not the case, as for example under the Protection from Harassment Act 1997 or the Family Law Act 1996, the conduct had to be directed against a specific, identified person. While 'harassment' under the 1997 Act has a similar definition to anti-social behaviour, there must be an actual or apprehended 'course of conduct' against one or more named victims for the injunction to be granted and there is a mens rea requirement.[5]

ASBOs have been obtained for conduct as varied as repeated public attempts to commit suicide,[6] playing football in the street, street prostitution,[7] and drug dealing and associated violent crime.[8] The important features here are that the conduct that may be covered varies widely in severity, and that while some of it will fall under the scope of the ordinary criminal law, some will constitute a civil wrong and some, arguably, no wrong at all in law. While Lord Steyn in *Clingham* stated that '[s]ection 1 is not meant to be used in cases of minor unacceptable behaviour but in cases which satisfy the threshold of persistent and serious anti-social behaviour'[9] this requirement is not present in the legislation, and is in all events open to a wide range of interpretations.

Arguably, therefore, the legislation does not provide adequate safeguards against the arbitrary application of an ASBO, since the definition of anti-social behaviour is so wide that anything that has or is likely to upset people will do (and this includes many forms of legitimate protest and other perfectly lawful activity) – unless the defendant can persuade three magistrates that it was reasonable.

Scope of the orders

Before ASBOs, most statutory injunctions were passed in order to halt or prevent *specific* wrongs, and, therefore, the scope of the orders was limited. Sometimes it was specifically limited by statute: in relation to a non-molestation order, for example, the respondent can be restrained from acts of molestation against an 'associated' person or a 'relevant child'.[10] These terms are statutorily defined; it is clear that these orders are designed to prevent molestation in a domestic context

and the context of family proceedings.[11] In the case of other orders, their scope has natural limits because they serve specific purposes: the common law injunction, for example, is intended to restrain the specific wrong(s) contained in the claimant's statement of case.

By contrast, the purpose of the ASBO is to protect (all of the) residents of the local government area and any specified adjoining area from (any) further acts of anti-social behaviour by the defendant, and the order may include *any provisions necessary* to achieve this aim (section 1(6)(b) of the 1998 Act). While the requirement of necessity might seem to limit the restrictions that could be imposed by an order, in practice the courts have often construed their discretion widely. In *Clingham* Lord Hutton gave examples of common provisions:

> *Such an order will frequently prohibit the defendant from entering a defined area where he has been particularly troublesome and from using or engaging in any abusive, insulting, offensive, threatening or intimidating language or behaviour or from threatening or engaging in violence or damage against any person or property within a somewhat wider area.*[12]

The breadth of discretion in the statutory scheme and the fact that the express purpose of the orders is solely preventative (rather than punitive) tempts courts to attempt to ensure prevention rather than considering the proportionality of the order in relation to past conduct. The orders are frequently unlikely, therefore, to restrict rights proportionately; the aim of preventing disorder or crime by the defendant could often be met by less restrictive means.

The parties who apply for an ASBO

In most injunction applications, the applicant is a private individual or corporation, or a public authority acting in a private capacity. In the case of ASBOs, the public and quasi-public authority applicants act in their public capacity, on behalf of the local community. Evidently, not all those who the authority seek to protect will be present or named at the hearing. Since ASBOs were intended to avoid the necessity of witnesses giving evidence against the defendant in court, and since hearsay is admitted, sometimes none of those affected persons will be present or named.

This form of representative standing has serious consequences. Firstly, the admission of hearsay evidence, particularly of anonymous complaints, makes the allegations difficult to refute. This is to some extent alleviated by the requirement laid down in *Clingham* that the criminal standard of proof should apply to the past behaviour alleged against the defendant.

Secondly, the court's view of the balancing of rights is affected. In civil proceedings courts typically balance the competing rights of two identified legal persons. In ASBO applications, courts must balance the rights of the defendant with those of the community at large: when considering the evidential rules for ASBOs, Lord Steyn said that his 'starting point is … an initial scepticism of an outcome which would deprive communities of *their* fundamental rights'.[13] It is difficult fairly to balance the rights of the defendant, against whom accusations of bad behaviour are being made, with those of an abstracted and generalised 'local community' who are myriad in number and largely absent from the courtroom, and for whose benefit the court must act when making an order.

ASBO applicants have duties and responsibilities in relation to the residents of a defined local area. This leads to the drafting of disproportionate orders, that seek to stop complaints from members of the public, or satisfy government targets, by simply shifting a problem out of a particular area or making it less visible, rather than solving it. However, the order may simply move the problem to another area. As such, it helps neither the defendant nor the community as a whole.

Further, different local authorities employ different levels of activism in relation to applying for ASBOs. This partially accounts for the fact that the number of orders granted per capita varies between areas. This ASBO 'postcode lottery' contributes to the arbitrary nature of the orders.

