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ISSN 1743-2472

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

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The challenge of dealing with hate speech

On 1 October 2008, Dr Frederick Toben was arrested on the basis of a warrant issued by Germany. He was in transit at Heathrow, having flown in from the United States and on his way to Dubai. His case has achieved some notoriety because a number of politicians, notably Liberal Democrat Chris Huhne, argue that this was an abuse of the concept of the European arrest warrant and shows that it should be renegotiated. Whatever the legal resolution of Dr Toben's objection to surrender to Germany, his case is one of a number that raise various policy issues relating to the proper approach to crimes of 'hate speech' that should be taken by the United Kingdom.

Dr Toben is not the first person to be the subject of a European arrest warrant for offences relating to holocaust denial. In July 2007, Gerd Honsik was arrested in Spain and subsequently returned to Austria to serve a sentence imposed in 1992. He had successfully evaded imprisonment by fleeing to Spain and foiled two attempts at extradition before falling foul of the accelerated procedures of the European arrest warrant. In 2006, David Irving was jailed in Austria for holocaust denial when he, somewhat ill-advisedly, returned there.

Holocaust denial is a useful issue to test the legitimate limits to free speech. We tend to regard it as silly, obtuse and eccentric. Chris Huhne was but one member of Parliament to take to the airwaves and press. In an article in the *Independent*, he quoted the classic defence of free speech by Voltaire: 'I disapprove of what you say, but I will defend to the death your right to say it'.[1]

In a UK context, the denial of the holocaust carries a relatively minor emotional charge: it is, of itself, unlikely to stir up hatred except when articulated in a particularly extreme context as part of some wider vilification designed to raise hatred. We have legislated fairly successfully against incitement to racial hatred. The extension to hatred of religion was, of course, controversial. The Racial and Religious Hatred Act 2006 raised a major domestic debate which was so strong that its likely practical effect was neutralised during its passage through Parliament. A major exclusion was imported so that nothing:[2]

> *Shall be read or given effect in a way which prohibits or restricts discussion, criticism or expressions of antipathy, dislike, ridicule, insult or abuse of particular religions or the beliefs or practice of their adherents, or of any other belief system or the beliefs or practices of its adherents …*

JUSTICE supported the principle of the Act – that stirring up hatred on grounds of religion should have the same protection as for race. But, the attempt foundered on practicalities.

Unsurprisingly, the US has a large influence in discussion about freedom of expression because of the strong protection given in current interpretations of the first amendment to the US Constitution:

> *Congress shall make no law respecting an establishment of religion, or prohibiting the exercise thereof; or abridging the freedom of speech, or of the press …*

However, a recent article in *The New York Review of Books* traces the less than glorious history of this amendment.[3] The crime of seditious libel, remarkably similar to the equivalent still extant in Turkey, continued to prohibit bringing the President or Congress into disrepute despite the passage of the first amendment. In the early nineteenth century, you could even be – and some were – imprisoned just for atheism. The Smith, or Alien Registration, Act was used to repress communists and left-wingers in the 1940s. McCarthyism flourished in the fifties. It was the case of *Brandenburg v USA*[4] in 1969 that set the modern test in stating that hate and seditious speech are protected unless calculated at inciting or producing, or likely to incite or produce, imminent lawless action. Thus, the vituperation of an Ohio Klu Klux Klan leader was left unchallenged by the law in furtherance of the idea of creating a market place of ideas in which only the best survive.

The International Covenant on Civil and Political Rights, by contrast with the US Constitution, takes a rather different position. While Article 19 guarantees freedom of speech subject to balancing considerations relating to such matters as the rights of others and national security, Article 20 places specific restrictions on this by prohibiting 'Any propaganda for war' and 'any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence'. This reflects a more European approach – though it leaves open the question of whether holocaust denial, by itself, would qualify as incitement. That would depend heavily on the context.

The European Convention on Human Rights avoids any reference to 'hate speech'. Article 10(1) protects a general freedom of expression although 10(2) betrays a certain nervousness on the part of the states negotiating the original covenant with a rather longer list than might now be thought necessary of exceptions which, even then, does not expressly include hatred:

> *The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.*

From this excursion into constitutions and treaties, we should return to Dr Toben and the allegation of holocaust denial. This is criminalised by s120 of Germany's Criminal Code in the following terms:

> *Whosoever publicly or in a meeting approves of, denies or renders harmless an act committed under the rule of National Socialism of [genocide] in a manner capable of disturbing the public shall be punished with imprisonment for not more than five years or a fine.*

Genocide, in its turn, is its turn is committed by:[5]

> *Whosoever, with the intent of destroying as such, in whole or in part, a national, racial or religious group or one characterised by its folk customs by:*
>
> 1. *killing members of the group*
> 2. *inflicting serious or emotional harm …*
> 3. *placing the group in living conditions capable of leading, in whole or in part, to their physical destruction;*
> 4. *imposing measures which are intended to prevent births within the group;*
> 5. *forcibly transferring children of the group into another group …*

The cases of Dr Toben, David Irving and Gerd Honsik raise the preliminary question of whether countries like Austria and Germany can legitimately restrict speech about events under National Socialism. It would surely be difficult to deny, certainly until very recent times, that laws such as these played an important part in denazification and the establishment of a democratic state. The offence is, of course, rather wider than the term 'holocaust denial' might suggest both in what it catches and what is required to commit the crime – the public need to be disturbed.

We have to remember that denial plays an important part in acts of genocide. Genocide Watch, the international campaign against genocide, argues that there are eight stages to any genocide campaign: denial is the last:[6]

> ***DENIAL** is the eighth stage that always follows a genocide. It is among the surest indicators of further genocidal massacres. The perpetrators of genocide dig up the mass graves, burn the bodies, try to cover up the evidence and intimidate the witnesses. They deny that they committed any crimes, and often blame what happened on the victims. They block investigations of the crimes, and continue to govern until driven from power by force, when they flee into exile. There they remain with impunity, like Pol Pot or Idi Amin, unless they are captured and a tribunal is established to try them.*

Genocide Watch is concerned with the perpetrators of genocide but the same must hold true of their supporters and apologists. It is clear that only with the end of denial can societies hope to deal with massive breakdowns of human rights such as occurred in Germany under the Nazis but also, more recently, Rwanda, Argentina or South Africa.

So, as a matter of principle, if individual countries which have suffered genocide may legitimately legislate to prevent its denial, should other countries not assist them by repatriating alleged perpetrators who have fled or strayed into their jurisdiction – whatever the established doctrines of double criminality? Dr Toben's case relating to the European arrest warrant will soon be resolved. But, there remain the issues of principle and practice, irrespective of the detail of the Extradition Act 2003.

Dr Toben now lives in Australia from where his website beams out his views to whoever might seek them. These include a variety of minority and unpopular opinions, including a particularly circuitous explanation of the events of 9/11. Dr Toben is inhibited in expressing his views on the holocaust by the existence of a civil injunction in a case brought by the Executive Council of Australian Jewry. He deals with this ingeniously, if somewhat disingenuously, by stating that:

> *I am operating under a Federal Court of Australia Gag Order that prohibits me from questioning/denying the three pillars on which the Holocaust-Shoah story/ legend/myth rests:*
>
> 1. *During World War II, Germany had an extermination policy against European Jewry;*

2. *of which they killed six million;*

3. *using as a murder weapon homicidal gas chambers. It is impossible to discuss the Holocaust with such an imposed constraint. I therefore am merely reporting on matters that I am not permitted to state.*

For example, if I state the Holocaust is:

1. *a lie;*

2. *six million Jews never died, or*

3. *the gas chambers did not exist, then I would claim that I am merely reporting on what expert Revisionists such as Professors Butz/Faurisson, et al, are stating in public.*

Thus, Dr Toben raises a number of interesting questions:

(a.) Can Germany and Austria be criticised for maintaining denazification statutes that criminalise denial of the holocaust? In those countries in particular, is denial of the holocaust a symbol and symptom of a continuing attempt by groups on the far right to deny history in the hope of repeating it?

(b.) If conduct is accepted as legitimately criminal in Germany or Austria, why, in principle, should alleged perpetrators not be the subject of a European arrest warrant in other European countries? If someone was deliberately evading German laws by broadcasting support for the Nazis from elsewhere why should Germany, in principle, not ask for their surrender, particularly within the European Union?

(c.) On the other hand, what are the practical limits of the law in this area? Is holocaust denial by an eccentric on the other side of the world really a threat to the current German state? After all, David Irving has spectacularly little success in persuading any but a lunatic fringe in the UK to follow his ideas.

(d.) Finally, and in any event, what level of connection is required in a 'hate speech' crime between the act and its context, intention and consequence? The Americans argue it should be the incitement, or likelihood of, imminent lawless action. The holocaust is a generally accepted historical fact. If Dr Toben, Gerd Honsik and David Irving want to deny it happened, what is the immediate consequence of that? This takes us back in a circle to the first and fundamental question. Do Germany and Austria need to keep their denazification legislation because, otherwise, they will encourage disorder from far right elements in their society? If so, that might justify them. If not, the laws have become outdated and there is a principled case for saying that offences relating to holocaust denial should not be covered by the European arrest warrant – let alone a legal one.

Roger Smith, Director, JUSTICE

Notes

1 24 October 2008.
2 Inserted as s29J Public Order Act 1986.
3 Jeremy Waldon, 'Free Speech and the Menace of Hysteria', *The New York Review of Books*, 29 May 2008.
4 395 US 444.
5 S220a.
6 Gregory H Stanton, http://www.genocidewatch.org/aboutgenocide/8stagesofgenocide.html.

Law Lords at the margin: who defines Convention rights?

Baroness Hale of Richmond

This is the text of the JUSTICE Tom Sargant memorial annual lecture 2008 given at Dechert LLP, London on Wednesday 15 October 2008.

I have a confession to make. You may remember the title of Conor Gearty's lecture last year, *'Are the Law Lords out of their depth*?'[1] I was the Law Lord whose emailed response to the invitation was headed 'Not waving but drowning'. His argument then was that if the Law Lords got out of their depth they should on no account swim – even if they could. They should stick to the shallow end, by which he meant 'those bits close to their own function' – criminal justice, fair proceedings, civil liberties and the like. They should avoid 'the deep water on the far side, the social, taxation, foreign and other policy stuff that judges did not come across in the course of their day to day work and on which therefore they should not be claiming any special expertise'. There are many civil and family judges who would find that a curious statement. But he went further. We should all stick to 'the shallow end of a rule of law that defers to the wisdom of the crowd – even when convinced of its stupidity'. So it seems that he was counselling two types of caution: first, caution as to the subject matter of cases in which to intervene in the decisions of the democratically elected, whether government or Parliament; and secondly, caution even then as to whether and how to intervene.

So when Roger Smith asked me to give this year's lecture, he invited me to 'carry forward discussion on the role of the judiciary'. Specifically, in his view, 'if we are to have a debate about a bill of rights, it seems to me important that we have a constitutional understanding, articulated in words that schoolchildren can understand, which deters the judicial presumption inherent in *Roe v Wade*[2] while maintaining the ferocity of the test of proportionality in *Belmarsh*.[3]' On top of that challenging agenda, he wanted me to link this to thinking about how the creation of the Supreme Court might affect constitutional developments.

The simplest way of achieving what he seeks would be to retain the services of Lord Bingham as senior Law Lord and President of the new Supreme Court but sadly that cannot be. Nor indeed does the reality of judicial life lend itself to these simple dichotomies, still less to words that schoolchildren can understand.

A case comes before us and we have to decide it mainly on the arguments presented to us. Sometimes counsel may come close to saying 'you're in the deep end here, go back', or 'beware judicial presumption', but the arguments are rarely constructed in those terms. They concentrate on the application of the law in question to the facts in question. And because they are common lawyers they tend to treat the Strasbourg jurisprudence in the same way that they would treat the English case law.

Take the example of *Roe v Wade* itself. At issue was the Texas law banning abortion unless the woman's life was in danger. The majority in the US Supreme Court constructed a right to privacy from the 14th amendment's requirement that no-one be deprived of their liberty without due process of law. They balanced that right against the legitimate state interests in protecting the health of the mother and the life of the unborn child. They developed a balance between autonomy and regulation corresponding roughly to the three trimesters.[4] Liberty in the US Constitution is undoubtedly more widely construed than the physical liberty protected by Article 5 of the European Convention on Human Rights (the Convention). The issue between the majority and the minority was the standard against which to judge laws which interfered with liberty. The dissenters thought that no more than a rational connection between the legislation and a legitimate aim was required.

Here we would not be dealing with the 14th amendment but with Articles 2 and 8 of the European Convention. The European Court of Human Rights in Strasbourg has so far refused to decide whether an unborn child is protected by the right to life in Article 2. It has not ruled out the possibility but has emphasised that the rights of the unborn child would be limited by the mother's rights and interests.[5] Equally it has been very careful not to rule on whether there is a right to an abortion. The furthest it would go in *Tyriac v Poland*,[6] was to say that where abortion was allowed, its regulation fell within the scope of Article 8. There was a positive obligation to have an effective means of resolving disputes about whether the mother's health would be endangered by continuing the pregnancy. Former President Wildhaber has told me that this cautious approach was felt necessary to preserve the very existence of the Court, given the strength of opposition to abortion in some of the member states.

But it is not inconceivable that we might one day be asked to rule on whether some aspect of our law and practice of abortion constituted an unjustified interference with the mother's right to respect for her private life. It would not be judicial presumption for us to try and answer the question. We would have no choice. The question then becomes 'what is the proper role of the judges in interpreting or defining the scope and content of the Convention rights – as

well as in applying them to a given set of facts?' To what extent can and should we go further than Strasbourg has gone?

This is a surprisingly controversial question. The starting point is the famous statement of Lord Bingham in *R (on the application of Ullah) v Special Adjudicator*:[7]

> *It is of course open to member states to provide for rights more generous than those guaranteed by the Convention, but such provision should not be the product of interpretation of the Convention by national courts, since the meaning of the Convention should be uniform throughout the states party to it. The duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more but certainly no less.*

To this might be added the words of Lord Brown in *R (on the application of Al-Skeini) v Ministry of Defence*,[8] 'no less but certainly no more'. I have associated myself with both, not only at the time but also in other cases.[9] Sir Stephen Sedley has commented that 'the logic of this is entirely intelligible; it avoids judicial legislation and prevents member states from getting out of step with one another'. Although he points out that 'it carries the risk that, in trying to stay level, we shall fall behind'.[10]

Other commentators, Jonathan Lewis among them,[11] have pointed to more fundamental objections to the *Ullah* doctrine. The first is that the Human Rights Act 1998 (the Act) does not in fact incorporate the Convention into our national law. It deliberately creates new rights and remedies in national law, specifically the right to have public authorities act compatibly with the Convention rights. Those rights are defined in the same words as the rights in the Convention but they are rights protected by national law. This is why it was held in *Re McKerr*[12] that the protection for the right to life provided by the Act did not apply to deaths taking place before the Act came into force.

Secondly, the Act itself only requires the courts to 'have regard' to the Strasbourg jurisprudence,[13] not to follow it. Clearly, it contemplates that we shall keep pace with the Strasbourg jurisprudence, because the object is to avoid a situation where the UK is in breach of its obligations under the Convention and individuals have to go to Strasbourg to have it put right. That would in any event be consistent with the general principle that legislation is to be construed consistently with our obligations in international law. That is why we are most unlikely to disregard a clear and constant line of Strasbourg authority which indicates that the claimant should win. There may be a few exceptions; for example where someone has succeeded in Strasbourg which we find difficult to understand[14] or where the case can be distinguished on its particular facts.[15]

But there is nothing in the Act itself which prevents us from going further than Strasbourg has gone or can confidently be predicted to go in the future. Nor is there anything in the Act to support the reluctance shown in *Sheldrake v DPP*[16] to seek such guidance as we can from the jurisprudence of foreign courts with comparable human rights instruments (Canada is the best example), especially on subjects where Strasbourg has not recently spoken.

Thirdly, there are some indications in the Parliamentary history that Parliament itself expected us to develop the law ahead of Strasbourg. The white paper, *Rights brought home: the Human Rights Bill*, explained:[17]

> *The Convention is often described as a "living instrument" because it is interpreted by the European Court in the light of present day conditions and therefore reflects changing social attitudes and the changes in the circumstances of society. In future our judges will be able to contribute to this dynamic and evolving interpretation of the Convention.*

There were also clear statements by the Home Secretary in the House of Commons[18] and the Lord Chancellor in the House of Lords[19] that the courts must be free to develop human rights jurisprudence and move out in new directions. The Home Secretary also said this about the margin of appreciation which Strasbourg allows to member states in certain areas:[20]

> *Through incorporation we are giving a profound margin of appreciation to British courts to interpret the Convention in accordance with British jurisprudence as well as European jurisprudence. One of the frustrations of non-incorporation has been that our own judges ... have not been able to bring their intellectual skills and our great tradition of common law to bear on the development of European Convention jurisprudence.*

Lord Bingham himself, then Lord Chief Justice, told the House that 'British judges have a significant contribution to make in the development of the law of human rights. It is a contribution which so far we have not been permitted to make.'[21] He quoted Milton's *Areopagitica*: 'Let not England forget her precedence of teaching nations how to live'. But in practice the main contribution our judgments make in Strasbourg is to explain why we have *not* found a violation of the Convention in a particular case. Strasbourg may of course disagree with us, but at least it will have had the benefit of a full human rights analysis from us first.

A fourth objection to the *Ullah* principle is that the stated reason for it – that the interpretation of the Convention should be uniform throughout the member

states – does not make much sense. In *Brown v Stott*,[22] Lord Bingham had counselled against implying new rights into the Convention:

> *Thus particular regard must be had and reliance placed on the express terms of the Convention, which define the rights and freedoms which the contracting parties have undertaken to secure. That does not mean that nothing can be implied into the Convention. ... But the process of implication is one to be carried out with caution, if the risk is to be averted that the contracting parties may, by judicial interpretation, become bound by obligations which they did not expressly accept and might not have been willing to accept.*

Of course, Lord Bingham cannot have meant that an expansive interpretation in the UK would bind the courts of other member states, for it could not do so. He can only have meant one of two things. That Strasbourg will be cautious in its interpretations for fear of committing member states, which are bound by its decisions, to obligations which they did not want. Or that UK courts should be cautious for fear of committing the UK to obligations which it did not want. This finds an echo in Lord Brown's point in *Al-Skeini*,[23] that an aggrieved claimant can always go to Strasbourg but an aggrieved government can not. But there is no particular reason why either Strasbourg or other member states should object if we go forging ahead in interpreting the scope of the Convention rights in UK law.

So we have the *Ullah* principle and we have all these objections to it and no doubt there are many more. The issue has recently come up in an obscure little family law case from Northern Ireland, *Re P and others*.[24] The claimants were an unmarried opposite sex couple who wished jointly to adopt the woman's ten year old daughter. English law has permitted joint adoptions by unmarried couples, whether of the same or opposite sexes, since the Adoption and Children Act 2002 came into force in 2005. Scotland will permit it once the Adoption and Children (Scotland) Act 2007 comes into force. But Northern Ireland retains the old law, in the shape of Article 14 of the Adoption (Northern Ireland) Order 1987, which restricts joint adoptions to married couples (and even failed to include civil partners when the Civil Partnership Act 2004 was passed). Single people, whether or not they are in a stable opposite or same sex relationship, can adopt alone but the child will not become their partner's child or a member of their partner's family. While Northern Ireland was still under direct rule from London, civil servants produced an impressive review which concluded that the law should be brought into line with the rest of the UK. Consultation had produced some strong opposition, mainly from the Protestant churches, and particularly to adoption by same sex couples. But the review found good reasons to reject all of their arguments. Then devolution happened and the relevant

minister in the Northern Ireland government had not yet made a decision about what to do. It does not take much imagination to realise how difficult it must be for any elected politician in Northern Ireland to take such a step.

The couple, with the support of the Official Solicitor acting on behalf of the child, argued that to prevent them from adopting was to discriminate against them in the enjoyment of the right to respect for their private and family lives on the ground of their lack of marital status. The Crown accepted that the right (more correctly a claim) to adopt a child fell within the ambit of Article 8 but initially argued that, while marriage was a status covered by Article 14, lack of marriage was not. We had little difficulty in disposing of that point, although old-fashioned family lawyers would understand it. Marriage is a status in the technical sense that it affects the legal position of people other than the parties to it. But the concept of status in Article 14 is much wider than that. The real battleground was over whether the difference in treatment could be justified.

I found this much more difficult than at least three of my colleagues, no doubt because I had been party to the 1992 Review of Adoption Law on which the 2002 Act was based.[25] This recommended the retention of the marriage rule. It survived all later consultations[26] and went into the bill which was introduced into Parliament. The change was the result of back bench pressure as the bill went through the Commons and was hotly contested in the Lords. The arguments in favour of the new rule are simple. The best interests of the child are to be the paramount consideration governing the actions of adoption agencies and courts. The refusal of a couple to commit themselves to the legal consequences of marriage (or civil partnership) might well cast doubt upon whether an adoption would be in the best interests of the child. Should the relationship break down for any reason, both the surviving parent and the child will be much less well protected. But it is difficult to find good reasons for a blanket ban. It is, as Lord Hoffmann put it, to turn a reasonable generalisation into an irrebuttable presumption.[27] Bright line rules may be appropriate in some cases, but not where the object is to promote the welfare of children. There could well be cases, especially where the child was already living with the couple and had no contact at all with the other half of her birth family, where adoption by them both would be better for the child than the status quo. In reaching his conclusion abut what the law should be, Lord Hoffmann prayed in aid the decision of the South African Constitutional Court in *Du Toit and Vos v Minister for Welfare and Population Development*,[28] which was about a same sex couple.

But if it is our task to keep pace with the Strasbourg jurisprudence as it evolves over time, what would Strasbourg say? There is no case directly in point but there are two recent cases about adoption by single gay or lesbian people. In *Fretté v France*[29] it was held by a narrow majority that refusing to allow a single gay man

to adopt on his own was justified. But in *EB v France*[30] it was held that refusing to allow a single lesbian woman to adopt was not. Strasbourg has for some time looked with deep suspicion at discrimination based on sexual orientation and single adoption by heterosexual people was allowed. We can quite confidently predict that Strasbourg would not approve of the continued exclusion of civil partners from joint adoptions. But this does not necessarily help us to predict what Strasbourg would say about *joint* adoptions by unmarried (or unregistered) couples. Lord Walker and I thought that this was a case in which Strasbourg might well apply the margin of appreciation. They might accept that secular societies where living together outside marriage was commonplace could take one view on the matter, whereas deeply religious societies where it was still frowned upon might take another. The Irish Constitution, for example, requires that special protection be given to the marital family.[31] The rest of the United Kingdom is in advance of many other European countries. The European Adoption Convention 1967 still requires that joint adoptions be limited to married couples (although revisions are under discussion) so the UK had to denounce the relevant provisions in order to change the law. Northern Ireland still has much higher rates of religious observance and lower rates of living together and extra-marital birth than the rest of the United Kingdom. The review and consultation exercise had shown how difficult it would be to get the same changes through the Northern Ireland Assembly.

So was this a case where we should 'stick to the shallow end of a rule of law that defers to the wisdom of the crowd – even when convinced of its stupidity'? Or was it a case where we should make a small but significant advance upon the Strasbourg jurisprudence? Lord Walker, while agreeing that 'opposition to the proposed change in Northern Ireland adoption law seems to be based on the fallacy of turning a reasonable generalisation into an irrebuttable presumption',[32] would have left the matter to the Northern Ireland Assembly. He gave three reasons.[33] First, he thought it 'far from clear that the Strasbourg court would hold that the Adoption Order infringes the ECHR. So long as the 1967 Convention remains in force the Court would be more likely, in my opinion, to reach the opposite conclusion'. Second, the decision was one which ought to be made by a democratically elected legislature. Third, judges, lawyers, officials and agencies would be faced with a very abrupt change in the law and he suspected that there would be many practical difficulties. He would therefore have dismissed the appeal, but with a clear warning that if within two or three years a clear consensus emerged in Europe and Northern Ireland did not legislate in line with that consensus, the issue would have to be reconsidered and the result would probably be different.[34]

Lord Hoffmann, Lord Hope and Lord Mance all took a different view of the likely outcome of the case in Strasbourg. Lord Hoffmann thought it 'not at all unlikely' that Strasbourg would hold that the discrimination violated Article 14.[35] But even if Strasbourg would leave it to the margin of appreciation, this should make no difference. He pointed out that Lord Bingham's famous words in *Ullah* were not made in the context of a case in which Strasbourg has declared a question to be within the national margin of appreciation. Different states could give different answers. Nor would Strasbourg be concerned about whether it was the legislature, the executive or the judiciary which gave that answer. None of the normal reasons for following the Strasbourg decisions – the desirability of uniformity and respect for the decisions of a foreign court – apply where the foreign court has deliberately said that the matter is up to us. In a rather swift leap from this conclusion, he then decided that it was for the court to 'apply the division between the decision-making powers of courts and Parliament in the way which appears appropriate for the United Kingdom'.[36] Although this was a matter of social policy, where the legislature was free to decide between two rational solutions to a social problem, it was not free to discriminate on an irrational basis.[37]

Lord Mance also agreed that if the matter was within our domestic margin of appreciation the court was free to put it right. He made the additional point, based on some observations of Lord Steyn in *R (S) v Chief Constable of South Yorkshire Police*,[38] that there is a distinction between the basic content of the right, which should generally receive a uniform interpretation throughout the member states, and the justifications for interference, where different cultural traditions might be material. And he agreed with me that the cultural differences between Great Britain and Northern Ireland would not justify a different approach on this question.[39] In fact, it was those very differences which might make it more difficult for the legislature to act to put the matter right.

In the end my conclusions were the same as the other three and for much the same reasons. I did take the precaution of checking through the rest of the Adoption Order to ensure that telling the court to ignore the fact that the couple were not married would not lead to difficulties with other provisions. Rather surprisingly, it did not. This was subordinate legislation within the meaning of the Human Rights Act so it could simply be disregarded by the courts. We therefore made a declaration that it was unlawful for the Family Division of the High Court of Northern Ireland to reject the claimants' application to adopt on the ground only that they were not married to one another. Had it been primary legislation, of course, we could only have made a declaration of incompatibility. But in the general approach to the interpretation of the Convention rights it made no difference whether it was primary or subordinate legislation.

I did find the whole matter a great deal more difficult than the others. This may be because of my background in family law. It may be because of my

hitherto unqualified support for *Ullah*. Or it may be because of the 'democratic sensitivity' so kindly referred to by Conor Gearty last year. I am a mostly loyal disciple of Lord Bingham in that respect. This looks like the deep end in more ways than one – not just the subject matter but also in the decision to bypass the elected representatives. But I take comfort from the thought that 'democracy values each person equally even if the majority does not'. The courts in a democracy should therefore be especially vigilant to protect people from unjustified discrimination.

So we seem to have reached the following position. The 'Convention rights' given effect by the Human Rights Act are in the same words as the rights laid down in the European Convention on Human Rights. But they are rights which are given effect in national law. National law is free to define them for itself. In defining the substantive content of a right, the courts will generally respect a clear and constant line of Strasbourg jurisprudence unless there is good reason not to do so. If it is clear that the claimant would win in Strasbourg, then we will not hesitate to tell the politicians so, whatever the subject-matter. *Bellinger v Bellinger*[40] on the recognition of trans people's marriages in their reassigned gender is a good example. We may also make reasonable predictions of how Strasbourg might answer the same question if it has not recently done so. *Ghaidan v Godin-Mendoza* in the Court of Appeal is a good example.[41] But if it is clear that the claimant would lose in Strasbourg, we are still unlikely to forge ahead regardless.[42] And if the matter is or likely to be within the margin of appreciation which Strasbourg would allow to member states, then it is up to us to define the right as best we can. There may be more room for differing national interpretations in deciding upon the justifications for limiting rights than upon the content of the rights themselves. Local conditions may well play a part in this. We should not bother with whether this is defining the right or simply applying it to the facts[43] – the result will be the same.

This still does not give us a completely free hand. When deciding whether a particular limitation upon an established right is 'necessary in a democratic society' we are bound to give great weight to a considered decision of Parliament on the issue. Recent illustrations are the bans on political advertising[44] and hunting with dogs, both of them the result of prolonged debate and consideration by the legislature. In the Hunting Act case I may have put it too high in saying that 'this House should not attempt to second guess the conclusion that Parliament has reached'.[45] *Re P* shows us that it may be otherwise with legislation passed some time ago and without reference to human rights. But this is obviously worthy of more respect if it is going in the same direction as international human rights law rather than in the reverse. An illustration of this is the ban on corporal punishment in schools.[46]

There is another point on which I may have put it too high. In *DS v HM Advocate*,[47] for example, I said that 'The legislature can get ahead of Strasbourg if it wishes and so can the courts in developing the common law. But it is not for us to challenge the legislature unless satisfied that the Convention rights, as internationally agreed and interpreted in Strasbourg, require us to do so.' It is tempting to draw a distinction between leaping ahead of Strasbourg when developing the common law[48] and leaping ahead of Strasbourg in telling Parliament that it has got things wrong. It is in the latter context that most of the strongly *Ullah* type statements have been made. Yet the concept of the 'Convention rights', upon which all our powers and duties under the Human Rights Act depend, cannot mean different things depending upon whether we are developing the common law, controlling the executive, or confronting the legislature. So the dilemma remains, even if *Re P* has softened it at the margin.

No doubt there are many who would like us to continue to tread carefully, mindful of the deep unpopularity of human rights in the popular press. No doubt there are some who would like us to go further. Why, for example, when a point comes up which has not been decided in Strasbourg, should we try to predict what Strasbourg would do with it? Why should we not work out what we think the Convention rights require, using a broad range of national and international materials to guide us? Indeed, one does not have to be a very radical or activist judge to hold the view that it is preferable to have a broadly defined right and to concentrate on whether the state has good reasons for interfering with it.[49]

These problems exist because we have a Human Rights Act which gives effect to the rights defined in an international treaty whose signatories are subject to the jurisdiction of a supranational court. What would be the position if we had our own British bill of rights, as the Joint Committee on Human Rights now believes that we should?[50] The whole object would be to develop distinctively British rights, defined by British law, certainly no less and possibly some more than the present Convention rights. The Committee's sample bill makes it clear that if a right corresponds to an Convention right it shall be interpreted as having at least the same scope as the Convention right.[51] But when dealing with a British bill the *Ullah*-type reasoning would not apply.

The Committee's outline bill is an interesting mixture of the Human Rights Act and the Canadian Charter. It creates the same remedies for violation of the British rights as the Human Rights Act does for violation of the Convention rights. However, it contains a general 'limitation of rights' clause,[52] very like the Canadian Charter clause, which seems therefore to do away with the distinction between absolute and qualified rights. It also imports from Canada a 'notwithstanding clause' enabling Parliament deliberately to enact incompatible

legislation.[53] In practice, this is not used in Canada, where Parliament seems prepared to trust the courts to get the balance right even though they have the power to strike legislation down.

So what would our approach be to such a bill? We could no longer appeal to Strasbourg to support our reluctance to tell Parliament or even government that it has got things wrong. We would have to develop our own principles. We could of course do so by sticking to the shallow end and meddling only in those subjects which Conor Gearty thinks are our bread and butter. But as already seen, we cannot do that when it is clear that the claimant would win in Strasbourg. Or we could stick mainly to the shallow end and meddle in other areas only where we could find no rational connection between aim and interference. Or we could do what the legislation told us to do, assuming it took a similar form to the joint committee's outline, which is to define the rights and decide whether the limitations were acceptable. In doing that we would continue to give great weight to the recent and carefully considered judgments of the elected legislature and government. We would continue to think that there were many areas about which they might know more than we did, although I am not sure that these would be the same areas as Conor Gearty's deep end. And we would continue I hope to apply the proportionality principle with rigour if not ferocity.

We have a great deal to learn from our closest neighbours in this, the Supreme Court of Canada and the Constitutional Court of South Africa. But it is worth pondering one lesson from the United States. Their Supreme Court has so far tried very hard to solve the terrorism cases which have come before it on grounds other than the Bill of Rights. Perhaps they have been afraid that if they use the Constitution to reach what may seem an acceptable solution to the particular case, lasting damage may be done to that very Constitution. Our present situation, of implementing an international treaty rather than a home grown constitutional instrument, has imposed a discipline but it has also given us a freedom which we might be unwise to give up. I could well see us being even more cautious in interpreting and applying a home grown bill of rights than we have been with the European Convention. And perhaps that is what the politicians would like.

Turning to the final question in my examination paper, I believe that the answer is clear. The creation of the new Supreme Court will make no difference one way or the other.

Baroness Hale of Richmond is a Lord of Appeal in Ordinary.

Notes

1 (2007) Vol 4 No 2 *Justice Journal* pp8-18.
2 410 US 113 (1973).
3 *A and others v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 AC 68.
4 In simple terms, no regulation was permissible in the first trimester; in the second trimester regulation designed to protect maternal health was allowed; and in the third, regulation and even prohibition were allowed to protect the life of a viable foetus, unless abortion was necessary to preserve the life or health of the mother.
5 *VO v France* [2004] 2 FCR 577.
6 [2007] BHRC 155.
7 [2004] UKHL 26, [2004] 2 AC 323, para 20.
8 [2007] UKHL 26, [2008] 1 AC 153, para 106.
9 See *DS v HM Advocate* [2007] UKPC 36, [2007] HRLR 28, para 92: 'This means that we can only rely on the Convention rights as interpreted in Strasbourg as a basis for invalidating the act of a democratic legislature, for it is only incompatibility with those rights which gives us a ground for doing so.' Also *R (Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2008] UKHL 15, [2008] 2 WLR 781, para 53, where I declared that 'I do not believe that, when Parliament gave us these novel and important powers [to hold legislation incompatible with the convention rights] it was giving us the power to leap ahead of Strasbourg in our interpretation of the convention rights.'
10 'Bringing rights home: time to start a family?' (2008) 28 (3) *Legal Studies* 327, 332.
11 'The European ceiling on human rights' [2007] *Public Law* 720 – 747; I have also found T Rainsbury, 'Their Lordships' Timorous Souls' [2009] *UCL Human Rights Review*, forthcoming, very illuminating.
12 [2004] UKHL 12, [2004] 1 WLR 807.
13 S2.
14 Eg in *R v G* [2008] UKHL 37, [2008] 1 WLR 1379, para 6, Lord Hoffmann said of *Salabiaku v France* (1988) 12 EHRR 379, 'I think that judges and academic writers have picked over the carcass of this unfortunate case so many times to find some intelligible meat on its bones that the time has come to call a halt. The Strasbourg court, uninhibited by a doctrine of precedent or the need to find a ratio decidendi seems to have ignored it. ... I would recommend your lordships to do likewise'.
15 Eg *VgT Verein gegen Tierfabriken v Switzerland* (2001) 34 EHRR 159 in *R (Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2008] UKHL 15, [2008] 2 WLR 781.
16 [2004] UKHL 43, [2005] 1 AC 264, para 33.
17 *Rights brought home: the Human Rights Bill*, 1997, Cm 3782, para 2.5.
18 *Hansard,* HC Debates, 16 February 1998, vol 306, col 768.
19 *Hansard,* HC Debates, 18 November 1997, vol 583, cols 514-515.
20 *Hansard,* HC Debates, 3 June 1998, col 424.
21 *Hansard,* HC Debates, 3 November 1997, col 1245.
22 [2003] 1 AC 681.
23 [2007] UKHL 26, [2008] 1 AC 153, para 106.
24 [2008] UKHL 38, [2008] 3 WLR 76.
25 *Review of Adoption Law: Report to Ministers of an Interdepartmental Working Group*, published by the Department of Health and Welsh Office as a consultation document in 1992.
26 *Adoption: The Future*, 1993, Cm 2288; *Adoption – A Service for Children*, 1996; *Adoption: A New Approach*, 2000, Cm 5017.
27 [2008] UKHL 38, [2008] 3 WLR 76, para 20.
28 (2002) 13 BHRC 187.
29 (2002) 38 EHRR 438.
30 *EB v France* (2008) 47 EHRR 21.
31 Art 41.3.1.
32 [2008] UKHL 38, [2008] 3 WLR 76, para 79.
33 Para 82.
34 Para 83.
35 Para 27.
36 Para 37.

37 Para 20.
38 [2004] UKHL 49, [2004] 1 WLR 2196, para 27; see also *M v Secretary of State for Work and Pensions* [2006] UKHL 11, [2006] 2 AC 91, para 130.
39 [2008] UKHL 38, [2008] 3 WLR 76, para 121.
40 [2003] UKHL 21, [2003] 2 AC 467.
41 [2002] EWCA Civ 1533, [2003] Ch 380; soon vindicated by *Karner v Austria* [2003] 2 FLR 623, (2003) 14 BHRC 674.
42 There are statements to this effect in *R (Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs* [2005] UKHL 57, [2006] 1 AC 529, paras 25, 33-34 and 88, although it is on a rather different point of territorial application.
43 Cf Lord Hope in *R v DPP, ex p Kebilene* [2000] 2 AC 326, 380.
44 *R (Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2008] UKHL 15, [2008] 2 WLR 781.
45 *R (Countryside Alliance) v Attorney General* [2007] UKHL 52, [2008] 1 AC 719, para 126.
46 *R (Williamson) v Secretary of State for Education and Employment* [2005] UKHL 15, [2005] 2 AC 246.
47 [2007] UKPC 36, [2007] HRLR 28, para 92; see n9 above.
48 Lewis's argument, n11 above, was concerned with developing the common law, not with finding legislation incompatible.
49 Eg *R (Countryside Alliance) v Attorney-General* [2007] UKHL 52, [2008] 1 AC 719, para 121; Lords Rodger and Brown would have liked to extend the scope of Art 8 to cover hunting with hounds and only did not do so because it is such a very public spectacle.
50 *A Bill of Rights for the UK?* 29th Report of Session 2007-2008, HL Paper 165-I, HC 150-I.
51 Annex 1: Outline of a UK Bill of Rights and Freedoms, cl 11.
52 Cl 5.
53 Cl 4.

Building a better society

The Rt Hon Lady Justice Arden DBE

This is the text of the keynote address given by the Rt Hon Lady Justice Arden DBE at the JUSTICE / Sweet & Maxwell tenth annual human rights law conference on 21 October 2008.

Introduction

I start by thanking JUSTICE for inviting me to give this keynote address and by congratulating them for holding this timely event today. The workshop sessions will cover an enormously wide range of important topics with excellent speakers. As keynote speaker, I see my role as one of suggesting some broad general themes. I hope these themes will be helpful to the discussions that will take place in the various workshops today.

It may help to give you an idea of the scheme of this address. I propose to begin my address with a few thoughts about the last ten years. I will then make and develop my overarching point. In a nutshell, my overarching point is that the effect of the European Convention on Human Rights (the Convention) has been to alter the way we think about the position of the individual in relation to the state. Where human rights are engaged, the Human Rights Act 1998 means that we now start by focusing on the rights of the individual rather than those of the majority.

I will then identify four of the consequences which flow from this refocusing:

1. The Human Rights Act 1998 has changed the way we think about democracy.

2. We need to think about the institutions of our democracy to ensure that they are appropriate to the needs of the human rights era.

3. Questions of human rights can no longer be decided in isolation from developments in human rights jurisprudence in other parts of the world.

4. Human rights jurisprudence will more and more infuse the common law and be one of the major ways in which it is developed in this jurisdiction in the next ten years.

In so far as I express any view on any question of law which is not yet settled, my view is of course subject to its being worked out on the anvil of adversarial argument should the issue fall to be decided by me as a judge.