ASBOs and the magistrates' courts

Although ASBO applications are civil in character, the magistrates will be accustomed to seeing the police and the local authority prosecutors in the course of their criminal cases. Many magistrates regard police and local authority witnesses as particularly credible. Furthermore, the procedure for determining the prohibitions in an ASBO is akin to that for passing sentence. The rights of a defendant are often very much a secondary consideration in a sentencing exercise.

The magistrates are dealt a very difficult exercise in judgment by the ASBO provisions. The determinations that they must make as to whether the order is necessary and if so, what prohibitions are necessary, are more suited to experts in psychology, community safety and criminology than to a lawyer or a lay bench. The result is that magistrates err on the side of caution, and on the side of the police and local authorities that they are accustomed to trusting, in granting ASBOs. By June 2004, the total number of ASBOs granted was 3069. Only 42 had been refused.[14] In addition, the ASBOs are usually granted in the form for which they are applied (since applicants customarily draft the terms

of the ASBO). This means that ASBOs are often hugely disproportionate to the conduct they seek to restrain.

ASBOs made to be breached

ASBOs place responsibility for curbing anti-social behaviour on the shoulders of the defendant. In certain circumstances this may seem appropriate; however, behaviour that is deemed anti-social is frequently led by addiction and mental health problems.[15] This is in some cases an incentive for local authorities to apply for an ASBO, as it means that the responsibility for solving the problem becomes the defendant's and they are not under so much pressure to develop other (more expensive) solutions. In some cases, concurrent action may be being taken by social services or other agencies to assist the defendant. In many cases, it will not be.

Many people made subject to ASBOs have chaotic lives and are not good at disciplining themselves. This may be for reasons such as youth, immaturity or general social exclusion, or because of specific serious problems. A Home Office study found that in 60 per cent of cases in the study where information was available, there was a mitigating factor in the anti-social behaviour (including school exclusion, substance abuse, learning disabilities etc). The behaviour of many people made subject to ASBOs is led by addiction and/or mental health problems.

A case recently reported in the media concerned a woman who made hundreds of 999 calls on little or no pretext. An ASBO was made, but she carried on making the calls. Refusing to extend the ASBO, the District Judge said:

> *Everyone in this room knows that an ASBO is going to be breached. They are a deterrent for people who have done something wrong, but still display rational behaviour. That is clearly not the case here.*[16]

To provide an effective safeguard, this attitude should be incorporated into the legislation. Otherwise, ASBOs will be made in cases where the defendant has little option or ability to do anything other than breach them.

One of the sample prohibitions from ASBOs on the government's Crime Reduction website, for example, concerns prostitution, and prohibits entry to certain areas (presumably areas where kerb-crawling takes place), soliciting or loitering for the purposes of prostitution in a public place, and committing any lewd or obscene act in a public place. However, common features of street prostitution include coercion by pimps and drug addiction. Women who are coerced by pimps will have no choice but to breach the ASBO or face violent reprisal. They may therefore find themselves in custody. Women with drug

addictions will either breach the ASBO or engage in other, perhaps more serious, crimes than prostitution to fund their habit. Again, they are likely to find themselves in custody.

The BBC recently reported on the case of a man remanded in custody to be sentenced for breaching his ASBO for the eighth time. He had admitted drinking in a seafront shelter (the order prohibited him from drinking in public). Presumably it had been imposed because of previous drunk and disorderly behaviour. One of the sample ASBOs on the Crime Reduction website includes a prohibition on being drunk in public, or drinking in public. The difficulties of compliance for someone with an alcohol problem (who may be homeless, and therefore have nowhere to drink in private) are manifest.

The above-mentioned case of the woman given an ASBO to deter repeated public attempts at suicide is one example of using the deterrent of prison to deal with those with mental health problems. The application of an order in these circumstances is very likely to result in breach. The order effectively criminalizes mental illness and places responsibility for reforming behaviour on the defendant's will, rather than on treatment services. This is clearly inappropriate.

Orders on the ASBO template: progressive restriction on rights

The government's answer to situations where people find ASBOs too difficult to comply with is the 'intervention order' as proposed by the Drugs Bill, currently before the House of Lords.[17] As it is currently drafted, the intervention order will be available whenever an ASBO application is granted, or for anyone who is already subject to an ASBO, when the court considers it is desirable to prevent repetition of 'trigger behaviour'. The 'trigger behaviour' currently envisaged is drug misuse, but the Home Secretary will be able to extend this to other forms of behaviour.

Unlike an ASBO, the order will impose positive requirements. We suspect that for drug users, it will oblige the defendant to attend a drug treatment programme. It could also include participation in programmes similar to those available on a community rehabilitation order. It effectively forms, therefore, the imposition of a community sentence without a trial or conviction, on a purely preventative principle.

The Serious Organised Crime and Police Bill, again currently before the Lords, provides for the situation where 'anti-social acts' are committed by young children. It proposes to make their parents liable to pay compensation for property theft or damage under 'parental compensation orders'. These would be granted on a civil application by the local authority or police on a preventative

basis (to prevent the repetition of the behaviour). The order would be enforced in the same way as a fine.[18] Again, these orders impose a sanction (effectively a fine) without a trial or conviction (here in relation to the actions of a third party) on a purely preventative principle.

The recent proposals for 'control orders' in the Prevention of Terrorism Bill show us where this trend will lead us. In the form originally proposed by the Home Office, the order was like an ASBO, but passed by the Secretary of State for the Home Department rather than by a court. Such an order could impose unlimited restrictions and positive requirements (including, after derogation from the European Convention, deprivation of liberty) without conviction or trial, on a purely preventative principle.

This proposal is the culmination of a trend whereby the government, frustrated with what they perceive as the shortcomings of criminal trials (length, expense, uncertainty, acquittal rates, admissibility of evidence etc) is taking the regulation of behaviour out of the hands of the criminal courts, and is increasingly attempting to bypass due process guarantees. It demonstrates that ASBOs, despite the amusingly inventive prohibitions we hear about, are a very serious development indeed.

Sally Ireland is the criminal justice policy officer at JUSTICE.

Notes

1 *Clingham v. Royal Borough of Kensington and Chelsea; R v Crown Court at Manchester, ex p McCann and Others* [2002] UKHL 39, para 17.
2 'The Mud Bath', *Counsel*, March 2005, pp20-21 at p21.
3 Housing Act 1996, s192.
4 The Home Office website, www.homeoffice.gov.uk, lists it under 'Crime Types'.
5 Ss1 and 3 Protection from Harassment Act 1997 c. 40.
6 'Woman banned from jumping in the river', Richard Savill, telegraph.co.uk 26/2/2005.
7 *Chief Constable of Lancashire v Lisa Marie Potter* [2003] EWHC 2272 (Admin).
8 *R (on the application of M) v Secretary of State for Constitutional Affairs and another* [2004] EWCA Civ 312.
9 At para 25.
10 S42 Family Law Act 1996 c. 27.
11 Ibid s62.
12 At para 86.
13 At para 18.
14 Source: www.crimereduction.gov.uk.
15 See Home Office Research Study 236.
16 'Ignore 999 pest, judge tells services', *Western Mail*, 4 March 2005.
17 See Drugs Bill, clause 20 and *JUSTICE's Drugs Bill; Briefing for Second Reading (House of Lords)*, March 2005.
18 Serious Organised Crime and Police Bill, as brought from the Commons on 2005, clause 141 and schedule 11. See *JUSTICE briefing on Parts 3-6 of the Bill for its second reading in the House of Lords*, March 2005.

Book reviews

Blackstone's Guide to the Asylum and Immigration Act 2004

Doughty Street Chambers
Oxford University Press, 2004
218pp £29.95

This paperback is the latest in the Blackstone's Guide Series which, according to the blurb, 'delivers concise and accessible books covering the latest legislative changes and amendments. Published within weeks of an Act, they offer expert commentary by leading names on the effects, extent and scope of the legislation, plus a full copy of the Act itself'.

How does this offering match up to the claims in the blurb? It was published four months after the Act received the Royal Assent on 22 July 2004 (which, I suppose, is 'within weeks' of the Act), and the team of seven authors, all practising from Doughty Street Chambers near Gray's Inn, certainly includes some very well-known barristers in this field. As well as 'a full copy of the Act itself' at Appendix 1, there is a bonus at Appendix 2 of 'Useful Resources on the Internet', which gives the website addresses of all sorts of organisations great and small, from Asylum Aid to the New Zealand Refugee Status Appeals Authority (the nearest I could get to 'A-Z'). Another bonus is the discussion in the final chapter of the Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status, agreed on 29 April 2004, and its relationship to the 2004 Act in respect of (a) unfounded claims, (b) third country removals and (c) appeals.

But the distinctive feature of the book is the explanation and commentary it provides for each of the substantive components of the Act. There are ten chapters corresponding to these substantive components, which do not exactly match the major headings in the text of the Act itself. For example, in the Act ss8 to 13 are headed 'Treatment of Claimants', while in the book s8 is hived off into a chapter of its own entitled 'Credibility of Asylum and Human Rights Claimants', with ss9-13 being dealt with in the chapter entitled 'Welfare Support for Immigrants'. This reflects the significance and novelty of s8, in which one arm of the state (the legislature) is apparently trespassing upon the territory of another (the judiciary) by telling the members of the new tribunal how to go about an important aspect of their job (*viz* assessing the credibility of asylum-seekers).

Ss26 to 32 in the Act are headed 'Appeals', but in the book the chapter bearing that name omits s27 on 'Unfounded Claims', which, like s8, gets a chapter to itself because of its potential significance. There is now a very wide power to certify as 'clearly unfounded' claims from any country or part of a country, or claims made by a particular description of person. This reviewer having a special interest in appeals, the most detailed assessment in this review will be on the chapter entitled 'Appeals', which may perhaps give a flavour of the book as a whole.

Chapter 7 begins with a brief summary of the changes being made to the appeal system, followed by an historical outline of how the appeals system has fared since the Immigration Appeals Act 1969. There is a very useful flow chart, making comprehensible the complex series of reviews, reconsiderations and appeals which has superseded the familiar two-tier appeal structure. But when it comes to the details of the new Asylum and Immigration Tribunal, some inaccuracies emerge.