Some thoughts about the last ten years

It is now ten years since the Human Rights Act 1998 (HRA) was enacted. It was enacted in my final year as Chair of the Law Commission of England and Wales. It was not brought in to force until 2 October 2000 – coincidentally the day on which I became a member of the Court of Appeal of England and Wales.

In the course of the bill's passage through Parliament, there was much enthusiasm for the new legislation and, in the period leading up to its commencement, there was a great deal of preparation, particularly by civil servants in Whitehall and by the Judicial Studies Board. I took a little time out myself and I had the privilege of spending a month at the European Court of Human Rights. In that time, I learnt at first hand the sheer scale and variety of that court's work and the way in which it worked.

Perhaps the first point that an English lawyer notices about the Convention is the open-textured way in which Convention rights are expressed. After ten years we are now very familiar with them but we should not forget that they are enunciating broad statements of principle and setting standards, and that we need to respond to them on that level and not in the way that we would approach an ordinary statute. Even though ten years has passed, let us not forget that the Convention encapsulates standards and values and that it is a living instrument whose meaning may change over time. As Kirby J of the High Court of Australia has said, 'if you construe a constitution as if it were a last will and testament, that is what it will become'.[1] In the discussions today, it is, I suggest, important to keep this point in mind and to avoid getting distracted from the substance of the rights by intricacies in the case law.

I also sat as an ad hoc judge in the European Court of Human Rights on two cases. One of them, *Z v United Kingdom*,[2] was of great importance to the common law of negligence. It made it clear that there was no violation of Article 6 if the domestic court held that there was no duty of care owed, in that case by a public authority to a citizen. The other case, *T.P. and K.M. v United Kingdom*,[3] is less well known but it is also important. It established that, where there is a complaint in which human rights are engaged, there has to be a system, through the courts or otherwise, for investigating the complaint and where appropriate providing redress. This follows from Article 13. This holding operates in certain circumstances to counterbalance the situation which arises if the court holds as a matter of domestic law that there is no breach of the duty of care. (Since the HRA, a remedy for a violation of human rights has been provided by ss6 and 7 in cases where those sections apply).

For me, sitting in Strasbourg was an illuminating experience. It does not always come through the judgments but the judges often bring very different experiences to bear from those of the judges in the United Kingdom. Review by a supranational court can, in appropriate cases, be a salutary experience.

At the time of the enactment of the HRA, there was concern in the United Kingdom about the impact of the Act on the resources of public institutions. There was likewise a great concern that the integration of human rights jurisprudence would cause difficulty; in the end it did not cause a constitutional crisis. Great credit must be given to the Appellate Committee of the House of Lords for this smooth transition. The fact that members of the Appellate Committee sit also on the Privy Council may well have something to do with this as cases in the Privy Council frequently raise constitutional questions. Constitutional issues require considerable judgment and sensitivity to the environment in which they are given.

As you will shortly hear, I have recently been visiting courts in France. In the course of my visit, I saw a memorial to the seventeenth century French statesman, Mazarin. One of the figures in that memorial is that of the goddess of Prudence. She is holding a mirror so that she can see over her shoulder and backwards into history. One of the strengths of our common law tradition is its methodology. It builds on what has gone before. In this way it ensures so far as possible that, if there is change, the transition is smooth and occurs in a way that is consistent with the traditions of our society. For my part I consider that the common law has had an important role in securing change and stability in our law over many centuries and it is a tradition of which we should be very proud. It has enabled the judges in an appropriate case to move the law on in accordance with social conditions and needs.

At the same time, there are limits to the role of the courts. There are other ways in which the rights guaranteed by the Convention can be enforced. There are, of course, pressure groups like JUSTICE and they have a very valuable role to play. I would like to express my particular admiration for the work JUSTICE has done over the last year. Human rights can also be enforced through the normal processes of law reform, including a project conducted by the Law Commission of England and Wales or the Law Commission of Scotland or (now) the Northern Ireland Law Commission. In the recent case of *Van Colle v Chief Constable of Hertfordshire Police*,[4] in which JUSTICE made a joint intervention with MIND and INQUEST, Lord Phillips, now the Senior Law Lord, held:[5]

> *The issues of policy raised by this appeal are not readily resolved by a court of law. It is not easy to evaluate the extent to which the existence of a common law duty of care in relation to protecting members of the public against criminal injury would in fact impact adversely on the performance by the police of their duties. I am inclined to think that this is an area where the law can better be determined by Parliament than by the courts. For this reason I have been pleased to observe that the Law Commission has just published a Consultation Paper No 187 on "Administrative Redress: Public Bodies and the Citizen" that directly addresses the issues raised by this appeal.*

Leaving issues to Parliament is not always the answer but there is more reason to do so where there is a Law Commission project on foot or a recent Law Commission report. One of the most difficult questions for a judge is when to leave an issue to Parliament. Similar difficulties can arise in determining the relative institutional competence of the courts and other institutions, but this exercise does not discharge the court from its responsibility to review the acts of a public authority at the appropriate level.

The structure of the HRA is probably unique in the world. There are limitations in it on the enforcement of human rights. Declarations of incompatibility can only be made in the higher courts, but it does not appear that this restriction has given rise to any serious difficulty. There are other limitations. If a declaration of incompatibility is made, it is not binding on the parties to that case. There is also no right to compensation if a public authority has acted pursuant to statute in violating human rights. Those restrictions are more controversial, but are consistent with Parliamentary sovereignty. It is still necessary in these cases, and in cases caught by the transitional provisions in the HRA, for the parties affected to apply to the Strasbourg court. Overall, the HRA is also subject to criticism by those who oppose any form of protection for Convention rights but I have to proceed on the basis that those arguments have been rejected by Parliament. With these qualifications, however, the structure of the HRA has been widely welcomed as a means of giving protection to Convention rights in domestic law. Moreover, some problems arise not out of the structure of the HRA but out of the way litigation is funded. I note that there is no session today devoted solely to access to justice but it is an internationally known fact that the costs of proceedings in England are considerable, and any discussion of bringing rights home not just to our shores, but to the average citizen's living room, has to solve this problem as well.

There has been a large number of landmark cases under the HRA in the years since its commencement. I can do no more than single out one that bears on the overarching point that I will make. It is the *Belmarsh* case.[6] It concerned

suspected terrorists who were aliens and who could not be deported because of fears for their safety in the countries to which they would be returned. They were held in indefinite executive detention in Belmarsh prison.

By its decision the House of Lords, in exercise of its powers conferred by the HRA, by a majority quashed the Human Rights (Designated Derogation) Order 2001, and made a declaration that s23 Anti-terrorism Crime and Security Act 2001 (providing for detention without trial) was incompatible with Articles 5 and 14 of the Convention.

The first issue arose from Article 15 of the Convention and it concerned the question whether the government were right in saying that circumstances had arisen entitling the United Kingdom to derogate from the Convention under Article 15. Article 15 provides that 'In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation …'. Specifically the question was whether a state of emergency had arisen for the purposes of Article 15. The House of Lords (by a majority) rejected the detainees' arguments on this point. The House was prepared to attach great weight to the judgment of the Secretary of State and Parliament on the issue of whether there was a public emergency threatening the life of the nation.

The second issue was whether the provisions of the 2001 Act relating to detention violated Convention rights only 'to the extent strictly required by the exigencies of the situation' for the purposes of Article 15. Here the detainees' arguments focused on the fact that the powers of detention related only to foreign nationals who could not be deported. It could not be said that foreign nationals were the only threat; if they were a threat, they could under the 2001 Act go abroad and carry on their activities from abroad. They could be detained even if the threat that they presented was not as members of Al-Qaeda but of some other organisation altogether that had not been responsible for the state of emergency justifying the derogation. The House of Lords (by a majority) accepted these arguments: in a word, s23 was irrational. The power of detention did not prevent any person who was content to return to his/her own country from doing so and carrying on terrorist activities from there.

The third issue was whether the powers of preventive detention discriminated unjustifiably between non-UK nationals and UK nationals, who could not be detained on suspicion. The House held that there was unjustified discrimination. The power of detention did not prevent United Kingdom nationals from carrying on terrorist activities because they could not be detained under this power.

I have called the *Belmarsh* case a landmark case. It was the first major challenge to the enforcement of human rights in the courts. The field was the highly charged one of terrorism. Nonetheless the House did not shrink from reaffirming the values in the Convention and enforcing Convention rights. It demonstrated that it was part of the courts' role to give content and teeth to human rights.

A crucial change – my overarching point

I now come to what I have called my 'overarching' point. The point that I want to make is that the HRA has focused attention at the first stage on the individual rather than the state. That is quite different from the position that prevailed in such cases before the HRA (and still prevails in other judicial review cases), and it has changed the way in which we think about democracy. The *Belmarsh* case is indeed an example of this refocusing and that case could not of course have been decided the way it was before the HRA. I need to develop my 'overarching' point.

This 'overarching' point can be developed by reference to the ideas in John Stuart Mill's famous essay, *On Liberty*. In this essay, John Stuart Mill put forward the idea that the individual should be allowed the greatest freedom unless it could be shown that his actions would harm others. This is called the 'harm principle'. Mill wrote:[7]

> *That principle is, that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of the civilised community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant.*

An individual was entitled to act without restriction unless his conduct concerned others:[8]

> *To justify [compulsion], the conduct from which it is desired to deter him, must be calculated to produce evil to someone else. The only part of the conduct of anyone, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign.*

Mill also developed the argument that each individual has a right to liberty of self-development. Again this is subject to the rights of others. He says in *On Liberty*:[9]

> *In proportion to the development of his individuality, each person becomes more valuable to himself, and is therefore capable of being more valuable to others.*

The more that individuals develop themselves the more they and society would benefit.

The harm principle is not uncontroversial or easy to apply. But it throws light on the effect of the Convention.

The Convention distinguishes between absolute rights and qualified rights. Absolute rights include the right to life and the prohibition on torture. The court cannot interfere with absolute rights, nor can the state. Qualified rights include the right to respect for private and family life, freedom of thought, conscience and religion and so on. These rights are said to be qualified because the state can interfere with them in limited circumstances. (The right to property is a form of qualified right, but the state is allowed greater latitude to interfere with this right than with the rights conferred by Articles 8 to 11, and so in the interests of simplicity I leave that right out of account for the purposes of this address).

If the individual complains that his/her human rights have been infringed, then the court has to ask if the right is an absolute one or qualified one. If it is an absolute right, no one can interfere with it and the individual's right must prevail.

If the right is a qualified one, such as the right to freedom of expression and freedom to manifest one's religion, the right is not unlimited, but it is still not open to the state simply to interfere with it as it chooses.

It must meet the requirements of the Convention. It must show in accordance with the express requirements of the Convention that the interference is prescribed by law, necessary in a democratic society and proportionate. In order to show that the interference is proportionate, the state must show a pressing social need.

As with Mill's harm principle, the state must justify its interference with the individual's freedom to act as s/he determines. The Convention reaches in this respect the same broad result as Mill's harm principle.

We can contrast this result with judicial review where no human rights are involved. A decision made by the state that is within the law is not set aside as unreasonable unless it is perverse. Moreover, and this is an important point in

practice, the onus of showing that it is perverse lies on the individual seeking to establish that it is perverse and not on the state. This would not meet Mill's harm principle.

As it seems to me, one of the most notable changes made by the HRA has been to refocus the law at the initial stage on the rights of the individual. Either his/her rights cannot be abridged, or, if the state can interfere with them, the onus has shifted to the state to show that any interference with the right is essential and not just one which could not be classed as being perverse.

I said at the start of this address that there are some consequences that flow from this refocusing and that I would identify four of them. I now turn to the consequences I would like to mention.

First, the Human Rights Act 1998 has changed the way we think about democracy.

It used to be enough to speak of democracy as requiring that each person had one vote and all that that entails. However, with the refocusing of the law on the individual at the first stage where human rights are engaged, we can see that, equally importantly, democracy also consists of a complex interplay between majority and minority rights. In this way, the HRA has changed the way we think about democracy.

Indeed, one of the by-products of the Convention is that when it comes to the qualified rights we are expressly directed to think about democracy. The question of what democracy means and requires needs to be considered in more depth now as part of the legal issue of determining whether the state was entitled to interfere with the right in question.

There is some guidance in the authorities as to what is necessary in a democratic society. Baroness Hale has held that democracy is founded on the principle that each individual has equal value.[10] Lord Hoffmann has referred to equality before the law as one of the building blocks of a democracy.[11] In a case concerning the limits of the procedural duty to hold an investigation under Article 2 of the Convention, I held that the interests of a democracy did not require that there should be an investigation into questions of the allocation of public resources, which was a question for the executive and Parliament,[12] and that approach was approved by the House of Lords.[13]

Much more thought, however, could usefully now be given to what is meant by 'necessary in a democratic society'. Interestingly, the European Court of Human Rights has said relatively little about the meaning of democracy in this context. I think that there is probably a good reason for this, namely that the term needs

to be understood in the context of the particular member state. It is therefore something that we should expect to be free to decide for ourselves.

Secondly, we need to think about the institutions of our democracy to ensure that they are appropriate to the needs of the human rights era.

The Victorians built great buildings like the Royal Courts of Justice. They did so on a breathtaking scale. They planned for a society in which public institutions would play an important part.

In the 21st century, we have to build institutions for the future. They are institutions of a different kind. They are the institutions necessary to ensure the success of individual rights. Society has to protect a liberal democracy from within and from those forces within society that would, if accepted, diminish its liberal values.

To recognise, protect and enhance human rights, the state has to have the correct fabric of laws and institutions fitted to the task.

In fact, we are on the eve of an important institutional change in our legal system. Under a year from now the work of the Appellate Committee of the House of Lords will be transferred to the new Supreme Court of the United Kingdom. This represents a unique opportunity for setting up an apex court for the 21st century. It will of course have the same powers, and only the same powers, as the existing Appellate Committee of the House of Lords. Nonetheless the institution of the Supreme Court is the start of a new chapter. There are many issues to be considered.

One of those is the selection of cases, for example, should the court take on different cases or should it have different criteria, for instance, for cases which raise issues of a constitutional nature?

There is another issue on which I have spoken this year and that is the form of judgments. This may seem a very narrow and technical area but it is in fact all about the way in which courts communicate with the public. Things have changed radically in the last 50 years. The public is no longer simply content to be told what the law is. They want to know why it is. This is particularly the case with human rights. The judgment at whatever level it is given must be clearly reasoned and speak to the issues. When the court is dealing with an issue of a person's human or constitutional rights, the audience is not just the parties and practitioners. It is also the general public because when, for instance, there is a significant question of human rights many members of the public will be interested or involved.

I would expect that, if the Supreme Court evolves, it will only do so slowly in the way that institutions have evolved throughout our history. I cannot say whether or how it will evolve or how long it will take to evolve but let me illustrate how courts evolve by taking the example of the Conseil Constitutionnel, or Constitutional Council, in France. I choose this example because I have recently visited the Conseil Constitutionnel and thus can speak with the benefit of my researches. It is I think of some considerable interest to JUSTICE in view of its recent report, *A British Bill of Rights: informing the debate*.[14]

The Conseil Constitutionnel was set up in 1958 to monitor disputes arising from elections and also the boundary between Parliament and the executive. The President or the Prime Minister or the Speaker of the French Parliament or a specified number of members of Parliament can ask the Conseil Constitutionnel, after a statute is passed by the Parliament but before it is brought into force, to consider whether the statute is in accordance with the Constitution. The Conseil Constitutionnel is not a court in the ordinary sense. Its membership is drawn not simply from judges. Its members include distinguished persons from other walks of life. In the form in which it was originally set up, the Conseil Constitutionnel was not unlike, as it seems to me, a select committee of the House of Lords. It heard evidence from those it chose to call as witnesses.

The Conseil Constitutionnel produced decisions on issues of constitutionality. In due course the Conseil Constitutionnel held that it could consider the question of constitutionality by reference not only to the actual provisions of the Constitution but also by reference to documents referred to in the recitals to the Constitution. This included the far-reaching *Declaration of the Rights of Man 1789* and also the preamble to the previous constitution of 1946 setting out socio-economic rights. Later the Conseil Constitutionnel went further still and held that it could assess whether a legislative proposal was constitutional by reference to general principles to be found in legislation passed by Parliament in the period 1789 to 1946.

Finally in July 2008 the French Parliament adopted a law which enables either the Conseil d'Etat or the Cour de Cassation to refer to the Conseil Constitutionnel a question of constitutionality arising in the course of litigation. This is a major change. When this amendment comes into force, the Conseil Constitutionnel will perform not only an anterior review of legislation (like a select committee of the House of Lords) when requested to do so by Parliament, but also a posterior review of legislation when an issue arises in litigation as to its constitutionality. In either case it will be able to annul the law if it considers it to be unconstitutional in the sense that I have described. In some ways, this development is comparable to the right given by the HRA to an individual citizen to challenge a law on the ground that it is incompatible

with human rights. But it goes much further than the HRA did. It enables the citizen to argue that primary legislation is unconstitutional and to seek an order that it be set aside.

No doubt the Parliament of the United Kingdom, if it were ever so minded, could likewise give an individual the right to challenge legislation on the grounds that it is not in conformity with the fundamental principles of the common law. Until that happens the individual citizen must look to Community law, the Convention and (to the extent that it is available) the common law to protect his/her rights. Such protection will not, save in the case of Community law, avail against incompatible primary legislation, or, in the case of common law rights and in some circumstances, Convention rights, against incompatible secondary legislation. It is for others to say whether that position is anomalous, but it is the law of the land. The like position in French law has apparently proved unsustainable in the longer term.

We shall have to see how the Conseil Constitutionnel evolves in the future. I do not suggest that there will be a parallel development in the United Kingdom but the Conseil Constitutionnel illustrates how institutions can change and evolve as circumstances require. In making this point, I have no specific institutions in the United Kingdom in mind. I am simply re-affirming the importance of having appropriate institutions and the need for vigilance here.

Thirdly, question of human rights can no longer be decided in isolation from developments in other parts of the world.

When questions of human or constitutional rights arise the judicial system can no longer operate in complete isolation from what is going on in the rest of the world. Courts must be mindful of the experience in other countries and learn what they can from them. Accordingly I have always strongly supported meetings of judges from different jurisdictions. Personal contacts are extremely important. It enables ideas to be exchanged and networks to be built up.

I also support the study of comparative human rights and constitutional law. The question of course is always one of deciding what the law in this jurisdiction is. However, comparative law can enrich our understanding of human rights and constitutional rights in our own jurisdiction and enable us better to resolve new cases as they arise.

Fourthly, human rights jurisprudence will more and more infuse the common law and be one of the major ways in which it is developed in this jurisdiction in the next ten years.

Over the centuries judges have been responsible for developing the common law. The common law has enabled the law to adapt incrementally and thus in a way which encourages change commensurate with stability as social conditions require. It may be that more change is required and from time to time the Law Commissions make recommendations for change, or Parliament itself makes a change in the law. But there are still whole swathes of law that are common law and for which judges are responsible. Their role is crucial. They are at the heart of the system for human rights.

Building up human rights jurisprudence is in some respects the same type of task as developing the common law, though there may be new priorities, including a need for communication and transparency.

Human rights require that regard be had not just to legal rules but also to the wider context in which the rules operate. Law, it is sometimes said, is a discourse on other discourses. In the field of human rights, we are all discovering that law has new boundaries: the limits are not now the same as we always thought they were. So there may need to be a dialogue, not in the formal sense but in the sense of an awareness, between the law and other disciplines so that so far as possible decisions are taken on the basis of best information available.

This country is rightly proud of its common law tradition. The common law has contributed much to human rights and will continue to do so. But the traffic goes both ways. Over the decade to come, human rights jurisprudence may well become a crowbar for opening up and reinvigorating the common law in aspects of private law. Indeed, in some areas it has done so already. Human rights jurisprudence may also be used as a reason for changing the *Wednesbury*[15] test in judicial review to one of proportionality. The existence of the new system for the protection of human rights can occasionally be used as a reason for restricting the development of the common law, as it was in *Van Colle*.[16] However, it is likely that it will more often be used as a means of putting the common law on a more openly principled basis and bringing it up to date. Certainly that has been my experience in the Court of Appeal in the last few years.

Conclusions

So the overarching idea that I wish to start this conference with is this.

The HRA has made a profound difference to the work of the courts in the years since its commencement, and I have no doubt that it will continue to affect what we do and how we think in the years ahead.

The HRA has focused attention at the first stage on the individual and the onus has changed from the individual to the state to justify any interference with his human rights in those cases where some interference is permitted. That is quite different from the position that prevailed before the HRA, and still prevails in judicial review where human rights are not engaged. The HRA has changed our understanding of democracy. We can now clearly see that democracy is also a complex interplay between majority and minority rights. Lawyers could usefully consider what it means to be 'necessary in a democratic society'.

There are important consequences from this, including the following:

1. The Human Rights Act 1998 has changed the way we think about democracy.

2. We need to think about the institutions of our democracy to ensure that they are appropriate to the needs of the human rights era.

3. We need to be mindful of the experience in other countries and learn what we can from them.

4. Human rights jurisprudence will more and more infuse the common law and be one of the major ways in which it is developed in this jurisdiction in the next ten years. Human rights jurisprudence will reinvigorate the common law.

These are the thoughts I would like to leave you with as you go through the programme today. The first ten years has been very important and productive but there is still much to be done.

Thank you for your attention.

The Rt Hon Lady Justice Arden DBE is a member of the Court of Appeal in England and Wales.

Notes

1 The Hamlyn Lectures, *Judicial Activism, By The Hon. Justice Michael Kirby AC CMG, Justice of the High Court of Australia*, (2004), 40.
2 Application no 29392/95 (2001) 34 EHRR 97.
3 Application no 28945/95 (2001) 34 EHRR 42.
4 [2008] UKHL 50, [2008] 3 All ER 977.
5 At para 102.
6 *A v Secretary of State for the Home Department* [2005] 2 AC 68.
7 J.S. Mill, On Liberty, Penguin Classics, reprinted 1985.
8 Ibid, chapter I, *Introductory*, pp68-69.
9 Ibid, chapter III, *Of Individuality*, p127.
10 *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 at para 132.
11 *Matadeen v Pointu* [1999] AC 98 at 109.
12 *R (o/a Scholes) v Secretary of State for the Home Department* [2006] EWCA Civ 1343, 93 BMLR 132.
13 *R (o/a Gentle and others) v Prime Minister and others* [2008] 2 All ER 1 at paras 9, 28, 29 and 74.
14 Published November 2007.
15 *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] I KB 223.
16 See n4 above.

Human rights review of the year

Nathalie Lieven QC

This is the text of a speech given by Nathalie Lieven QC at the JUSTICE / Sweet & Maxwell tenth annual human rights law conference on 21 October 2008.

It is a measure of the success and the pervasive nature of the Human Rights Act 1998 (HRA) that in a 30 minute review of the year it is not possible to do justice to all of the many important judgments which have been delivered in the past 12 months. Instead, I would like to highlight four particular areas in which significant developments have occurred this year: the protection of life and bodily integrity; fair procedures; detention and liberty; and the home, family life and marriage. It is noteworthy that several of the key House of Lords cases this year arose from the allied invasion of Iraq. Although the claimants have enjoyed limited success, the HRA is plainly making a difference because cases that were previously unarguable are now receiving detailed scrutiny in our highest court. I have focused on domestic cases largely for reasons of brevity, but will mention a couple of European Court of Human Rights (ECtHR) cases.

Life and bodily integrity (Articles 2 and 3)

Article 2 – investigative duties

The courts have delivered several extremely important decisions this year in relation to the protection of life and bodily integrity. In *Van Colle v Chief Constable of the Hertfordshire Police*[1] the first claimant's son had been shot dead shortly before he was due to give evidence against a man charged with theft. The accused had made a number of attempts to dissuade the deceased from giving evidence and the deceased had reported this to the police. However, nothing had been done to protect the deceased. The claimant contended that there had been a breach of Article 2 of the European Convention on Human Rights (ECHR) by reason of the state's failure to protect his son; the state had required him to act as a witness, thereby exposing him to the risk and it therefore had an obligation to ensure a reasonable level of protection. Their Lordships held that in order to establish a breach of the positive obligation in Article 2 the claimant must show that the public authority had, or ought to have, known at the time of the existence of a real and immediate risk to the life of an identified individual from the criminal acts of a third party and that it failed to take measures within the scope of its powers which, judged reasonably, might have been expected to avoid that risk. Importantly, they held that this test applied regardless of whether the risk arose from the state's decision to call the deceased as a witness.

On the facts they held that there was no breach of Article 2 because it could not reasonably have been thought that there was a real and immediate risk to the deceased's life given the minor character of the theft offences with which the accused was charged and the accused's own minor criminal record. This decision suggests that it will be extremely difficult indeed to establish a breach of the positive obligation in Article 2 in cases where the police fail to protect someone from being killed if the killer is not a known offender and had not made explicit death threats.

In *Savage v South Essex Partnerships NHS Foundation Trust*,[2] the Court of Appeal considered the proper test for establishing a breach of Article 2 ECHR in the case of a detainee in an acute psychiatric ward who had absconded and committed suicide. Sir Anthony Clarke MR handing down the judgment of the Court held that it was not necessary to establish gross negligence for the Article 2 duty to be engaged; patients detained under the Mental Health Act 1983 were in a vulnerable position comparable to that of prisoners and the same test for breach of Article 2 ought to be applied. Accordingly, the relatives of the deceased must show that at the material time the defendant had known or ought to have known of the existence of a real and immediate risk to the life of the deceased from self-harm and that it had failed to take measures within the scope of its powers which might reasonably have been expected to avoid that risk.

The case of *R (L (A Patient) (by the Official Solicitor as litigation friend) v SSHD*,[3] concerned the duty to investigate an attempted suicide in custody. The claimant had tried unsuccessfully to hang himself in a young offender institution and he had sustained brain injury. The Secretary of State held an internal inquiry, but refused to hold a full and independent investigation. The Court of Appeal upheld Langstaff J's decision that Article 2 required such an enhanced investigation. Waller LJ explained that in all cases where a person died or was seriously injured in state custody, Article 2 required an independent investigation. Where serious injury occurred, the necessity for a public investigation depended upon whether in the circumstances ascertained by the independent investigator it appeared that the state or its agents were potentially responsible for the injury. In the present case, the prison service's internal investigation was not sufficiently independent. Since an independent investigation might possibly have concluded that the state had failed in its obligation to protect the claimant's life, a full enhanced investigation was ordered.

Article 3 – torture

The question of the use of evidence obtained by torture arose again this year, but in the context of a deportation decision. In *Othman v Secretary of State for the Home Department*,[4] the claimant was a Jordanian national with clear links to Islamist terrorist groups who had been granted asylum on the basis of his

claim that he had been tortured by the Jordanian authorities. In Jordan he was convicted in absentia of conspiracy to cause explosions on the basis of evidence, some of which had allegedly been obtained by torture. The Secretary of State decided under s97(1)(a) Nationality, Immigration and Asylum Act 2002 that the claimant's presence was not conducive to the public good and decided to deport him in the light of a memorandum of understanding concluded with Jordan to the effect that the claimant would not be tortured or otherwise treated in breach of Article 3 ECHR upon his return. The Special Immigration Appeals Commission held that there was a real risk that the claimant would be tried on evidence obtained by torture, but that this evidence was insufficient to conclude that there would be a complete denial of the claimant's Article 6 rights. The Court of Appeal allowed the claimant's appeal. The prohibition against torture in Article 3 was absolute and therefore evidence obtained in breach of Article 3 must be treated differently to other defects in the trial process. Any admission of evidence obtained by torture was unacceptable. Therefore if a tribunal finds a real risk that evidence obtained by torture will be presented at trial it can only conclude that there will not be a complete denial of Article 6 if the court is assured that such evidence would be excluded or not acted upon.

Evidence and torture was also at issue in *R (on the application of Binyam Mohamed) v Secretary of State for Foreign and Commonwealth Affairs*.[5] Thomas LJ and Lloyd Jones J held that the UK government was under a duty to disclose evidence which it holds about the treatment of a Guantanamo Bay detainee. The disclosure duty related to the period between the claimant's detention by the Pakistani authorities in April 2002 and his reappearance in Bagram Air Base in July 2004, during which time he alleged that he had been repeatedly tortured. The High Court held that this information was essential for him to have his case considered fairly and that without the information he would not be able to put forward a defence given the confessions he had made in Guantanamo Bay in 2004. Their Lordships did however note that the British government had gone to great lengths to assist the claimant and had requested his return from Guantanamo Bay.

In *C v Secretary of State for Justice*,[6] concerning physical restraint in secure training centres, the Court of Appeal placed a surprisingly low threshold for 'inhuman or degrading treatment' although they were clearly influenced by the fact that those detained and therefore subject to the restraint were young people.

Perhaps the most prominent decision of the year was the nine judge decision of the House of Lords in *R (Gentle) v Prime Minister*.[7] The claimants were the mothers of British soldiers who were killed while serving in Iraq. They sought judicial review of the defendants' refusal to hold an independent inquiry to examine whether the UK government had taken reasonable steps to be satisfied

that the invasion of Iraq was lawful as a matter of international law. The House of Lords held that the procedural obligation imposed by Article 2 ECHR did not apply independently of the substantive obligation; accordingly, the claimants had to show at least an arguable case that the substantive duty was engaged. In that regard, the question whether the state unjustifiably took life or failed to protect it would arise in respect of a particular deceased person and there was no warrant for reading Article 2 as a generalised provision protective of life, irrespective of any specific death or threat. On the facts of the present case, the right and duty that the claimants asserted did not depend upon their sons' deaths – indeed if it existed at all it would have arisen before either young man was killed and would exist had both men survived.

Most importantly, their Lordships held that the issue of the legality of the invasion in international law had nothing to do with the state's obligations under Article 2 to protect the servicemen and women in its jurisdiction. The legality of the invasion was part of public international law and it was not part of domestic law reviewable either in the UK or, under the Convention, by the ECtHR. Furthermore, the risk to soldiers' lives was not affected by whether a military operation was lawful or unlawful under international law. Indeed an unlawful surprise attack might actually be safer for invading forces.

Fair procedures (Article 6)

Unsurprisingly, given public law's traditional concern with fair process, this year has produced many decisions relating to Article 6 and fair hearings. The most dramatic was surely the House of Lords' decision in *R v Davis*.[8] The defendant had been charged with two counts of murder and at trial the judge had accepted that the only three eyewitnesses were in genuine fear and that their lives would be endangered if they were identified. He therefore ruled that protective measures should be imposed whereby the witnesses' names and addresses were withheld, the defendant was prevent from asking questions that might identify them and they gave their evidence from behind screens so that they could be seen by the judge and jury but not the defendant. Their voices were also subject to mechanical distortion so that the defendant could not recognise them. Many hundreds of trials in Britain are said to be dependent on anonymous witnesses. But, astonishingly, the practice is a very new one: as recently as 1972, Lord Diplock, making his famous report into the criminal process in a terrorism-wracked Northern Ireland, ruled it out as entirely contrary to the very foundations of the criminal process. The House of Lords held that although the intimidation of witnesses posed a serious threat to the administration of justice, the practice of witness anonymity was irreconcilable with the common law and it must be authorised by Parliament. The use of anonymous witnesses was not per se incompatible with Article 6 ECHR; the fairness of the trial must be considered as a whole including the extent to which the defendant had been handicapped in his defence by the anonymity and the extent to which the anonymous evidence was decisive. Importantly, their Lordships held that where a conviction was based solely or to a decisive extent on the testimony of anonymous witnesses, the trial could not be regarded as fair. The effect of this ruling was dramatic: Parliament rushed to legislate and the Criminal Evidence (Witness Anonymity) Act 2008 was passed with a first reading on 4 July 2008 and royal assent only 17 days later.

The requirement of independence in Article 6 continues to have a significant impact in both the criminal and the civil sphere. Article 5(4) also contains a requirement of independence: 'everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if detention is not lawful'. In *R (Brooke) v Parole Board*,[9] the Court of Appeal held that the Parole Board was not sufficiently independent to satisfy Article 5(4) when exercising its power to decide whether convicted prisoners should be released on licence. The Court of Appeal observed that the board's function had changed from that of a body advising the Secretary of State in relation to the exercise of her executive function to that of a judicial body assessing whether continued deprivation of a prisoner's liberty was justified because of a risk that s/he would re-offend if released. However, the Secretary of State was still closely involved in what was now a judicial function; she had sought to influence the manner in which the Board carried out its risk assessment of prisoners, she had control over appointments to the board as well as the termination of appointments, and she funded and exercised financial control over the board in a manner which exceeded that of a mere sponsoring department. Accordingly, there was a breach of Article 5 ECHR.

Factual scrutiny is also important in the context of Article 6 ECHR. In this context, the question is whether judicial review provides an adequate safeguard in cases where the initial fact-finding is carried out by a body that is not independent and impartial within the meaning of Article 6. The point seemed to be settled following Lord Hoffmann's judgments in *Alconbury*[10] and *Begum*,[11] but in *Tsfayo v UK*,[12] the ECtHR held that a housing benefit review board staffed by councillors was not independent and that judicial review did not cure this defect. The ECtHR explained that *Tsfayo* was not a case where the decision-maker 'required a measure of professional knowledge or experience and the exercise of administrative discretion pursuant to wider policy aims';[13] the issue of whether the applicant had 'good cause' for delaying in re-applying for housing benefit was simply one of fact and judicial review could not adequately correct errors of fact because 'it did not have jurisdiction to rehear the evidence or substitute its own views as to the applicant's credibility'.[14]

The implications of *Tsfayo* are potentially far reaching, as the Court of Appeal's decision in *R (on the application of Wright) v Secretary of State for Health* illustrates.[15] The case concerned the Care Standards Act 2000 which introduced a listing system for the protection of vulnerable adults. Care workers included on the lists were prevented from working as carers of vulnerable adults. Under s82(4) the Secretary of State had a power to include a worker on the list on the basis of information submitted in a reference pending a determination of the reference. This provisional listing power was held to be incompatible with Article 6 ECHR. Dyson LJ held that it followed from *Tsfayo* that it was important to have regard to the breach of Article 6 which judicial review was alleged to 'cure' – the more serious the breach, the less likely that judicial review would amount to a cure (ie review by a court of 'full jurisdiction'). Since s82(4) denied a basic right viz the right to be heard, this could not be cured by the availability of judicial review. *Wright* and *Tsfayo* therefore seem to present a stark choice: further intensification of review of fact and evidence in judicial review, or substantial modifications to administrative decision-making procedures.

Detention and liberty

There have been several interesting and important cases concerned with liberty and detention this year. In *R (Walker) v Secretary of State for Justice*, the claimant who was serving an indeterminate sentence for public protection (IPP) pursuant to s225 Criminal Justice Act 2003 received no formal sentence planning and had no access to any programmes or courses which might enable him to demonstrate to the Parole Board that the risk he posed to the public was low enough to justify his release after he had served the minimum term. The Court of Appeal held that the primary purpose of an IPP was to detain serious offenders who posed a significant risk to members of the public until they no longer posed such a risk. Since participation in appropriate courses was usually necessary if such prisoners were to cease to be dangerous, it was likely that participation would be required to satisfy the Parole Board that a prisoner had ceased to be dangerous. This effectively put the ability of prisoners to show that they had ceased to be dangerous in the Secretary of State's hands and she had failed to provide sufficient resources to allow all prisoners serving IPPs to do so. This was not merely a discretionary resource allocation decision, but rather it was a breach of the Secretary of State's public law duty because its direct and natural consequence was to make it likely that a proportion of prisoners would be kept in prison longer than necessary for the protection of the public contrary to Article 5 ECHR. However, a prisoner who remained detained was not unlawfully detained and there would not breach of Article 5(1)(a) unless and until it was no longer necessary to detain a prisoner in order to protect the public. Therefore prisoners serving IPPs who had completed their tariffs we not entitled to be released immediately.

In the follow up case of *R (Lee) v Secretary of State for Justice* Moses LJ found that the continuing detention of two IPP prisoners continued not to be a breach of Article 5(1).

The question of what constitutes a lawful deprivation of liberty within the meaning of Article 5 ECHR arose in *Austin v Commissioner of Police of the Metropolis*.[16] The case arose out of the violent disorder which took place in central London on 1 May 2001. Large numbers of demonstrators, some of whom were violent, had converged on Oxford Circus and the police had cordoned thousands of them in, refusing to allow many people to leave for many hours. Tugendhat J held that although the cordon had deprived the claimants of their liberty, the deprivation fell within Article 5(1)(c) and so it was lawful. The Court of Appeal upheld this decision; on the facts of the case, in the exceptional circumstances of the widespread disorder, the actions of the police struck a fair balance between the general interests of the community and those of the claimants. Moreover, the interference with the claimants' freedom of movement was not the sort of arbitrary deprivation of liberty that Article 5 was directed at and so Article 5 did not apply. This is a rather narrow reading of Article 5 and leave to appeal to the House of Lords has been granted.

A claim that Article 5 had been breached by reason of the detention of an individual in a detention centre operated by British forces in Iraq failed in *R (Al-Jedda) v Secretary of State for Defence*.[17] Although the British forces were in Iraq as part of a multi-national force which was acting under the authority of UN Resolution 1546, the majority of the House of Lords held that they were not operating under the auspices of, or under the command of, the UN. The present situation was therefore distinguishable from that of the British forces operating in Kosovo. Accordingly, the claimant's detention was not outside the scope of the ECHR's protection. However, the obligation under Article 25 of the UN Charter for member states to carry out decisions of the Security Council prevailed, by virtue of Article 103 of the UN Charter, over other international obligations. Resolution 1546 obliged the UK to use its powers to detain the claimant for security reasons; therefore that obligation prevailed over Article 5 ECHR to the extent that infringing the claimant's Article 5 rights was inherent in his detention.

The home, family life and marriage

In *Doherty v Birmingham City Council*,[18] the House of Lords held that s5(1) Mobile Homes Act 1983 was incompatible with Article 8 ECHR because it excluded gipsies from the definition of 'protected site'. However, their Lordships did not make a declaration of incompatibility because the Housing and Regeneration Act 2008 had now remedied the defect. Lords Walker, Hope and Rodger also emphasised that their decision did not undermine previous decisions

concerning the use of Article 8 to resist possession proceedings. In particular, county court judges should continue to apply the guidance given by Lord Hope in *Kay v Lambeth LBC*.[19]

The Court of Appeal's decision in *AB (Jamaica) v SSHD*[20] gives important guidance in relation to the removal of individuals married to British citizens. The claimant was a Jamaican national who had come to Britain on a six month visitor's visa in 1998. She overstayed, was joined by her daughters and married a British citizen in 2001. She sought leave to remain on the basis of her marriage, but the Home Office refused her application and decide to remove her. The Court of Appeal held that where a claimant appealed against a decision to remove her from the UK on the basis of marriage to a person lawfully settled in the UK, the spouse effectively became a party to the proceedings due to the impact of the appeal decision on his Convention rights (which were as fully engaged as his wife's). Accordingly, there had been a breach of Article 8 because the situation of the claimant's husband, who as a British citizen had an inalienable right of abode, should have been given detailed and anxious consideration before deciding whether it was proportionate to expect him to emigrate, find work and find accommodation abroad in order to preserve his marriage. At paragraph 22 Sedley LJ was particularly critical of the 'dismissive treatment' that the immigration judge gave to the impact of removal on the claimant's husband.