For example, the Act substitutes a new Schedule 4 to the 2002 Act, so that a person is eligible for appointment to the AIT if he has certain legal qualifications or experience or if he 'in the Lord Chancellor's opinion, has non-legal experience which makes him suitable for appointment'. This is bowdlerised in the book to 'non-legal experience which makes *her* suitable'. The authors prefer the feminine to the masculine pronoun as the 'default' gender in the third person singular, an unwarranted intrusion of political correctness into the rules of English grammar. More worryingly, the book continues,

> *Only persons appointed as legally qualified members of the Immigration Appeal Tribunal automatically become legally qualified members of the AIT. An adjudicator with a seven-year legal qualification is treated as a non-legally qualified AIT member, though the Lord Chancellor can appoint her as a legally-qualified member instead.*

That is simply wrong, and results from a misreading of paragraphs 27 and 28 of Schedule 2 to the new Act. The present IAT comprises both legally qualified and non-legally qualified members. They will all transfer into the AIT, but only the ones who are legally qualified members at present will be legally qualified members of the AIT. The adjudicators will all be legally qualified members of the new AIT: see paragraph 2(2) of the new Schedule 4 to the 2002 Act.

The misunderstanding continues in the following passage.

> *The most important distinction in the new AIT will be the size of the panel which hears the appeal. An appeal determined by a panel of three or more members cannot be challenged on statutory review, but only on appeal to the Court of Appeal. This rule applies regardless of the number of legally qualified members on the panel.*

Again, that is wrong. As the new s103A(8) and s103E(1) make clear, it is only where the panel consists of three or more *legally qualified* members that an appeal lies directly to the Court of Appeal or the Court of Session, instead of there being a review by the High Court. The lay members of the AIT may well sit on panels hearing cases which are intended to give 'country guidance', rather than dealing with complex legal issues. Those three-member panels will be amenable to review, in the same way as appeals heard by a single Immigration Judge.

However, such minor blemishes do not detract from the overall usefulness of the commentary, which includes relevant case-law, ministerial statements, and reports by parliamentary committees such as the Joint Committee on Human Rights. Where it makes suggestions as to how the new legislation should be interpreted, those suggestions seem often to be right. For example, at present the IAT frequently remits cases for rehearing

where the appellant, through no fault of his own, did not receive notice of the hearing before an adjudicator, and the appeal was dismissed in his absence. The authors suggest that 'error of law', which is the only basis on which the new AIT can be asked to reconsider its decision, 'should be interpreted to encompass such a non-culpable denial of justice'.

Much of the new legislation is complex, and it ranges widely over areas as diverse as criminal offences, welfare provision, register office marriages, and detention and bail. The authors, not surprisingly, approach all of this from a liberal standpoint, and are critical of such measures as the restrictions on freedom to marry at register offices, which are said to raise concerns about compatibility with Articles 12 and 14 of the European Convention. (These restrictions do not apply to marriages solemnized by the Church of England.)

All in all, in their twofold aim, to provide both practical guidance and critical analysis, the authors have been largely successful.

Richard McKee, immigration adjudicator

Handbook on the European Arrest Warrant

Judge Rob Blekxtoon (editor-in-chief)
Wouter van Ballegooij (managing editor)
TMC Asser Press, 2005
283pp £60

The European Arrest Warrant (EAW) was due to be implemented by the 15 'old' member states of the European Union by 1 January 2004 and by the ten 'new' members by 1 May. Many did not, however, make the deadline and only by December had all the states (bar Italy) transposed it. Furthermore, the European Commission reported significant disparities between national provisions as well as outright failings to implement elements of the warrant.[1] Such shortcomings testify to the radical nature of the changes to extradition practice ushered in by the EAW – which required constitutional revisions to be made in some member states – and reflect the difficulties experienced in transposing the EAW.

The EAW is intended to improve the efficiency of cross-border law enforcement in an increasingly 'open' European Union, contributing to the creation of a genuine European 'judicial area' through the mutual recognition of judicial decisions and improved protection of individual rights. It is the first measure in the field of criminal law to implement the principle of mutual recognition and even those who welcome it in principle, like JUSTICE, tend to do so with substantial reservations. Alas, these reservations strike at the core of the EAW – at its presumption of mutual trust between member states, at the adequacy of individual safeguards across the EU, at the real extent of the consensus on procedural and substantive criminal law between member states.

Amongst the very first publications on the EAW,[2] the Handbook will be a useful resource for all those working with or studying the EAW. It marks the first step towards the realisation of an ambitious project, led by The TMC Asser Instituut in The Hague, to establish a network of Europe-wide correspondents, practitioners and researchers on the EAW. The project will culminate in a website, www.eurowarrant.net, containing expert information, commentary and case-law.

JUSTICE is a member of the consortium behind the project, which is funded by the European Commission.

The research project is practice-orientated and this approach is also observed in the Handbook with special attention being paid to the new procedural rules and the complex issues that arise from, for example, double jeopardy, verdicts in absentia and the double criminality rule under the new scheme, as well as the interaction of the EAW with other relevant legal instruments, notably the 1950 European Convention on Human Rights (ECHR) and the 1983 Council of Europe Convention on the Transfer of Sentenced Persons.

Judge Blekxtoon's lively introduction guides us through the origins of extradition, with colourful examples plucked from 19th century warrants discovered in an Amsterdam flea market and instructive explanations for the reforms that followed, leading eventually to the development of a formal extradition practice in the EU, and culminating in the EAW. This vibrant historical account is accompanied by an insight into the immediate geopolitical factors that played midwife to the EAW, as well as a brief preview of its shortcomings.

The ensuing 14 chapters take up these problems and explore the implications of the new scheme. The analyses are complemented by useful historical and political background material and an interesting selection of case-law drawn from various civil and common law jurisdictions. The publication brings together practitioners and academics with expertise in extradition practice, judicial co-operation, international criminal law, European law and human rights law and practice. This is an excellent approach to such a new instrument whose actual implications will undoubtedly be as diverse as the criminal justice systems in which they will take effect, and are for the most part yet to be seen. Judge Blekxtoon confirms this view by his remarks at the outset of his article-by-article commentary on the EAW, 'of course at this stage objectivity cannot be guaranteed, which is the more reason to publish in order to instigate others to come forward with better arguments'.

Many of the Handbook's contributors take on the key question of the extent to which executing judicial authorities under the new scheme will be able to hear arguments based on human rights grounds or ordre public, requiring them to make inquiries, or ask for further guarantees or even to refuse extradition in individual cases – or whether these are now barred by the principle of mutual recognition and the restricted terms of the EAW itself. Despite the absence of respect for fundamental rights as an explicit ground for refusal in the EAW, two-thirds of member states have in fact introduced such a provision into their domestic legislation. The European Commission has stated that the general condition of respect for fundamental rights was never intended to be a ground for refusal in the event of infringement. It says in its evaluation report, 'in a system based on mutual trust, such a situation should remain exceptional'. However, as Harmen van der Wilt points out, 'at first sight, the principle of mutual recognition of judicial decisions seems an appropriate trick in the prevention of conflicts, as it advocates infinite tolerance towards divergent legal opinions. But it may cover up and conceal harsh realities and lingering tensions'.

Paul Garlick QC returns to this issue in his contribution on the EAW and the ECHR, examining in particular the position in the UK whose implementing legislation includes a specific human rights ground for refusal in precisely the terms criticised by the Commission. He concludes that the requisite mutual trust needed to ensure the success of the EAW will crucially depend on a wide interpretation being given to this and equivalent provisions in national legislation. Nico Keijzer would doubtless concur with this view as, expanding on the Dutch perspective on extradition and human rights, he observes, 'by entering into a system of closer co-operation in criminal matters … the Member States of the European Union … not only share the benefit of more efficient criminal law enforcement, but they also more closely share the burden of maintaining the rule of law and protecting the human rights of citizens throughout the Union. If human rights are endangered, anywhere within the Union, no Member State can wash its hands in innocence'. Caroline Morgan, Criminal Justice Unit of the European Commission, agrees that 'the EAW cannot be successfully implemented in a climate of disregard for fundamental rights'. She recognises that more needs to be done to ensure 'the courts, police officers and lawyers throughout the European Union who actually carry out the implementation on a day-to-day basis have faith in the system'. She does, however, believe that in some ways the EAW already enhances defendants' rights and seeks to reassure sceptics with a thorough overview of the individual safeguards of the ECHR that continue to apply to the EAW scheme, the specific protections that have been incorporated in the EAW framework decision, and the complementary work being done by the Commission to supplement these protections. However, given the current record of ECHR violations by EU member states, and the lack of political will that tends to prevail when measures to improve individual rights are brought to the negotiating table, it is yet to be seen whether her optimism is justified.

The advent of the EAW means that EU citizens facing justice in other member states will only be confident of access to adequate standards of criminal justice if governments take a strong stance on minimum safeguards now.[3]

Marisa Leaf, EU legal officer, JUSTICE

Torture: A collection

Sanford Levinson (ed)
Oxford University Press, 2004
326pp £18.50

This book addresses a range of questions made very contemporary in the aftermath of 9/11. What is torture? What is the mind set and framework against which torturers act and that of their victims? Why is there so much reluctance to calling dubious interrogation and detention practices 'torture'? What do the terms 'cruel, inhuman and degrading treatment', 'coercive interrogation' and 'stress and duress techniques' mean? Why are they *preferred* over the term 'torture'? Above all, some of its contributions get to the core of a very topical issue – as Sanford Levinson probes: 'at least in some carefully specified circumstances, might be a "lesser evil" than some other "greater evil" that menaces society'. The book has 17 contributors from the United States, Jerusalem, Northern Ireland and the United Kingdom – the best known of whom is the controversial Alan Dershowitz. The very publication of

a book on this subject – some of whose contributors want to roll back the clock and provide acceptable conditions for the use of torture – is a sad reflection of our times and the domination of a particular strand of US thinking.