A similarly broad approach to Article 8 ECHR was adopted in *Beoku-Betts v SSHD*.[21] The claimant's mother relied on him for emotional support and therefore the adjudicator held that it would be disproportionate to remove the claimant from the UK having regard to the family's position as a whole. The House of Lords reinstated the adjudicator's decision and held that he was correct to have considered the effect of the claimant's deportation on the family unit as a whole. Furthermore, each of the family members could be considered to be victims.

Article 14 of the Adoption (Northern Ireland) Order 1987 provided that an adoption order could only be made on the application of more than one person if the applicants were a married couple. The House of Lords considered the compatibility of this provision with Article 14 and Article 8 ECHR in *In re G (Adoption: Unmarried Couple)*.[22] Overruling the Court of Appeal their Lordships held that being unmarried was a status within the meaning of Article 14 and also that restrictions on who could adopt a child fell within the ambit of Article 8. Although the state was entitled to consider that generally it was better for a child to be brought up by parents who were married, it was altogether another thing to say that no unmarried couples could be suitable adoptive parents. The irrebuttable presumption in the 1987 Order defied everyday experience,

it contradicted the fundamental adoption principle of the best interests of the child and it was therefore disproportionate. Lords Hoffmann, Hope and Mance held that it was likely that the ECtHR would consider there to be a breach of Article 14 and that in any event the House of Lords should not be inhibited from developing the law further than the ECtHR given that the margin of appreciation available to member states in sensitive areas of social policy was not automatically applicable to the legislature. Significantly they held that 'Convention rights' in the Human Rights Act 1998 were domestic rights, rather than international rights. Accordingly, the duty on the UK courts was to give effect to the Convention rights according to what they considered to be their proper meaning as they would other statutory rights. Lord Hoffmann sought to confine the well known remarks of Lord Bingham in *R (Ullah) v Special Adjudicator* that it is 'the duty of national courts to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less'.[23] Lord Hoffmann said that these remarks were *not* made in the context of a case in which the ECtHR has declared a question to be within the national margin of appreciation; in such cases *Ullah* does not apply, the question is one for the national authorities to decide for themselves and member states may take differing views.

In *R (on the application of Baiai) v SSHD*,[24] the House of Lords considered the scheme established by s19 Asylum and Immigration (Treatment of Claimants etc) Act 2004 to prevent sham marriages. The scheme required individuals subject to immigration control and not settled in the UK who wished to marry in the UK to obtain entry clearance expressly for that purpose or a certificate of approval (COA) from the Home Office. The Secretary of State had a policy of not granting a COA unless a person had been granted leave to enter or remain in the UK for more than six months, with at least three months remaining at the time of the application, or if there were especially compassionate features. The claimants contended that the scheme was incompatible with their Article 12 right to marry and the House of Lords upheld their claim. Their Lordships held that although it was open to the Secretary of State to impose reasonable conditions on the rights of a third country national to marry in order to ascertain whether the proposed marriage was a marriage of convenience, Article 12 did not permit significant restrictions to be placed on all marriages irrespective of whether they were genuine or not.

Property

Finally, *R (RJM) v Secretary of State for Work and Pensions* judgment is being delivered in the House of Lords tomorrow. This concerned a homeless man being refused disability premium on the grounds of his homelessness, allegedly in breach of Article 14. This will finally settle the question of whether non-contributory benefits fall within the ambit of Article 1 of Protocol 1. It may also

have important things to say about what amounts to an 'other status' for the purposes of Article 14.

Nathalie Lieven QC is a barrister at Landmark Chambers.

Notes
1 [2008] 3 WLR 593.
2 [2008] 1 WLR 1667.
3 [2008] 1 WLR 158.
4 [2008] 3 WLR 798.
5 [2008] EWHC 2048.
6 [2008] EWCA Civ 882.
7 [2008] 2 WLR 879.
8 [2008] 3 WLR 125.
9 [2008] 1 WLR 1950.
10 [2003] 2 AC 295.
11 [2003] 2 AC 430.
12 [2007] BLGR 1.
13 Para 46.
14 Para 47.
15 [2007] EWCA Civ 999.
16 [2008] 2 WLR 415.
17 [2008] 2 WLR 31.
18 [2008] 3 WLR 636.
19 [2006] 2 AC 465.
20 [2008] 1 WLR 1893.
21 [2008] 3 WLR 166.
22 [2008] 3 WLR 76.
23 [2004] 2 AC 323, para 20.
24 [2008] 3 WLR 549.

Test cases and third party interventions in commercial cases

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This paper is the product of a pro bono project between JUSTICE and Allen & Overy LLP. A group of trainees led by associates in the litigation department of Allen & Overy LLP examined the use of test cases and third party interventions with the aim of assisting JUSTICE in analysing the contemporary use of test case litigation and third party interventions as a strategy in a commercial context.

Introduction

Test cases are usually considered in a non-commercial context. Pressure groups from the Anti-Slavery Society to the Child Poverty Action Group have used litigation as part of a strategy to obtain public recognition and governmental acceptance of causes which they felt the democratic political process has failed. The majority of the literature on test cases records their successes and failures as well as considering the desirability of the strategy.[1] This paper considers the use of test cases by commercial organisations for commercial goals. It also analyses one particular tactic: third party interventions.

Definition

A test case for the purposes of this article is a legal action, the outcome of which is likely to set a precedent or test the constitutionality of a statute. Such cases can capture press interest and often have a public interest element. The article considers those cases where there has been an element of media coverage and which fall within one of the following areas of law: banking and finance, tax, insurance, intellectual property or media. We identified that the motivations behind bringing test cases fall within one or more of the following categories:

- a change in the law relating to the dispute; or
- a clarification of the law at issue; or
- to send a message to the public or to particular industry sectors.

We have focused on proceedings with a commercial background brought before the UK courts or the European Court of Justice (ECJ) but with a UK origin.

Changing the law

Tax law is one area in which test cases are frequently brought. A fertile area of litigation has been opened up by the popularity of cross-border group structures within multinational organisations. The increased use of complex structures with subsidiaries and parent companies resident in different EU member states has resulted in a need for local tax authorities to focus in particular on issues of double taxation. In doing this, they must ensure that they do not infringe companies' rights of freedom of establishment and freedom of movement within the Union. This would happen if a state requires more tax from a company whose parent is elsewhere as against a company all of whose enterprises are resident in that state.

The following cases show that companies are prepared to challenge legislation that they consider discriminatory through reference to the ECJ.

Cadbury Schweppes PLC and Cadbury Schweppes Overseas Ltd v CIR[2]

The claimants brought a claim to the Special Commissioners[3] arguing that the relevant UK legislation was contrary to the freedom of establishment conferred by the EC Treaty. The relevant UK legislation provided that the profits of a foreign subsidiary of a UK parent company, where subject to a less severe regime of corporation tax than that adopted in the UK, were liable for corporation tax in the UK, notwithstanding that such tax had already been paid under the national regime of the subsidiary company.

The Special Commissioners sought a preliminary ruling from the ECJ regarding the compatibility of the UK legislation relating to such controlled foreign companies (CFCs), designed to prevent UK corporation tax avoidance. The relevant UK rules provided that where a resident company owned a holding of more than 50 per cent in a CFC established in a country with a corporation tax rate of less than three-quarters of the UK tax rate, the resident company would be taxed on the CFC's profits.

The ECJ decided that the UK legislation meant that a resident company with a subsidiary in a lower tax member state suffered a disadvantage which constituted a restriction on the freedom of establishment. This restriction would only be permissible if it was justified by overriding reasons of public interest and was proportionate to the objective pursued, such as where the restriction was to prevent the creation of wholly artificial arrangements which do not reflect economic reality with a view to escaping the tax normally due on profits. If it could be proven that the CFC carried on genuine economic activities in the host member state in which it was established, despite the existence of tax motives, the profits of the CFC should not be included in the tax base of the UK resident company. The national courts must determine whether the UK legislation could be interpreted in such a way as to catch only those artificial arrangements.

This judgment was important to a large number of companies as it impacts on future group structures and the establishment of subsidiaries in particular member states for the purposes of benefiting from a favourable tax regime. It has allowed groups of companies to focus on commercially driven group structures, provided that any subsidiary established in another member state carries on genuine commercial activities. As a response, the UK government introduced legislation allowing companies with EU and EEA subsidiaries which would otherwise be caught by the CFC legislation to apply for exemption from the legislation. This reduced tax revenue on overseas profit.

Proposals were made in the 2007 budget for a fundamental change resulting in a harsher regime to tax overseas profits in the UK. As a result, a number of multinationals that previously had their headquarters in the UK have moved to other jurisdictions. On 2 June 2008 the government announced it would delay such proposals on the tax of foreign profits.

Marks & Spencer v Halsey[4]

Marks & Spencer brought proceedings in the UK claiming relevant UK legislation was contrary to EU law. It prevented a resident parent company from deducting from taxable profits losses incurred by a subsidiary established in another EU member. The Chancery Division stayed proceedings in order to ask the ECJ whether such provisions constituted a restriction on freedom of establishment because, by contrast, a resident parent company was allowed to deduct losses incurred by a resident subsidiary.

The ECJ decided[5] that it was only contrary to the freedom of establishment to prevent a resident parent company from deducting from its taxable profits losses incurred in another member state by a subsidiary established in that member state if:

- the non-resident subsidiary has exhausted the possibilities available in its state of residence of having the losses taken into account for the accounting period concerned by the claim for relief and also for previous accounting periods; and
- there is no possibility for the foreign subsidiary's losses to be taken into account in its state of residence for future periods either by the subsidiary or a third party.

The Court of Appeal subsequently held that:[6]

- the relevant time for determining whether these two conditions have been satisfied is at the time a claim for group relief is made; and
- the phrase 'no possibility' in the second condition was to be read as 'no real possibility' in the sense that a real possibility was one which could not be dismissed as fanciful.

This decision was welcomed by many multinational organisations. The Finance Act 2006 amended the UK group relief rules to conform to the ECJ decision. However, the UK government has taken a narrow approach and the new legislation complies only in the strictest sense but goes no further. The Chancery Division of the High Court and the Court of Appeal interpreted the ECJ decision more widely. For example, they held that the relevant time for determining whether the conditions have been satisfied should be the time of claiming the relief: the legislation states that the relevant time is the end of the accounting period in which the losses were incurred.

Clarifying the law

The majority of test cases brought in the areas of law that were considered for this project were cases focused on clarifying the law. Many of these have a large public interest element. Examples include the regime for funding civil proceedings where legal aid is not available (litigation funding) and the legality of bank overdraft charges (consumer protection).

Funding civil proceedings

The law relating to insurance attracted a number of test cases due to the new funding regime for litigation through conditional fee agreements (CFA) and the use of after the event (ATE) insurance following the abolishment of legal aid for personal injury claims. The Courts and Legal Services Act 1990 permits parties to submit costs orders that not only include the payment of any basic fees payable under a CFA but also a success fee.[7] The Access to Justice Act 1999 provides that the premiums paid in respect of insurance policies by the winning party to litigation could also be recovered from the losing side.[8] However, there was no firm guidance in the statute, or related order, regulations and rules, as to what the success fee is actually for, what the definition of 'premium' covers or how either should be calculated.

Court of Appeal judgment

Callery v Gray[9] showed that the Court of Appeal endorsed the ATE and CFA regimes and followed the government policy of not preventing this market from flourishing. The House of Lords stated that the Court of Appeal had the responsibility of supervising the developing practice by which the new funding regime was to be operated: that the court should monitor and control any potential abuses and difficulties which might arise.[10] The House of Lords should, in general, be slow to intervene since it could not respond to changes in practice with the speed and sensitivity of the Court of Appeal.

The Court of Appeal also took a very pragmatic approach in the *Claims Direct Test Cases*[11] finding that a doctrine of 'substance over form' could be applied in the case of premiums. In these cases, Claims Direct offered to take on claims in return for payment of a 'premium' of £1250 plus insurance premium tax (IPT) for a 'Litigation Protection Insurance Policy'. The claimant borrowed the 'premium' under a consumer credit agreement. Repayment was deferred until the end of the case. The insurers repaid it if the claim failed. An intermediary arranged payment to the insurers of the sum of £140, due to them for insurance cover, plus IPT, retaining a brokerage fee. A sum of £1110 per case remained. It was split between Medical Legal Support Services Ltd (MLSS, a subsidiary of Claims Direct) and Claims Direct, Claims Direct retaining £110 as brokerage or commission. MLSS received £1000, for what were described as initial and continuing insurance services, of which £225 was initially paid into an MLSS retention trust account, by agreement with the insurers. In a number of test cases in which the claimants succeeded in court proceedings and sought to recover the whole of the 'premium' paid for their 'Litigation Protection Insurance Policy' defendants resisted that claim. The Court of Appeal focused on the sum paid to MLSS and determined that the correct approach to identify what should truly be regarded as a premium within the 1999 Act was to undertake a detailed analysis of what was actually being provided. On that basis, the entire sum paid to MLSS could not be considered to be part of a premium within the scope of the Act. The Court of Appeal in *Rogers v Merthyr Tydfil County Borough Council*[12] further held that the premium must be proportionate to that which is at stake and the court must take into account all the circumstances in considering this.

The government has recognised the concerns expressed in the papers and in April 2007 the Department for Constitutional Affairs produced a consultation paper entitled *Case track limits and the claims process for personal injury claims*[13] which contains a section on ATE insurance and CFAs. It proposed that an ATE premium taken out at the commencement of the claim should not be recoverable.

Legality of bank overdraft charges

An example of how pressure groups can create awareness of an issue, giving rise to a test case to help to clarify the law and possibly have greater implications is the recent banking case: *The Office of Fair Trading v (1) Abbey National plc; (2) Barclays Bank plc; (3) Clydesdale Bank plc; (4) HBOS plc; (5) HSBC Bank plc; (6) Lloyds TSB Bank plc; (7) Nationwide Building Society and (8) Royal Bank of*

Scotland Group plc[14] in relation to overdraft charges (the bank charges) paid by consumers.

The Office of Fair Trading (OFT) and consumer groups expressed concern over the number and level of unarranged overdraft charges. In March 2007, the OFT announced a formal investigation. It sought to determine whether, in its view, the relevant terms concerning bank charges (the terms) were 'unfair' under the Unfair Terms in Consumer Contracts Regulations 1999. This followed a high-profile campaign by *Which?* and other consumer groups whereby bank customers were guided on how to reclaim bank charges by fighting the banks in the small claims and county courts. Over the course of 2007, £400m was paid out to consumers by banks, as many opted to pay out on the claims rather than fight consumers in the courts. The banks, however, have argued throughout that the bank charges are a legitimate part of the payment they receive in exchange for providing the whole package of banking services under the 'free-if-in-credit' system. The banks have also argued that the bank charges are paid in exchange for the specific services relating to overdrafts, including, amongst others, providing customers (at their request) with overdrafts, taking the credit risk of granting temporary overdrafts and/or notifying the customers of unpaid debts.

In July 2007, the eight defendant banks (the banks), which make up over 90 per cent of the personal current account market, agreed to a test case with the OFT in the High Court to clarify the legal position on bank charges rather than litigating hundreds of thousands of individual cases. As part of the banks' agreement to the test case, the majority of pending litigation claims were frozen pending its outcome, pursuant to a request to the county courts (where the consumer cases were being heard) and a 'waiver' granted by the Financial Services Authority, in respect of certain minimum time limits in which the banks must address customer complaints.

The test case is intended to address the bank charges when current account customers exceed their arranged overdraft limit; issue a cheque and there are insufficient amounts in the account to clear it; or otherwise issue a payment instruction without sufficient funds in the account to meet it. At a preliminary issues hearing, the OFT asked the court to confirm that the bank charges are assessable for fairness. The relevant provision provides that terms that relate 'to the adequacy of the price or remuneration, as against the goods or services supplied in the exchange' are not assessable for fairness.[15] The judge was asked to decide whether the terms:

- were assessable for fairness or whether s6(2)(b) of the regulations excludes them from assessment;

- were in plain and intelligible language; and
- were capable of being penalties at common law.

The question of whether or not the terms are in fact fair has not yet been dealt with.

On 24 April, Mr Justice Andrew Smith ruled that the terms were:

- wholly in plain and intelligible language as far as four banks were concerned and largely in plain and intelligible language in relation to the other four;
- all assessable for fairness as they cannot be excluded from assessment on the basis that they relate to 'the adequacy of the price or remuneration' of the services under regulation 6(2)(b);
- not capable of amounting to penalties at common law.

In July 2007, there was a subsequent hearing at which Smith J considered the extent to which his decision applied to some of the banks' historic terms on bank charges. On 7 October, he decided that the banks' historic terms were also assessable for fairness, but in the main were not capable of being penalties at common law (he did not find that any were capable of being penal, but has asked for further submissions to be made by some banks on some terms).

The banks appealed the decision that the bank charges are assessable for fairness under the regulations. The appeal commenced on 28 October 2008. Following further decisions on this case and once its investigation is completed, which is not expected before the end of 2008, the OFT is likely finally to determine its position on whether or not it considers that bank charges satisfy the fairness test. A binding decision on whether the bank charges are in fact fair, however, could only be taken by a court and this question may come before the court after the OFT has formed its view.

This case has received considerable press coverage because of the potential implications for banking generally. If the OFT determines that the bank charges are unfair and the court agrees, the banks may have to lower their overdraft fees or re-structure the way they charge customers entirely as well as possibly repaying large sums already received. They are likely to recover the costs in other ways, namely charging customers to operate a bank account. This might threaten the principle of 'free-if-in-credit' banking in the United Kingdom.

Sending a message

Test cases directed at 'sending a message' usually also seek to clarify an area of law to confirm what activities are permissible by certain legislation or case law whilst emphasising what actions are prohibited. However, such cases may not

be economically justifiable on their own merits but serve the broader purpose of sending a message to the public and to the relevant industry sectors to warn of the consequences of carrying on illegal activities, for example. The following are examples of such cases in media and intellectual property law.

Murphy v Media Protection Services Ltd[16]

The Premier League used a company called Media Protection Services Ltd (MPS) to bring a private prosecution against a group of publicans including Ms Murphy. The claimant argued that Ms Murphy got her satellite decoder from a foreign broadcaster rather than BSkyB (the broadcaster which had been given exclusive rights in the UK by the Premier League) and, thus, evaded payment of the appropriate fees. This, MPS argued, amounted to a breach of the requisite provisions of the Copyright, Designs and Patents Act 1988 (the CDPA) which provide that 'a person who dishonestly receives a programme included in a broadcasting service provided from a place in the United Kingdom with intent to avoid payment of any charge applicable to the reception of the programme commits an offence and is liable on summary conviction to a fine not exceeding level 5 on the standard scale'. [17] Ms Murphy was found guilty.

The High Court was asked to clarify the following issues:

- For the purposes of the CDPA, is it a requirement that the broadcasting service or broadcaster providing the programme in question is based in the UK?

The court held that the place from which the broadcasting service is provided is the point at which the initial transmission of the programme for ultimate reception by the public took place. In this case, it is the UK.

- Does the requisite 'intent to avoid any charge applicable to the reception of the programme' apply to circumstances where the appellant paid a charge to AV Station (an entity selling decoders from the Greek broadcaster and cards in the UK) and then receives a programme from that Greek broadcaster but does not pay any other fee to any other broadcaster (in this case BSkyB) as the domestic broadcaster in question?

The High Court held that the requisite intent to avoid a charge is proved if it is shown that the defendant knows that the broadcaster has the exclusive right in this country and makes a charge for reception of its broadcasts, and s/he makes arrangements to receive its broadcasts without paying that charge. The fact that a charge is paid to a broadcaster who the defendant knows does not have the right to broadcast in this country is not inconsistent with an intent to avoid the UK broadcaster's charge. The appeal was dismissed and Ms Murphy's conviction

was upheld. It was significant that she knew that BSkyB had an exclusive right to broadcast live Premier League matches in the UK.