The book — well documented with footnotes — begins with the philosophical considerations, *ie* whether torture can ever be justifiable (Henry Shue), and the dilemma or necessity of having one's hands 'dirty' (Michael Walzer and Jean Bethke Elshtain). John Langbein and Jerome Skolnick dwell on the historical transformation of torture in Europe, UK, and US, from being a part of judicial procedures to its proscription. This context is instructive. Torture moves from mediaeval ideas of a 'chance giving' alternative to execution and detailed instructions were inscribed in the procedural criminal codes. It continues with Mark Osiel's analysis of the mental state of torturers during the Argentinean 'dirty war'. This part of the book, though unpleasant in some of its content, was very accessible.

By contrast, the second part was distinctly not reader friendly, particularly to a reader from Mexico, where how the confession is obtained while under custody has no weight on whether that confession can be used as reliable evidence against a defendant. I found it distressing that some contributions, such as Henry Shue's, proposed the 'moral loss' of allowing torture as 'necessary' to obtain information from suspected terrorists in extreme cases. Likewise, Oren Gross' statement that 'an absolute ban on torture is the right thing to do'; but 'in circumstances amounting to a catastrophic case' most of us hope that government agents will 'resort to whatever means they can wield', even if those means, '*may* entail violating the absolute prohibition on torture'.

In his contribution, Alan Dershowitz affirms to be 'against all forms of torture *without accountability*'; hence, he dexterously argues *torture warrants* would require that judges oversee its use. Taking the opposite view, Elaine Scarry holds that a guarantee of exoneration should not be provided to torturers before the fact.
I cannot be thoroughly objective about this book as a whole, particularly those essays that deal with *when* and *how* torture would be permissible. These are attempts to legalize a practice generally and rightly condemned. As Ariel Dorfman expresses the messianic rhetoric of some contributors:

> *What if the person […] is guilty? […]; what if we were invited to enjoy Eden all over again while one despicable human being was receiving over and over again the horrors he imposed on others? Would we answer no?*
>
> *Would we answer that torture is always, definitely, absolutely, unacceptable?*

I can only hope we all would reject this and choose to answer 'no to torture' just as Dorfman pleads. I come from a culture that has not fully accepted the banning of torture. Do not be persuaded by anything to return there.

Patricia Hernández Ruiz, Open Society Justice Institute Fellow; Intern, JUSTICE

Blackstone's Guide to The Employment Equality Regulations 2003

N de Marco

OUP

296 pp £29.95

Harvey Special Report Series 2004: Discrimination – The New Law

M Rubenstein

102 pp £80.00

Non-Discrimination in International Law: a Handbook for Practitioners

Kevin Kitching (ed)

Interights, 2005

290 pp

Available only on the internet:

http://www.interights.org/pubs/handbook.pdf

The last few years have brought many substantial changes to our equality law. But despite widespread calls for simplification of the law the changes that have been implemented have only served to make it more complex and inaccessible to the ordinary person. In 2000 the Hepple Report[4] calculated that within the UK there were 30 relevant Acts, 38 Statutory Instruments, 11 Codes of Practice and 12 EC Directives and recommendations directly relevant to discrimination. By the end of 2004 this had reached 35 Acts, 53 Statutory Instruments, 13 Codes of Practice, 3 Codes of Guidance and 18 Directives and Recommendations that apply to UK equality law.

The changes dealt with in these two books have been introduced in order to implement the EC Directive no 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin and the EC Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation.

The new Employment Equality (Sexual Orientation) Regulations 2003 and the Employment Equality (Religion or Belief) Regulations 2003 have brought protection from discrimination in employment on the grounds of sexual orientation and religion or belief. As yet there are few decided cases on them. Most of the cases are in the Employment Tribunal so do not create any precedents, hence books to give guidance are very welcome.

In addition to the new grounds in respect of race there are new definitions for indirect discrimination, harassment, genuine occupational requirement and a new burden of proof for discrimination on the grounds of 'race, or ethnic or national origin' but not for discrimination on the grounds of 'nationality' or 'colour'.

In the area of disability discrimination too, the government has had to make changes in order to implement the EC Employment Directive. The definition of direct discrimination has been extended to discrimination 'on the ground of' a disabled person's disability, thus including those discriminated against because of their link to a disabled person or some other reason related to their disability. They, too, benefit from a new burden of proof, from changes to the duty to make reasonable adjustments as well as extensions to the scope of these provisions.

The Blackstone's Guide which covers only sexual orientation and religion or belief[5] is ostensibly aimed at employment and discrimination

lawyers, employers and personnel managers, trade union and employee representatives and community activists concerned about religion or belief or sexual orientation discrimination but would also be of interest for academics or students. It is detailed and comprehensive, setting out the elements of every concept in clearly headed paragraphs.

For most of the book it considers the two new regulations in relation to sexual orientation and religion or belief alongside one another, dealing in turn with the prohibited discrimination, the scope of protection, other unlawful acts, the genuine occupational requirement, general exceptions from protection and enforcing the regulations, followed by two chapters dealing with specific issues in relation to each separate ground. Additionally, and very usefully, it contains a copy of the EC Directive, the Regulations themselves together with the relevant ACAS Guidance. So it provides a complete package of the materials necessary to deal with this area of law.

The Harvey Special Report covers not only sexual orientation and religion or belief but also the new Regulations in relation to race and disability, although it does not contain copies of the relevant Directives, Regulations and Codes of Guidance. It takes as its focus 'the busy practitioner', probably mainly human resource managers and lawyers. It provides a broad overview of the recent changes to the law. It starts by considering each of the common concepts in turn – direct and indirect discrimination, harassment, the scope of the legislation and employer liability. It then devotes separate chapters to the changes in relation to race, religion or belief, sexual orientation and disability discrimination. It is accessible and easy to read. It gives clear examples and considers the main relevant employment and human rights case-law.

Of course, changes are still occurring and discrimination books become quickly out of date. The definition of 'disability' will be extended to make it easier for mental health service users, people with cancer, HIV and multiple sclerosis to claim their rights when the new Disability Discrimination Bill 2005 is passed. The new Equality Bill 2005 is proposing a new definition of 'religion or belief' to correct some of the shortcomings identified in both these books.

It is hard to know at what point to 'capture' the law. These books are certainly useful but need to be read alongside an awareness of current changes.

One can only hope that the government's recently announced Discrimination Law Review will grapple effectively with this complex morass of law to ensure that it is simplified and that common standards are achieved wherever possible. Until then these books are recommended reading for discrimination lawyers.

The Non-Discrimination in International Law Handbook is an impressive project which sets out to provide 'an overview of the key principles of discrimination and equality from each of the most important systems of human rights protection'. It sets out to provide this handbook on international discrimination law entirely on the internet, with the intention of updating it regularly.

The Handbook sets out the principal international and regional human rights discrimination instruments before going

on to examine the key legal standards in international discrimination law. There is a section on how to make a claim that is followed by detailed consideration of each of the possible categories of discrimination. The final section picks up some of the intersecting issues such as multiple discrimination and equality as dignity. Each section provides useful references to other relevant publications.

The search engine is easy to use and moves quickly to the relevant section, however, one cannot help feeling that it could also be useful in a book format that might facilitate its more systematic use. Nonetheless, this is a useful research tool for academics and practicising lawyers alike.

Gay Moon, head of the equality project, JUSTICE

Civil Society, International Courts and Compliance Bodies

Tullio Treves, Marco Frigessi di Rattalma, Atilla Tanzi, Alessandro Fodella, Cesare Pitea, Chiara Ragni (eds)

A project of the Universities of Milano, Brescia and Verona with the co-operation of PICT – the Project on International Courts and Tribunals

TMC Asser Press, 2005

317pp £55

This book is an ambitious project, taking a broad approach to determining and discussing the role of civil society in international law. Placed in the context of the development of what is termed and acknowledged as 'civil society', the expansion of globalisation and the erosion of state sovereignty, the book is a series of essays on the role, growth and experience of non-state actors in the systems of international courts, tribunals and compliance bodies.

The accessibility of international courts and compliance bodies to non-state actors is varied. In some circumstances it has widened considerably, others remain more limited. The book focuses on international NGOs, acknowledging that such non-state actors constitute a rather heterogeneous crowd but claiming common features do exist:

> *… they try, inter alia, to influence the decisions and activities of states, acting not only through the channels accepted (or even set up) by states, but also outside of them.*

The book focuses on three particular areas of international law, defined as those where the collective interests of individuals are the subject matter of international law rules: human rights, environmental and international criminal law.

The chapters on the role of NGOs and human rights courts and compliance bodies are immensely varied, ranging from focusing on a NGO's experience of a variety of courts and compliance bodies (Amnesty International, Chapter One), to one NGO's experience in one court (The AIRE Centre and the European Court of Human Rights, Chapter Two) to the practice for a particular court or compliance body (The Intern American Court of Human Rights, Chapter Three, the European Court of Human Rights, Chapter Four, and the United Nations Human Rights Committee, Chapter Five).

The second section shifts the focus onto international criminal law and the role of NGOs with international criminal

courts and tribunals. This ranges from the ad hoc tribunals for the Former Yugoslavia and Rwanda (Chapter Eight), to the East Timor Special Panels for Serious Crimes (Chapter Ten), to the establishment of the International Criminal Court (Chapters Nine and 11).

In both the areas of human rights and international criminal law, NGOs have played an increasingly important and active role. A core theme throughout the chapters is the limitations placed on such a role by resources.

Part three of the book turns to international environmental law, again with a wide variety of focuses: from the experience of a particular NGO (Greenpeace, Chapter 12), to a particular convention of international environmental law (The Aarhus Convention [access to information, public participation in decision-making and access to justice in environmental matters] Chapter 13) to general compliance mechanisms (Multilateral Environmental Agreements, Chapter 15) to a particular body (The World Bank Inspection Panel, Chapter 14). Part four of the book is about NGOs and inter-state and European disputes and the book concludes with a chapter on the role of amicus curiae in international courts.