This case reflects the courts' crackdown on the use of foreign satellite equipment to show live English Premier League football in pubs. It has assisted the Premier League to act against infringers and ultimately maintain the value of the exclusive licence with BSkyB. In 2007, the existence of the litigation prompted the Greek broadcaster from which Ms Murphy received her satellite to protect its position by sending an open letter stating that actions such as Ms Murphy's were illegal. Furthermore, in 2008 the courts found a supplier of foreign decoding equipment guilty of copyright infringement.

Polydor Limited & others v Brown & others[18]

Polydor Limited and at least six other members of the British Phonographic Industry (BPI) brought infringement proceedings against Mr Bowles and others for providing the public with access to music files etc through peer-to-peer (P2P) file-sharing software. They applied for summary judgment in relation to copyright infringement.[19] The claimants were awarded summary judgment. It was held that the mere fact that the files were present on Mr Bowles's computer and were made available to the public was sufficient. Ignorance of the law was not seen as an excuse. The case provides greater clarity of the 'communication to the public right'.[20]

This case, along with *Murphy v Media Protection Services*,[21] could not have been justified by such a large corporation on its own merits due to the large financial cost involved with bringing proceedings for such a small claim against individuals. However, it is the longer term effects of such cases on the telecommunications and media industries, in these particular cases, that justify litigation. The case reflected the music industry's approach to stamping out illegal file sharing of copyright musical works on the internet by private individuals and assisted the record companies and others in the music industry to stem the loss of music royalties. In October 2007, the government urged internet service providers to take a 'more activist role' in the problem of illegal file-sharing and warned them that the government may legislate on the issue if necessary.

Levi Strauss & Co and Levi Strauss (UK) Limited v Tesco Stores Limited, Tesco Stores Plc and Costco Wholesale UK Limited[22]

The claimants (Levi) sought summary judgment against the Defendants (Tesco) for trade mark infringement. Tesco had imported Levi jeans from the United States, Canada and Mexico and sold them in the UK. Such goods were sold at lower prices in the UK than those supplied by the manufacturer's official

distributors in Europe but were identical to those supplied by the claimant to the European market.

The ECJ held that the consent of a trade mark proprietor to subsequent marketing within the European Economic Area (EEA), following the initial marketing of such products outside the EEA, must be express and cannot be implied.[23] The High Court subsequently rejected Tesco's argument that the action for infringement was not maintainable in the United Kingdom.[24] On the contrary, the High Court held that permitting a proprietor in the Community to use its mark to prevent his own goods from entering the Community was not contrary to Article 28 of the EC Treaty.[25] [26]

Tesco was given the right to appeal in this case but did not. In *Kabushiki Kaisha Sony Computer Entertainment v Electricbirdland Ltd*[27] the High Court allowed summary judgment in a similar parallel import case on the basis that there was no case to argue. This shows that the courts are indeed clamping down on parallel imports. The High Court stated that a company which claims that the registered owner of a trade mark consented to it importing goods subject to that trade mark from outside the EEA into the EEA must provide cogent evidence to show that the trade mark proprietor had consented.

Third party interventions

A third party intervention (TPI) is an intervention in litigation by an interested party, not a party to the case, who wishes to make submissions to the court with a view to influencing the outcome of the case. Almost by definition, a party making a TPI sees their intervention as a form of test case with the objectives that we set out above.

What is a third party intervention?

There is no standard definition of a third party intervention. Nor have the reasons for allowing or disallowing proposed interventions been clarified by the courts. There is a lack of clearly formulated criteria for deciding who should be permitted to intervene and on what grounds – the Rules of Court contain no such criteria. Decisions on whether or not to permit interventions are usually made on paper and without reasons. In *Re Northern Ireland Human Rights Commission*,[28] the court stated that an intervention would be allowed if the intervention would promote the interests of justice and assist the court. *Matthews v Ministry of Defence*[29] would allow a TPI that raised wider policy issues on which the court needed a fuller range of information, if the party had a direct or indirect interest (for example, the outcome would be determinative of its own case). However in *Arthur JS Hall & Co v Simons*,[30] discussed in more detail below, a third party intervention was allowed which, although it may have arguably raised wider policy issues (such as advocate immunity), did not provide any additional information to the court. There would appear to be no standard formula for allowing a TPI and the success or failure of an application is unpredictable.

Two further limitations on bringing a third party intervention are:[31] first, lack of information in the sense that those who might wish to intervene often do not know about the case until it is too late; and, secondly, the financial risk that an intervener might face an adverse costs order.[32]

Who intervenes?

Third party interveners may include a wide range of organisations, including the government. However, they are often of three main types:

- a commercial organisation, such as a bank or insurance company, may intervene because a case has a direct or indirect effect on its own pecuniary interests.

- a professional body acting in relation to its members' interests. The Bar Council and Law Society, for example, have intervened several times in cases which they perceive to affect their members' interests. They can be said to lie between a campaign body (discussed below) and a commercial organisation, in that their purposes are not directly pecuniary, and usually relate to an interest in a particular point of law, but nor are they entirely disinterested, since they represent their members. Their members' interests are often pecuniary, but not universally so, as for example in the BCCI case[33] where both the Bar Council and Law Society intervened with regards to the concept of legal advice privilege. Though they do not go so far as to claim to represent the public, as campaign bodies do, professional bodies typically claim that their arguments favour 'the public interest'.

- a campaign body, that is, a body typically concerned with human rights or civil rights, usually defines itself as intervening on behalf of the public interest. They will take up cases which provide the opportunity to test a particular point of law. The interest in testing existing law operates in parallel to an interest in making new law (eg by policy lobbying). Although campaign bodies may typically be associated with liberal NGOs such as JUSTICE or Liberty, they are distributed across the political spectrum and different groups may well have opposing interpretations of human rights or civil rights, as when pro-life groups intervened in *Pretty v United Kingdom*.[34]

This report considers the position only of commercial organisations because they have been insufficiently studied.

Hall v Simons: a case study[35]

To illustrate the way in which the public interest may be invoked and competing public interests balanced, it is instructive to look at a particular intervention. In the case of *Hall v Simons* the Bar Council, a professional body, intervened to protect the concept of advocate immunity (the immunity of an advocate from a negligence suit). Three main arguments were raised that claimed to protect the 'public interest'. First, it should be retained to protect the 'cab rank' principle, that is, the principle that barristers should not be able to pick and choose their clients. It was in the public interest that a case could be brought even if it was unlikely to succeed. Advocate immunity arguably protected the cab rank principle because it prevented advocates from rejecting weak cases, as they might otherwise do (bearing in mind the threat of a negligence suit in the event of failure). However it was also in the public interest that a suit could be brought against a negligent advocate. The court held that both interests could be served, since as long as the courts were 'able to judge between errors of judgement … and true negligence', there was no danger to the advocate who lost a hopeless case that the court would judge him/her negligent.

Second, the advocate's duty to their client and to the court might be forced into conflict. A barrister may not mislead the court or allow a judge to accept a bad point in their favour, and must cite all relevant law, whether or not supportive of their case. It had previously been decided[36] that a barrister who could face a negligence suit from a client would be unlikely to effectively fulfil their duty to the court. However in *Hall v Simons* this stance was updated: advocates were compared to doctors, whose duties to their patients sometimes conflicted with their ethical code, yet they had no protection from negligence suits. There was a public interest in the effective functioning of justice, whether or not this conflicted with the interest of the individual who suffered arguments against his case. The court would be able to protect an advocate from a vexatious suit brought by such a client, because it recognised that fulfilling the duty to the court was not negligence.

Third, it is in the public interest that a decision of a court of competent jurisdiction not be re-litigated (the *Hunter* principle).[37] Bringing a negligence suit against an advocate who lost a case would be an indirect challenge to the case itself. However, in criminal law for example, public policy requires a defendant who seeks to challenge his conviction to do so directly, for example by appealing. They cannot bring an indirect challenge. The effect of a successful negligence suit on a guilty verdict would be destabilising. The negligence suit could not seek to recreate the original case. A conflicting decision would undermine confidence in the system and offend the principle of certainty. The necessity of preserving these principles was also upheld in *Hall*. However it

was agreed that in a criminal case such a challenge could be allowed where the conviction had been struck out (on other grounds). The danger of a conflicting decision would then fall away.

In civil cases, the court felt that alternative judicial principles were sufficient to protect civil decisions from collateral challenges, such as res judicata (ie judgment being final), issue estoppel (preventing an issue that has already been decided on from re-litigation, even when the parties are different) and abuse of process (the purpose being an improper one collateral to the proper object of the process). Therefore, although negligence suits might well be prevented by alternative means, it was not in the public interest to render them impossible by retaining the concept of advocate immunity.

Hall v Simons demonstrated that the court will not merely accept the definition of the 'public interest' with which a particular intervening organisation seeks to align itself. As might be expected, the court will resolve a definition according to legal principles, and, where public interests compete, seek to balance one against the other.

We now look at two case studies of TPIs as typically undertaken by commercial organisations, specifically, media and insurance.

Third party interventions by media organisations

Media organisations regularly intervene in particular cases in relation to reporting restrictions. Such interventions typically occur in cases of a sensitive nature (for example, in criminal law and family law proceedings) with the intention of having a reporting restriction order set aside on the basis that it is in the public interest to publish and or broadcast the information in question. However, instances where media organisations have actually joined proceedings as a third party intervener are relatively rare in the UK.

McKennitt v Ash[38]

This case involved an attempted third party intervention by a number of media organisations (the applicants) in an appeal to the Court of Appeal.[39] The applicants applied for an order that they be permitted to intervene in the appeal, attend the hearing of the appeal and address written and oral submissions to the Court of Appeal on the issues of principle raised by the appeal.[40]

The defendant, Ms Ash, had written a book about her former friend and confidante, a renowned Canadian musician, (the claimant, Ms McKennitt), entitled Travels with Loreena McKennitt: My Life as a Friend. Ms McKennitt, who sought to prevent widespread publication of the book, issued proceedings in the High Court contending that the book contained identified material

which was published in breach of confidence and or as an invasion of privacy. Upholding Ms McKennitt's claim in relation to the majority of the identified passages, Eady J, at first instance, granted an injunction preventing further publication and £5,000 in damages. Ms Ash appealed.

The Court of Appeal dismissed Ms Ash's appeal. Buxton LJ, who gave the leading judgment of the Court of Appeal, adopted the standard two-stage approach to the issue of privacy, tying the questions in with Articles 8[41] and 10[42] of the European Convention on Human Rights (ECHR). Thus, the first question was:

- Is the information private in the sense that it is in principle protected by Article 8?

and the second, if the answer to the first question is yes:[43]

- In all the circumstances, must the interest of the owner of the private information yield to the right of freedom of expression conferred on the publisher by Article 10?[44]

There were seven applicants that represented the greater part of the press: Times Newspapers Limited, Telegraph Group Limited, Associated Newspapers Limited, The Press Association, British Sky Broadcasting Ltd, the BBC and the Periodical Publishers Association (the PPA, an organisation representing almost 400 publishing companies, who publish more than 2,260 consumer, business and professional magazines in the UK).

The applicants were concerned about the potential impact of the developing law of privacy upon their publications in the print or broadcast media (including websites). They intervened on the grounds that the appeal raised a number of issues which were likely to have an important impact on the law and practice in this evolving field, and thus upon the balancing by the courts of the competing demands of the protections of freedom of expression and personal privacy. They submitted that they were in a position to assist the Court of Appeal with both written and oral submissions on the wider impact of the emerging principles of press freedom in the United Kingdom and, in particular, they wished to raise the following issues:

- the way in which English law identifies and approaches the protection of privacy of public figures – an issue of 'considerable importance' to the applicants;
- the 'obvious importance' of clear principles to deal with situations where one party to a private relationship or activity wishes to disclose their story through the media;

- the need for an objective test of whether something is or is not a matter of which disclosure is required in the public interest, irrespective of the motive of the person making the disclosure. Newspapers and broadcasters are often unaware of the motives of sources and do not have sufficient time in which to investigate the motives of sources or any practicable means by which to do so;
- establishment of whether the disclosure of apparently trivial information is to be regarded as an invasion of privacy unless justified by countervailing considerations, or whether the disclosure of trivial information is something which is incapable of founding a cause of action;
- clear principles governing the extent to which 'public domain' considerations are relevant in this area of law;
- clear principles to emerge as to when the developing law of privacy would be engaged by the publication or threatened publication of information which the claimant contended was false; and
- the extent to which newspapers are free to report information about court proceedings disclosed to them by a person who, like Ms Ash, was a party to the proceedings.

The applicants were concerned that these issues might not be the subject of full argument at trial; it was likely that the representatives of the defendants would have been primarily concerned with the way in which the developing law impacts on the particular facts of the case; and that important questions of principle of wide public importance might need to be decided. In granting permission to appeal the Court of Appeal appeared to have shared the concerns of the applicants by observing that:[45] '… this is an important and developing area of law where an appeal on these facts may help to clarify and define some of the relevant principles even if it does not alter the outcome.'

The applicants argued that the Court of Appeal would be assisted in considering such issues of principle, if it received submissions from counsel instructed on behalf of the applicants, who would seek to identify and illuminate the applicable principles, without making submissions on the application of those principles to the facts of the case. The Court of Appeal suggested that the matter could be managed not by a formal intervention but by the Court of Appeal taking note, and asking the parties to take note, of the detailed submissions in the application to intervene, and the authorities there set out. The applicants agreed. The Court of Appeal also received a letter from the PPA, which it indicated to the parties that it had read. The Court of Appeal took these steps without prejudice to the law or practice on intervention by commercial as opposed to public or public interest parties, an area which remains in a state of some uncertainty.

Many media organisations are often reluctant to intervene in cases because of the risk of adverse costs awards and the lack of clear guidance on the method of so doing. In practice, it would appear that such factors discourage media organisations from intervening in proceedings as a matter of public interest. Consequently, instances where media organisations have actually joined proceedings as a third party are only likely to occur in situations where the commercial interests of the media organisation(s) are likely to be directly affected by the outcome of the particular case in question, rather than in those cases raising fundamental issues of the role of information and media in society. If effective interventions are to be made then these issues need to be addressed by definite rules which make clear and specific provision for interventions and their costs consequences.

Wilson v First County Trust Ltd[46]

Four of the UK's most prominent insurers together intervened in the seminal case of *Wilson* concerning consumer credit. Mrs Wilson pawned her car with First County Trust Ltd (FLT), a pawnbroker, for £5,000 under a credit agreement. When Mrs Wilson failed to repay the loan, the pawnbroker sought repayment from her. In the event it was not repaid, FLT intended to sell the car. In response to this, as a litigant in person, Mrs Wilson commenced proceedings in the county court, claiming that the credit agreement was unenforceable as it did not contain the terms prescribed under the Consumer Credit Act 1974 (CCA).

Under the CCA, a regulated agreement, which the loan agreement with the pawnbroker was, had to meet three conditions to be considered properly executed. The material condition was that the agreement must contain all of the prescribed terms. If not, the agreement was unenforceable: if the agreement was unenforceable, so too was the security, in this case Mrs Wilson's car. The loan agreement stated the amount of credit was £5,250. This sum included a 'document fee' of £250. The county court judge had to decide whether inclusion of the document fee in the amount stated to be 'credit' meant that the credit amount had been misstated and therefore breached one of the conditions rendering the agreement unenforceable. The judge found that the agreement had fulfilled the conditions and Mrs Wilson lost her case.

Mrs Wilson took her case to the Court of Appeal. The Court of Appeal reversed the county court judgment and found that the agreement was unenforceable due to a misstatement of credit. FLT argued that, because the agreement was unenforceable, the CCA contravened Article 6(1) (right to a fair trial) and Protocol 1, Article 1 (protection of property) of the ECHR. The Court granted a declaration of incompatibility. In essence, it was decided that the Human Rights Act 1998 (the HRA) gave retrospective effect to the ECHR. The guarantee of a fair trial was of no effect if the contract was unenforceable and FLT's contractual

rights and right to the security were completely eroded by the unenforceability of the agreement.

The Court of Appeal decision was appealed to the House of Lords. At this stage, Mrs Wilson dropped out of the proceedings.

FLT, which also dropped out of the appeal to the House of Lords probably on account of a lack of financial resources, approached the Finance and Leasing Association (the FLA), their industry body, to join the proceedings on their behalf. The FLA considered the issues at stake to be so close to the interests of their members that they applied and were granted leave to intervene. The credit agreement which Mrs Wilson had entered into was a standard form drafted by the FLA and was used by most of their members involved in pawnbroking.

The FLA had two main arguments; either:

- the finding that the CCA rendered the agreement unenforceable was a contravention of their members' human rights under Article 6 and Protocol 1, Article 1 ECHR. Whilst the HRA could not be applied retrospectively, their members' human rights were engaged once the matter came to court and the court found the contract unenforceable. Further, the court could potentially make a declaration of incompatibility under s3 HRA in respect of any statute enacted before the coming into force of the HRA; or
- this was a restitutionary claim, an argument advanced by the Secretary of State. Under such a claim, the test for unjust enrichment would allow the court to order repayment on terms by using its inherent discretionary powers. Therefore, whilst an actual credit agreement would be unenforceable, the creditor could be awarded an amount equal to that which it had lent under the credit agreement, plus interest and costs. However this was at odds with the interests of insurers.

A petition to intervene was made by a number of insurers, CGNU Plc, Royal & Sun Alliance Plc, AXA Insurance UK Plc and Churchill Insurance Company Limited, together representing the Association of British Insurers (ABI), a group that forms the majority share of the motor insurance market. The Lords granted the petition to intervene.

The petition to intervene was probably influenced by the possibility that an earlier precedent, *Diamond v Lovell,*[47] might be overturned. For several years before the House of Lords' decision in *Diamond*, accident management companies (AMCs) were a thorn in the side of insurers. Extensive litigation concerning the charges levied by AMCs had taken place between the AMCs on the one hand, and insurers on the other. An AMC would arrange car hire,

vehicle repair and other-post accident services for customers involved in road traffic accidents on the basis that the AMC believed the customer was blameless. The service fees were delayed for a long period whilst the AMC tried to recover them from a third party, usually an insurer. In *Diamond*, the House of Lords found that AMCs provided car hire service under a credit agreement regulated under the CCA. The agreement in question omitted details of the amount of credit and therefore was found to be unenforceable as it did not contain all the prescribed terms. As a result, the claimant had no claim for damages whatsoever as there was no subsisting loss, and the contract was unenforceable. It was advanced by counsel for the claimant in that case that the creditor could make a restitutionary claim against the debtor or third party – they had received the service and so they should pay for it. However, the House of Lords stated that the common law should not reverse the enrichment which was compelled by statute – a windfall for the insurers. Claims by insurers have been assessed and defended on the basis of the decision in *Diamond* and as a result, many insurers have closed several files on the basis that no further claims could be sustained by the AMCs.

If the House of Lords had found in *Wilson* that restitution could be pursued, insurers could have faced a reversal of their success in *Diamond* and consequent financial losses. If a change in the common law vis-à-vis unjust enrichment had occurred, those old files which had been closed by the insurances companies could have been reopened and might have been litigated. In the insurers' petition to intervene, it was made clear that permission was sought on the grounds that the commercial interests of not only the specific interveners, but the motor insurance industry as a whole, were at stake.

The government, through the Department of Trade and Industry (DTI), had also been granted permission to intervene. The DTI sought to save the legislation by arguing that it was compatible with the HRA, a point with which the insurers agreed. However, the DTI further argued that restitution should be available. The Attorney General was also granted leave to intervene on behalf of the Speaker of the House of Commons. He was not concerned with the merits of the appeal but wished to address the House of Lords on the use of *Hansard*. The Court of Appeal had referred to *Hansard* in order to identify the particular issue of social policy which the legislature or executive thought it necessary to address when enacting s127(3) CCA, and the thinking that had led to that issue being dealt with in the way that it was. The Speaker of the House of Commons was concerned that speeches of Parliamentarians should not be used as evidence of policy considerations. In this case, it was submitted, reference to *Hansard* should only be made in very limited circumstances to interpret statute where the language of the statute is ambiguous. It should not be used to determine policy considerations. He argued that the wording of the CCA was clear and therefore

the Court of Appeal was not permitted to refer to *Hansard* in determining whether or not the CCA was incompatible with the HRA. In this case, the Speaker's interests did not conflict with those of insurers.

In the end, the House of Lords considered that they would be failing in their duty to determine the compatibility of the statute with the HRA if they were prevented from considering the background to the statute. This included reference to *Hansard*. However, it was accepted that reference to *Hansard* would rarely arise. The House of Lords found in favour of the insurers in that:

- The Court of Appeal had been wrong to make a declaration of incompatibility because the cause of action arose before the HRA came into force;
- The restrictions in s127(3) CCA did not engage creditors' Article 6 ECHR rights since creditors are not prohibited from approaching the court to decide whether the agreement in question is actually caught by the restriction;
- No restitutionary claim could be made by creditors as that would be inconsistent with what Parliament intended in enacting s127 CCA. The common law cannot be used to get around statutory law. Winning this point was crucial to the insurers. Given that no restitutionary claim can be pursued by creditors, insurers no longer needed to be wary of hundreds of closed files coming back to life; and
- In deciding whether a declaration of incompatibility should be made, the court is entitled to consider *Hansard*, otherwise they would be failing in their duty under s3 HRA.

Wilson is a good example of a case where the commercial interests of insurers were successfully protected through the use of strategic litigation. ABI's interests were clearly not a public interest and neither were FLA's. Apparently, the courts are willing to allow, and traditionally have been amenable to allowing, third party interveners to pursue their own self-interest. *Wilson* highlights that self-interest can also be a commercial interest.

Conclusions

Commercial organisations will continue to bring test cases, especially in areas that are financially remunerative where such cases could have wide-ranging implications. Furthermore, test cases have sometimes forced the government to change legislation or at least seriously to consider change, for example in relation to the tax regime mentioned above. Cases can allow the courts to set guidelines and lay down principles to be followed in the future. For example, the Court of Appeal determined in *Callery v Gray*[48] that a success fee of 20 per cent was the maximum uplift that can reasonably be agreed in relation to a modest and straightforward claim for compensation. They also show how judges sitting

in the Court of Appeal and the House of Lords can use the platform afforded by a test case to express unease about a particular area of law. In *Callery v Gray*[49] the Lords expressed concerns about the new funding arrangements which were 'unbalanced and unfairly prejudicial to liability insurers' (Lord Nicholls). Those test cases which seek to 'send a message' have had a measure of success, particularly in the context of protection of intellectual property, by sending strong messages to would-be infringers that there may be sanctions (which are sometimes criminal) for their actions. In the *Murphy v Media Prosecution Services Ltd*,[50] the Premier League was able to utilise a clear ruling in their favour to help to act against suppliers of foreign decoding equipment who were aiding others to infringe copyright. Similarly, the other test cases in this area highlight how court rulings can be employed to protect intellectual property rights, and as in *Kabushiki Kaisha Sony Computer Entertainment*,[51] future infringers in the same area can be dealt with quickly by the court.

Interestingly, test cases can occasionally be a victim of their own success, with the government passing specific laws to reduce the impact of specific test case outcomes. This was what happened in the tax test case *Metallgesellschaft Ltd v Inland Revenue Commissioners*.[52] This case, along with a number of other test cases relating to the same tax, resulted in an abolition of advanced corporate tax (ACT). The ECJ held that companies which had been unlawfully required to pay ACT were entitled to restitution or compensation. Deutsche Morgan Grenfall Group plc was successful in claiming restitution 'for relief from the consequences of a mistake'.[53] However, the government tried to limit the number of claimants making similar restitution claims against the HMRC through the Finance Act 2004.[54] This adjusted the relevant limitation period relating to a 'taxation matter under the care and management of the Commissioners of the Inland Revenue'. The effect was to change the commencement of the limitation period from when the mistake of law could reasonably have been discovered (in this case, 2001) to when the mistaken payment was actually made (which dated back as far as 1973). Given the short limitation period of only six years, this significantly limited companies' ability to recover mistaken tax payments. The legislation was introduced with no prior warning and applies to all claims made on or after 8 September 2003, with no transitional period. This change is currently being challenged in *Aegis Group plc v IRC*.[55] It is likely that Aegis Group plc may be successful, given previous EU decisions in support of transitional periods.

The outcome of the *Aegis Group* case could be very important as it may highlight the extent to which the courts are willing to go in support of persons whose rights are negatively affected by legislation that could be considered unjust or unfair. It may also be an interesting example of the separation of powers principle.

The cases highlight that where commercial entities feel their interests are best served through litigation, be it to attempt to force a change to the law, to clarify the scope of existing law or to send a message to the public, test cases may be launched. This strongly suggests that such cases will continue into the future and this is reinforced by the proliferation of industry and public interest groups. Such cases have met with the tacit approval of the courts such as in the arrangements put in place in respect of the bank charges case. Commercial entities naturally seek to harness publicity arising from test cases for their own ends. However, a degree of caution should be exercised by commercial entities before embarking on test cases given litigation uncertainties, costs and the potential for negative publicity. In addition, even where successful, specific legislation may be introduced to limit the effect of the court decision.

A similar level of uncertainty surrounds third party interventions. *Wilson v First County Trust Ltd* and *McKennit v Ash* involved interventions which could be claimed as being in the public interest – in the former case, essentially a declaration was sought that key consumer protection legislation was valid; in the latter, the interveners asked the court to clarify how the competing demands of the protections of freedom of expression and personal privacy should be balanced. Both interventions were also clearly motivated by private commercial interests, yet the courts were still happy to grant the relevant organisations the opportunity to make submissions which at the very least indirectly sought to protect those interests. It appears, then, that whether motivated by access to justice in the human rights arena, by financial concern in the worlds of insurance and the media, or by the grey area constituted by members' interests of professional organisations, bodies will not be routinely denied their day in court.

Yet two key issues emerge from all the cases analysed – first, that it is not clear exactly when and for what reasons the right to intervene will be granted by the courts; and second, that simple analysis of the judgments handed down reveals little in terms of the actual impact of the interventions granted. If one overriding conclusion is to be drawn from this exercise, it might be that these two factors are likely to be interlinked, and that without greater clarity in the rules on permitting interventions, there will continue to be confusion as to the effect existing interventions are having on the outcome of cases. It is submitted that the courts are unwilling to state directly when they have been influenced by the submissions of an intervener for the very reason that the legitimacy of that intervener to influence them has not been well enough established. The introduction of clear principles relating to who will be granted leave to intervene would surely serve to entrench the legitimacy of the intervention, which in turn will hopefully lead to the courts being more open about the merits of third party

interventions – something which can only be of benefit to those who see the process as their only route to justice.

In any event, it is clear from our research that third party interventions and test cases are not the sole territory of social action groups. Commercial organisations use these techniques as well.

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JUSTICE would like to thank Allen & Overy LLP for their support of this project.

Notes

1 See eg Carol Harlow and Richard Rawlings, Pressure through Law, Routledge, 1992; Tony Prosser, Test Cases and the Poor: legal techniques and the politics of social welfare, CPAG, 1982; Roger Smith, 'How Good Are Test Cases?' in Jeremy Cooper and Rajeev Dhavan, Public Interest Law, Blackwell, 1986; *Somerset v Stewart* King's Bench 1772.
2 Case C-196/04, [2006] All ER (D) 48 (Sep).
3 2004 WL 1372483.
4 ECJ: (Case C-446/03) [2006] stc 1235, Court of Appeal: [2007] EWCA Civ 117.
5 Case C-446/03, [2006] stc 1235.
6 [2007] EWCA Civ 117.
7 S58.
8 S29.
9 [2001] EWCA Civ 1117.
10 2002 WL 1310759.
11 [2003] EWCA Civ 136.
12 [2006] EWCA Civ 1134.
13 CP 8/07.
14 [2008] EWHC 875 (Comm).
15 S6(2)(b) of the regulations.
16 [2007] EWHC 3091 (Admin).
17 S297(1) CDPA.
18 [2005] EWHC 3191(Ch).
19 Pursuant to ss16(1)(d) and 20 CDPA.
20 Introduced into the CDPA 1988 on 31 October 2003, merging the broadcast right and cable transmission right.
21 See n16 above.
22 ECJ: Case C-416/99, [2001] All ER (D) 287 (Nov), High Court: [2000] EWHC 1556 (Ch).
23 Case C-416/99, [2001] All ER (D) 287 (Nov).
24 On the basis of s10(6) Trade Marks Act 1994 and the Human Rights Act 1998.
25 Article 28 EC Treaty states that 'quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States'.
26 [2000] EWHC 1556 (Ch).
27 [2005] EWHC 2296.

28 2002 WL 1039678.
29 [2003] UKHL 4.
30 [2002] 1 AC 615.
31 See *Third Party Interventions in Judicial Review: an action research study*, Public Law Project, 2001; Michael Fordham, "Public interest' intervention: a practitioner's perspective' [2007] PL 410.
32 See *R (Marper) v Secretary of State for Home Department* [2004] 1 WLR 2196, where the threat of seeking costs from Liberty as an intervener resulted in their withdrawal from the appeal.
33 *Three Rivers District Council and others v Governor and Company of the Bank of England* [2004] UKHL 48.
34 [2002] 2 FLR 45. This case considered assisted suicide.
35 (2000) 3 WLR 543.
36 *Rondel v Worsley* [1969] 1 AC 191.
37 *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529.
38 [2006] EWCA Civ 1714.
39 The contemporary practice of the Court of Appeal is to permit interventions in private litigation 'when points of statutory construction are causing great difficulty' (see *Bowman v Fels* [2005] 1 WLR 3083, para 13 (duties of disclosure of solicitors under the Proceeds of Crime Act 2002, interventions from the Bar Council, the Law Society and the National Criminal Intelligence Service)).
40 It should be noted that the applicants did not apply to intervene on the application of the principles to the particular facts of the case.
41 Art 8 provides that everyone has the right to respect for his private and family life, his home and his correspondence.
42 Art 10 provides that everyone has the right to freedom of expression.
43 If the answer to the first question is 'no', that will be the end of the matter.
44 Accordingly, the Court of Appeal held that Eady J had made no error of principle in applying such an approach to the facts and his assessment of the balance between Arts 8 and 10 would not be interfered with.
45 [2006] EWCA CA Civ 778 at para 2.
46 [2003] UKHL 40.
47 [2000] 2 All ER 897.
48 See n9 above.
49 Ibid.
50 [2007] EWHC 3091 (Admin).
51 See n27 above.
52 Joined Cases C-397 and C-410/98, [2001] Ch 620.
53 [2006] UKHL 49.
54 S320 Finance Act 2004.
55 [2006] STC 23.

The draft Immigration and Citizenship Bill

Eric Metcalfe

> ***The English don't give asylum out of respect for us the asylum seekers, they give it out of respect for themselves, because they invented the idea of personal liberty.***
>
> *Alexander Herzen, 1852, quoted in Tom Stoppard, The Coast of Utopia*

This article examines the Immigration and Citizenship Bill, which was published in draft in mid-2008 and is expected to be introduced in the next Parliamentary session. The article is based upon JUSTICE's written evidence to the House of Commons Home Affairs Committee inquiry into the draft bill.

Introduction

In the middle of October, the newly-minted Home Office minister in charge of immigration, Phil Woolas, gave a series of interviews to the BBC in which he floated, among other things, the idea of a cap on the UK population at around 70 million and balancing the number of departures with the number of arrivals. Adverting to the reported rise of the UK population of approximately two million people since 2001 and the projected further rise of another several million by 2018, the Minister remarked, 'it's been too easy to get into this country in the past and it's going to get harder'.[1] The respect for liberty and the concept of asylum that Herzen admired in the English in the mid-nineteenth century seems long ago to have given way to a constant, petty grumbling about numbers.

Migration estimates are, of course, very easy to make but notoriously difficult to make accurately. In late 2007, for example, the government was caught short when it emerged that different government departments had used identical Labour Force Survey data to give wildly differing answers on the numbers of foreign workers in the UK.[2] If it is difficult to know accurately what the population of the UK is at present, it is correspondingly much harder to make sensible predictions of what it will be several years from now – something the Office of National Statistics' own somewhat wobbly track record demonstrates. In the mere seven months between September 2007 and April 2008, for instance, the ONS estimate of the UK population in 2018 apparently climbed from 62 million to 65 million.[3] If official projections for the population ten years hence can vary by three million people across a matter of months, then it becomes that much more difficult to take them seriously as any kind of reliable basis for migration policy.

Whatever the truth behind the figures, the minister's promise of tighter controls to come is a familiar trope of the immigration debate in the UK. The same promise lay behind such legislation as the Immigration and Asylum Act 1999, the Nationality Immigration and Asylum Act 2002, the Asylum and Immigration (Treatment of Claimants etc) Act 2004, the Immigration Asylum and Nationality Act 2006, the UK Borders Act 2007 and the Criminal Justice and Immigration Act 2008, to name but a few of the measures that have been added to the statute books in recent years. And, indeed, the plethora of immigration legislation is now a problem in its own right, making the original 1971 Immigration Act hopelessly incomplete as a framework. The generally poor quality of decision-making by immigration officials would ordinarily be bad enough, but that the law itself is under near-constant amendment.

Indeed, what is different about the forthcoming Immigration and Citizenship Bill is certainly not the government's tired promise of ever-tougher immigration measures but the prospect of their long-overdue consolidation into a single Act. And the bill is certainly wide-ranging: replacing the scheme of the 1971 Act with a new system of immigration permission, replacing deportation and immigration removal with a single regime of expulsion orders, provisions on probationary citizenship and so forth. Published in draft form in the summer, the bill is not only a draft but a self-described 'partial' draft, as its explanatory notes make clear:

> *The draft for pre-legislative scrutiny is a partial Bill. There are a number of further topics for inclusion in the full Bill which are not yet drafted: the most relevant of which are powers (of arrest, entry, search, etc); data-sharing; biometrics; asylum support and access to public funds.*

Each of these topics might prove weighty in their own right but, at 12 parts and more than 240 clauses, the draft bill is already shaping up to be – for better or for worse – the most substantial piece of immigration legislation since the 1971 Immigration Act. This article looks at five areas of the draft bill: entry into the UK, detention powers, expulsion orders, appeal rights, and citizenship, considering in each case how the proposed measure fits into the government's overall vision for immigration control and, just as importantly, how it stacks up against the core idea of human rights that should be at the foundation of any decent law governing asylum, immigration and citizenship.

Entry into the UK

One of the first, key innovations of the draft bill is the replacement of the existing scheme of immigration control with a new scheme premised on British citizenship. S1(1) Immigration Act 1971 provides that all those with 'right of abode' shall be 'free to live in and come and go into' the UK 'without let or

hindrance'. This includes not only UK citizens (who automatically have right of abode) but also a broader category of 'patrials': Commonwealth citizens and other British subjects whose parents were born in the UK prior to 1983.[4]

By contrast, clause 1(1) of the draft bill provides only that a *British citizen* is free to 'enter and leave, and to stay in, the United Kingdom', ie the broader category of patrials is excluded. Instead, they will presumably be assimilated within the provisions for non-British citizens under clause 2, ie people who require 'immigration permission' to enter or stay in the UK. Like migration figures generally, the exact number of patrials is difficult to estimate but the category itself is a large one – an early estimate suggested that there were at least two to three million patrials living outside the UK at the time of the 1981 British Nationality Act,[5] and this of course fails to count the number of patrial children born to qualifying British-born parents since that date. Whatever the precise number, the fact that the first clause of the draft bill proposes to disenfranchise millions of patrials of their right of abode in the UK is hardly an auspicious start.

Indeed, it is interesting to compare the cavalier dismissal of patrials' right of abode with the recent decision of the House of Lords in the Chagos Islands case.[6] Although the majority of the Appellate Committee held that the Order in Council excluding the Chagos Islanders return was valid, both the majority and minority judgments gave extensive consideration of the constitutional significance of right of abode. Lords Bingham and Mance dissenting made reference to Chapter 29 of Magna Carta ('No freeman shall be taken, or imprisoned ... or exiled, or any otherwise destroyed … but by the lawful judgment of his peers, or by the law of the land') and Blackstone's edict that:[7]

> *A natural and regular consequence of this personal liberty is, that every Englishman may claim a right to abide in his own country so long as he pleases; and not to be driven from it unless by the sentence of the law.*

More generally, it is important to note that the right to enter and return to one's country is a fundamental right recognised in international and European law,[8] and – crucially – the idea of 'one's own country' extends *beyond* people who are citizens. As the UN Human Rights Committee makes clear, the right to enter and return:[9]

> *is not limited to nationality in a formal sense, that is, nationality acquired at birth or by conferral; it embraces, at the very least, an individual who, because of his or her special ties to or claims in relation to a given country, cannot be considered to be a mere alien.*

By contrast, the provisions for immigration permission for non-citizens under clauses 2 and 4 of the draft bill make no distinction between individuals who, on the one hand, may have substantial ties to the UK (including those with right of abode under the 1971 Act) and those whom, on the other hand, may be only temporary visitors. The only concession towards long-standing residents is the possibility of being granted permanent as opposed to temporary immigration permission.[10] But there is nothing in the draft bill that indicates that patrials will necessarily receive permanent permission[11] and even the grant of such permission is on far less favourable terms than right of abode.[12]

Detention powers

Another of the draft bill's key measures is the power under clause 25 of immigration officials to 'examine' any person for the purposes of determining their identity and immigration status, including whether they are a citizen or not.[13] Such powers are of course well-established in the context of ports and airports upon arrival,[14] but the striking thing about the power in Part II of the draft bill is its wholesale lack of geographical or temporal restriction.[15] The power applies not only to those who have just arrived in the UK[16] but also to those who have already entered.[17] More significantly still, the power to examine entails not only a power to require that person to submit to a medical examination,[18] but also a power to detain that person pending the completion of the examination, until 'all relevant matters have been determined'.[19] In other words, it empowers officials to stop any person in the UK at any time and lawfully detain them for as long as they deem necessary to determine any of the matters set out in clause 25(2). In addition, the refusal to comply with an examination or to submit to a medical examination itself constitutes a criminal offence.[20]

The apparent licence afforded to immigration officials to apparently detain at will would be disturbing enough, but the practical reality is that – absent even a requirement of reasonable suspicion – its application would not be applied on an equal basis (eg by way of random checks) but would fall disproportionately upon those whom appear to immigration officials to be least 'British', ie members of ethnic minorities. The unchecked power to examine (and, to effect examination, detain) would thus become a de facto requirement for members of the public to carry sufficient identification at all times or otherwise risk detention until such time that one's identity and immigration status can be properly determined.

A distinct and equally unappealing feature of the draft bill's powers of detention are the provisions for detention pending expulsion and the grant of immigration bail – in particular, the remarkable limitations that are imposed upon the Asylum and Immigration Tribunal's (AIT) powers to grant it. Clause 55(1) of the draft bill grants the Secretary of State the power to detain where she 'thinks' the

person is someone liable to be subject to an expulsion order. 'Thinks', it emerges, is a favoured formulation in the draft bill and introduces an utterly unnecessary degree of subjectivity into the Home Secretary's decision making.[21] There is also no requirement that the Secretary of State believes detention is *necessary* in order to effect expulsion, merely that she has reasonable grounds to believe that the individual in question is liable to be expelled from the UK. Still more surprising is the presumption in clause 55(4) in favour of detention of foreign criminals subject to expulsion 'unless, in the circumstances, the Secretary of State thinks it inappropriate'. Such a provision seems fundamentally at odds with the common law presumption of liberty and, indeed, the right to liberty under Article 5 European Convention on Human Rights (ECHR).