The scope of the book is impressive, but does not allow for much detailed comparison between the different areas of law, courts and bodies, and non-state actors. However, it provides clear examples of how non-state actors are able to participate in the development of international law. The task for civil society beckons.

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Notes

1 Report from the Commission based on Article 34 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, COM (2005) 63 final, Brussels 23.02.2005.

2 JUSTICE was the first with *European Arrest Warrant: a solution ahead of its time?* S Alegre and M Leaf, 2003, Price £20.

3 A position on which the House of Lords European Union Committee has strongly agreed with JUSTICE. See the *House of Lords EU Committee Report on Procedural Rights in Criminal Proceedings*, HL Paper 28, 7 February 2005.

4 *Equality: A New Framework, Report of the Independent Review of the Enforcement of UK Anti-Discrimination Legislation*, B Hepple QC, M Coussey & T Choudhury, 2000, Hart Publishing.

5 In March 2005 The Blackstone's Guide to The Disability Discrimination Legislation will be published.

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1. Joint JUSTICE/Liberty amendments for the House of Lords Committee stage of the Civil Contingencies Bill, September 2004.
2. Briefings for the House of Commons second reading on the Mental Capacity Bill, September 2004.
3. Submission on Legal Aid, September 2004.
4. Oral evidence to the European Commission Against Racism and Intolerance in their inquiry following up recommendations made in their second report on the United Kingdom, September 2004.
5. Oral evidence to the House of Lords Committee F on counter-terrorism in the EU, October 2004.
6. Oral evidence to the House of Lords Committee E on Commission proposals for safeguards for defendants, October 2004.
7. Briefing on the Housing Bill amendment clauses 180-182 relating to Gypsies and Travellers, October 2004.
8. Joint submission with Liberty to the UN Committee against Torture in response to the UK's fourth periodic report, October 2004.
9. Response to the House of Lords Select Committee on the European Union Sub-Committee E inquiry into the proposed framework decision on certain procedural rights in criminal proceedings throughout the European Union, October 2004.
10. Written submission to the Joint Committee on the Draft Mental Health Bill, November 2004.
11. Asylum and Immigration Tribunal: Legal aid arrangements for onward appeals, November 2004.
12. Submission to the Joint Committee on Human Rights re the UN Committee on the Elimination of all forms of Racial Hatred concluding observations on the United Kingdom's 17th report, November 2004.
13. Briefing on the Serious Organised Crime and Police Bill for the second reading in the House of Commons, November 2004.
14. Letter and briefing note to all MPs on UK/US Extradition Treaty, November 2004.
15. Briefing for the Home Office on the extension of protection against discrimination on grounds of religion or belief, November 2004.
16. Response to the Northern Ireland consultation on the Single Equality Bill, November 2004.
17. Letter to David Blunkett re UK-US extradition, December 2004.
18. Briefing on the Inquiries Bill for the second reading in the House of Lords, December 2004.

19. Briefing on the Identity Cards Bill for the second reading in the House of Commons, December 2004.
20. Information Resource, drafted by trainees at Clifford Chance, on Identity Cards, December 2004.
21. Submission to the European Commission on the proposed Fundamental Rights Agency, December 2004.
22. Response to the European Commission's green paper on mutual recognition of non-custodial pre-trial supervision measures, December 2004.
23. Submission to the Home Office consultation on the implementation of Council Directive 2003/09 of 27 January 2003 laying down minimum standards for the reception of asylum-seekers, December 2004.
24. Briefing for the House of Commons Standing Committee D on the provisions of the Serious Organised Crime and Police Bill concerning incitement to religious hatred, January 2005.
25. Amendments for the Identity Card Bill at the committee stage in the House of Commons, January 2005.
26. Oral evidence to the House of Commons Select Committee on Home Affairs on anti-social behaviour, 18 January 2005.
27. Response to *Increasing Diversity in the Judiciary*, January 2005.
28. Briefing for the House of Commons standing committee D on the provisions of the Serious Organised Crime and Police Bill concerning Incitement to Religious Hatred (clause 119 and Schedule D), January 2005.
29. Response to the House of Lords Select Committee on the European Union inquiry into the Hague Programme (Sub-Committees E and F), January 2005.
30. Oral evidence to the House of Commons Constitutional Affairs Committee on proposals for legal aid in asylum cases, 9 February 2005.
31. Written and oral evidence to the House of Commons Constitutional Affairs Committee on the Special Immigration Appeals Commission, February 2005.
32. Briefing on the Serious Organised Crime and Police Bill's new proposed clauses relating to the protection of organisations from economic damage and other interference with activities, February 2005.
33. Submission to the Department for Constitutional Affairs' consultation on broadcasting the courts, February 2005.
34. Response to the Department for Constitutional Affairs' questionnaire on increasing diversity in the judiciary, February 2005.
35. Briefing on the Prevention of Terrorism Bill for the House of Commons second reading, February 2005.

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