Equally improper are the proposals in clauses 62(2)(b) and (c) limiting the availability of immigration bail at the behest of the Secretary of State. Clause 62(2)(b) prevents the AIT from granting bail to any person detained on arrival (including a UK citizen) until they have spent at least a week in the UK. Clause 62(2)(c) prevents the AIT from granting bail to any person whose removal is imminent and who has no pending appeal, without the consent of the Secretary of State. Under Article 5(4) ECHR, the right to liberty includes the right to review of one's detention by an independent and impartial tribunal 'by which the lawfulness of his detention shall be decided speedily … and his release ordered if the detention is not lawful'. It is plain that a tribunal whose power to grant immigration bail is variously time-limited and subject to the consent of a government minister is not capable of meeting the requirements of Article 5(4) in such a case. Similarly, the power in clause 68(1) for the Secretary of State to impose additional bail conditions or vary those the AIT has already imposed seems an unwarranted and improper intrusion by the executive into the independence of the AIT in carrying out its judicial functions.

Expulsion orders

Perhaps the most significant change contained in the draft bill is the provision for expulsion orders under Part IV, which combines two distinct and long-standing legal regimes – deportation and immigration removal – into a single legal scheme. The traditional 'non-conducive' grounds for deportation under s3 of the 1971 Act, for instance, are now one of several of grounds in clause 37(4) upon which the Secretary of State has the discretion to make an expulsion order against a non-national.[22] Other grounds include being in the UK without permission (clause 37(4)(c)), breaching a condition of temporary permission (clause 37(4)(d)), and lack of transit permission (clause 37(4)(b)).

One of the key distinctions between deportation and immigration removal is that persons who are deported are unable to return to the UK while their deportation order remains in effect, whereas persons removed on immigration grounds are free to seek re-entry into the UK (at which point their previous removal can be taken into account in the decision to allow entry). This reflected the very different severity of the different measures: deportation aims not only to remove people from the UK on the basis that their continuing presence is undesirable (eg because they have been found guilty of extremely serious criminal offences) but to exclude them indefinitely. Immigration removal, by contrast, meant only that a person was liable to be removed from the UK because they were in breach of a condition of their visa - eg a student who works 21 hours a week when her student visa restricts her to 20 hours a week. The ability of those removed on an administrative basis to seek lawful re-entry reflected the fact that many breaches of immigration rules are merely technical and certainly do not warrant the severity of indefinite exclusion from the UK.

Part IV of the draft bill seeks to end this relatively tolerant approach towards technical breaches of immigration rules. Clause 37(1)(b) provides that an expulsion order remains in effect following removal, prohibiting re-entry until the order is cancelled or expires.[23] Moreover, clause 37(6) allows expulsion orders to be made for an unlimited period. In other words, Part IV imposes mandatory and potentially indefinite bans on re-entry for *all* persons removed from the UK, not simply those deported for reasons of criminality, for example. The imposition of a blanket ban of this kind is clearly intended to be a punitive measure but it is difficult to see the point of such a severe punishment: certainly those serious criminals who would be liable to be deported under the existing rules would be unaffected as they would have been excluded indefinitely in any event. The impact, instead, will be felt by those whose breaches of immigration rules have long been considered de minimis.

A second consequence of the new scheme for expulsion orders is to collapse the long-established distinction between a decision to remove on the one hand, and the setting of removal directions on the other. Currently, it is the decision to remove which is typically the main subject of legal challenge, while the removal directions may be set much later and given at much shorter notice (currently 72 hours prior to removal)[24] and subject only to the more limited grounds of judicial review.[25] By contrast, the making of an expulsion order will be effective immediately upon notice to the individual concerned,[26] and removal directions are not required to be served on them.[27] The only bar on removal is clause 48, preventing removal where the individual has an in-country right of appeal. However, clause 171(3) excludes any appeal for persons alleged to have breached a condition of their immigration permission, and family members of such persons.[28] Given that this is likely to be a common ground for expulsion, it is striking that appeal rights have been stripped away in such a fashion.

Clause 37(2)(b) removes the discretion of the Secretary of State to make an expulsion order where the individual is a 'foreign criminal' (as defined by clause 51). This essentially restates the automatic deportation provisions of the UK Borders Act 2007 and accordingly shares its flaws. As ever, the mandatory expulsion of persons for criminality without any kind of assessment of individual circumstances (including whether there is any risk of future offending) smacks of arbitrariness, undermines the importance of rehabilitation in general, and is wholly unnecessary. The arbitrary nature of the mandatory scheme for foreign criminals is compounded by the lack of an in-country right of appeal,[29] and the provisions for the deportation of family members.[30] Such provisions also seem incompatible with the provisions of Article 1(F) of the 1951 Convention relating to the Status of Refugees (the Refugee Convention), which disapplies the Convention only in cases of 'serious' crimes – a mere 12 months imprisonment in clause 51(2) seems well below this threshold.

The limitations on making expulsion orders in clause 38 by and large restate UK's obligations under the Refugee Convention, the ECHR and EU law. However, the limitations are attended by the same formulation that applies to the Secretary of State's powers to detain, ie 'the Secretary of State thinks'. As before, this introduces a wholly unnecessary degree of subjectivity into what are well-established public law principles governing ministerial decisions. It is also remarkable that there is no provision to prevent expulsion in contravention of the UK's obligations under the Council of Europe Convention on Trafficking in Human Beings (all the more striking because such an exception *is* provided in relation to mandatory expulsion orders against foreign criminals in clause 39(5)).

Appeal rights

Part 10 of the draft bill continues the progressive trend of government of most recent immigration legislation, ie further restricting the appeal rights of immigrants and asylum seekers. A key feature is – as noted above – the effect of expulsion orders on the current appeal arrangements, including the loss of notice concerning the setting of removal directions and the lack of an in-country right of appeal for those who are alleged to have breached a condition of their temporary permission or are classified as 'foreign criminals'.[31] As has been widely noted, the quality of decision-making by immigration officials at first instance is in general staggeringly poor and this accordingly strengthens the case for effective independent judicial oversight, rather than – as the draft bill envisages – weakening it further. Of particular concern is the provision in clause 170(2) that would deny a person granted refugee status in the UK an in-country right of appeal if their permission was cancelled while abroad (eg on holiday). In practical terms, such a measure may amount to constructive refoulement of a refugee contrary to Article 33(1) of the Refugee Convention. The denial of an

in-country right of appeal to family members of those designated as 'foreign criminals' also seems strikingly unfair – whatever the merits or otherwise of the arrangements for those who have committed criminal offences while in the UK, there can be no justification for denying access to justice to individuals simply by virtue of their family ties.

Moreover, clause 205(6) seeks to limit the ability to make an application for protection under the draft bill to those persons within the *territory* of the UK. Such a limitation of the extraterritorial application of the draft bill in appears incompatible with both the Refugee Convention and Article 1 of the ECHR. In respect of the Refugee Convention, it has never been held that the scope of a country's obligations are limited to its territory and, in respect of the ECHR, it is clear from decisions such as *R (B and others) v Secretary of State for Foreign and Commonwealth Affairs*[32] and *Al Skeini and others v Secretary of State for Defence*[33] that the UK's obligations under the Convention are not restricted to the territory of the UK. At the very least, the ability to make a protection application should match the UK's own jurisdiction and control, rather than its territory.

Citizenship

Part III of the draft bill is intended to implement the government's proposals first set out in its *Path to Citizenship* consultation,[34] as well as those in Lord Goldsmith's review of citizenship.[35] The government's proposal to link citizenship with the enjoyment of rights[36] has been considered elsewhere.[37] What Part III in particular seeks to achieve is the creation of a new category of 'probationary citizenship', in which those otherwise eligible for UK citizenship will now serve a certain period of time as 'probationary' citizens, which – among other things – can be hastened by means of undertaking voluntary work.

Whatever the merits of the idea of 'earned' citizenship (as opposed to the unearned way that almost all British citizenship is acquired, ie by birth, descent or marriage), Part III is remarkable in another way for, far from simplifying the current law relating to British nationality, Part III unnecessarily and unduly complicates it. Indeed, no law which contains mathematical formulas such as those in clause 34 can rightly be described as simplifying anything. Some of the factors used to determine the length of the qualifying period for probationary citizenship are themselves strikingly unfair. Consider, for example, the proposed measure in clause 34(6) that seeks to extend qualifying periods for probationary citizenship, not simply for those convicted of criminal offences but for persons 'connected' with them – in essence, punishing persons not for their own actions, but for those they are related to.

The draft bill also reflects something of the absurdities of the larger debate on citizenship. The language requirements for probationary citizens, for instance,

include 'sufficient knowledge of the English Welsh, or Scottish Gaelic language'.[38] The purpose of this provision is presumably to ensure that all UK citizens are able to communicate in at least one national language. However, it is worth noting that at least two of those languages are minority languages and, in the case of Scots Gaelic, a vanishingly small minority at that – at last count, there were approximately 58,652 Scots Gaelic speakers in the UK,[39] as compared to approximately one million people in the UK who speak Urdu.[40] If the purpose of a language requirement is to ensure that new citizens are able to communicate with at least some of their fellow citizens, then it is unclear why preference should be given to a language spoken by 0.01 per cent of its population over one spoken by at least 0.5 per cent. If, on the other hand, the government is willing to recognise the value of linguistic diversity in the UK and, indeed, tie this to its citizenship agenda, then – again – the question becomes why the government should be keen to welcome Scots Gaelic speakers as citizens and not those who speak other languages. If, however, the government's goal is for everyone to speak English, then it is difficult to see why exceptions should be made for some minority languages but not others.

Conclusion

Considered in the context of the early twenty-first century, it is easy enough to see how Herzen's admiration of the British tradition of asylum could be dismissed out of hand as quaint or naïve. Certainly the circumstances of migration in Herzen's day were much different than they are now: there was no cheap air travel, no European Union allowing free movement of persons, and the dominant demographic trend was mass emigration to other parts of the British Empire and countries like the United States rather than a steady influx of asylum seekers and other migrants. Britain itself was different too: there was certainly no formal system of asylum tribunals, for instance, and no Refugee Convention or Human Rights Act giving rise to justiciable grounds to resist removal. No doubt the government would claim that the provisions of the draft bill reflect this new reality rather than some nineteenth century dream of liberty: there was no golden age of asylum and, even if there were, there is no going back to a time when the UK could offer haven to all who seek it.

But however nostalgic or fanciful the nineteenth century view of asylum may sometimes seem, it nonetheless contains an important kernel of truth about the nature of British law and institutions, one that deserves to be defended from political pressure to reduce the numbers of immigrants and asylum seekers. Herzen accurately identified a tradition of liberty in Britain, one that was wholly unconcerned with national origin or immigration status. Whatever the prejudices of the populace at any particular time, the principle of equality before the law sought to guarantee that the courts were open to all and treated all alike, because all were subject to the law in the same way. The draft Immigration and Citizenship Bill represents a continuation of a trend to diminish and erode this fundamental principle of equality, by treating persons subject to immigration control on terms ever less favourable than those subject to other kinds of administrative decisions (such as, for example, housing or planning).

Indeed, when one considers the modern global context in which the economies of all states are increasingly interconnected and interdependent, it is the UK's Canute-like approach to restricting numbers of migrants that seems at best naïve and old-fashioned, at worst deeply confused. The rise of the Polish plumber as a focus for tabloid hysteria shows a public attitude simultaneously hostile to foreign workers yet eager to accept the economic benefits they bring. Equally schizophrenic is the popular hostility towards asylum seekers receiving benefits, while at the same time Parliament forbids asylum seekers from working to support themselves.[41] Xenophobia and hypocrisy are not positive qualities in any nation, still less in one that continues to pride itself on its 'passion for liberty'.[42] But whether it is fear or passion that is in the ascendant, it is worth remembering Herzen's view that the British tradition of asylum, and of treating immigrants fairly, does not stem from either sympathy or sentiment: it is a matter of national self-respect.

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Notes

1 BBC, 'Migrant numbers 'must be reduced'', 18 October 2008. The item also reported that '[f]igures from the Office for National Statistics show the population grew by nearly two million to almost 61m people between 2001 and 2007'.
2 See eg Statistics Commission (now UK Statistics Authority), *Foreign Workers in the UK*, December 2007.
3 Cf *Daily Mail*, 'Two million more migrants expected in UK in just a decade', 28 September 2007, citing ONS projections, and the *Daily Telegraph*, 'Record immigration sees UK population soar', 19 April 2008.
4 Cf INF12, UK Border Agency, updated 16 July 2008.
5 Charles Blake, 'Citizenship Law and the State: The British Nationality Act 1981', (1982) *Modern Law Review*.
6 *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2008] UKHL 61.
7 *Commentaries*, Bk 1, p136 cited, ibid, at para 151 per Lord Mance (whose reasoning Lord Bingham expressly endorsed and adopted). Lord Hoffman gave the view of the majority when he wrote at para 45: '*the right of abode is a creature of the law. The law gives it and the law may take it away. In this context I do not think that it assists the argument to call it a constitutional right … I quite accept that the right of abode, the right not to be expelled from one's country or even one's home, is an important right … The importance of the right to the individual is also something which must be taken into account by the Crown in exercising its legislative powers - a point to which I shall in due course return. But there seems to me no basis for saying that the right of abode is in its nature so fundamental that the legislative powers of the Crown simply cannot touch it*'.
8 See eg Art 12(2) of the International Covenant on Civil and Political Rights and Art 2(2) of Protocol 4 of the European Convention on Human Rights: 'Everyone shall be free to leave any country, including his own'. See also Art 45(1) of the EU Charter of Fundamental Rights: 'Every citizen of the Union has the right to move and reside freely within the territory of the Member States'.

9 Ibid, para 20.
10 Cl 4(4).
11 The explanatory notes states only that 'those with right of abode who are not British citizens will now require permission to enter and stay in the UK. The intention is to confer that permission by order under clause 8' (para 47) and 'a grant of permanent permission by order *could* make provision for Commonwealth citizens with right of abode [emphasis added]' (para 57).
12 Although permanent permission is not only indefinite and unconditional (cl 4(5)(b)), it may nonetheless be cancelled: either at the discretion of the Home Secretary (cl 14), where the individual is made subject to an expulsion order, or automatically where the person has been out of the UK for more than 2 years (cl 13).
13 Cl 25(2)(a).
14 See eg the general authorising power under s4(2)(b) of the 1971 Act allowing 'the examination of persons arriving in or leaving the United Kingdom by ship or aircraft'.
15 By contrast, the power to examine persons *leaving* the UK under cl 26 is only exercisable at a port, international railway station or 'other place' which the Secretary of State believes is being used as an embarkation point from the UK (cl 26(1)(b)).
16 Cl 25(1)(a).
17 Cl 25(1)(b).
18 Cls 25(3) and 27(1)(b).
19 Cl 53(1)(b).
20 Cls 101 and 102 respectively.
21 See eg the same formulation in cl 38(1) relating to expulsion orders.
22 Cf cl 37(4)(h): 'the Secretary of State thinks that the person's expulsion from the UK would be conducive to the public good'.
23 Cl 37(7).
24 See Border and Immigration Agency, *Operational Enforcement Manual*, chapter 44.
25 Cf Part 54 of the Civil Procedure Rules, para 18, dealing with judicial review of removal directions.
26 Cls 37(8) and 44.
27 Cl 44.
28 There is also no in-country right of appeal for exclusion orders against those designated as 'foreign criminals' – see section titled 'Appeal rights heading'.
29 Cl 171(3)(b).
30 See eg cl 51.
31 See the discussion at n28 above and corresponding text.
32 [2004] EWCA Civ 1344 at para 79: ' the Human Rights Act 1998 requires public authorities of the United Kingdom to secure those Convention rights defined in section 1 of the Act within the jurisdiction of the United Kingdom as that jurisdiction has been identified by the Strasbourg Court'.
33 [2007] UKHL 26 per Lord Brown: 'Parliament intended the [Human Rights] Act to have the same extra-territorial effect as the Convention'.
34 Border and Immigration Agency, *Path to Citizenship: Next Steps in reforming the immigration system*, February 2008.
35 *Citizenship: Our Common Bond*, October 2007.
36 See eg para 185: 'The Government believes that a clearer definition of citizenship would give people a better sense of their British identity in a globalised world. British citizenship – *and the rights and responsibilities that accompany it* – needs to be valued and meaningful, not only for recent arrivals looking to become British but also for young British people themselves [emphasis added]'.
37 See eg Eric Metcalfe, 'Human rights v the rights of British citizens', Vol 5 No 1 *JUSTICE Journal* (2008).
38 Cls 32 and 33.
39 *UK Census 2001*, National Statistics Office.
40 *A Guide to Urdu*, BBC Languages.
41 S8 Asylum and Immigration Act 1996.
42 Gordon Brown, 'On Liberty', University of Westminster, 25 October 2007, http://www.number10.gov.uk/output/Page13630.asp.

Homicide reform: too little, too soon?

Sally Ireland

*In its recent consultation paper **Murder, manslaughter and infanticide: proposals for the reform of the law**, the government has set out plans for the reform of partial defences, complicity and infanticide which it proposes to include in the forthcoming Law Reform, Victims and Witnesses Bill. These proposals are in the main adapted from those of the Law Commission in its 2006 report **Murder, Manslaughter and Infanticide**. However, the government has failed to take into account the context in which the Law Commission proposed them, which included structural reform of the substantive homicide offences, and general reform of complicity. Some of the adaptations made by the government are also inapposite. In this article the author argues for wholesale reform of the law – or failing that, maintenance of the status quo in most areas until more widespread changes can be made.*

Why legislate now?

The Law Commission have been working on the law of homicide for a number of years; in 2004 their report *Partial Defences to Murder* encouraged a more general review of homicide which was announced by the government later that year. Following research and an extensive consultation exercise, in their 2006 report *Murder, Manslaughter and Infanticide* the Law Commission recommended a fairly comprehensive homicide law reform scheme (within the terms of their remit, which excluded the mandatory life sentence and the sentencing principles of Schedule 21 to the Criminal Justice Act 2003). Inter alia, they proposed a three-tier structure to replace the current murder/manslaughter distinction, which would mitigate the worst effects of the serious harm rule and allow discretionary sentencing in the less serious cases where serious harm is intended.

The government, in its 2008 consultation paper *Murder, Manslaughter and Infanticide: proposals for reform of the law*, has declined to take up this structural reform, but has instead taken sections from the 2006 Law Commission report on provocation, diminished responsibility and complicity, made some alterations and now plans to include them in the forthcoming Law Reform, Victims and Witnesses Bill. It seems, however, that the government has not taken account of the different impact that the partial defences proposals will have if implemented in the absence of the structural reforms proposed by the Law Commission.

Whether or not we can expect structural homicide law reform at a later date, it is curious that the government have chosen to legislate now in relation to

the limited areas mentioned. In relation to provocation, it is clear that at least one cabinet minister believes that immediate action is needed because of the perceived availability of the partial defence to men who kill unfaithful wives or partners in anger, and its unavailability to women who kill husbands or partners following domestic violence/abuse. The minister for women and equalities, Harriet Harman, has recently said that '[t]his defence is our own version of honour killings and we are going to outlaw it … I am determined that women should understand that we won't brook any excuses for domestic violence.'[1] The article continues:[2]

> *'It is a terrible thing to lose a sister or a daughter, but to then have her killer blame her and say he is the victim of her infidelity is totally unacceptable,' said Harman. 'The relatives say "he got away with murder" and they're right.'*

However, there does not seem to be a similar political imperative, at ministerial level, in favour of reforming diminished responsibility, complicity or infanticide in the ways the government proposes. Further, in the absence of the structural reforms to homicide law proposed by the Law Commission, the proposed changes to the partial defences make little sense. The proposed reform of complicity – confined only to homicide – risks creating ridiculously lengthy tests and jury directions in relation to different offences on the same indictment or alternative verdicts. As Professor John Spencer has said, '[t]he resulting structure, unfortunately, looks rather like a wheel without a hub.'[3]

This article will examine the government's proposals, in particular those relating to provocation and diminished responsibility. Much is missing from the proposals for the Bill – including badly needed reform of the law of duress in relation to murder, and the issue of consensual mercy killing where all that may stand between a loving relative and a murder conviction is the good sense of the prosecutor or jury. But failing to reform the structure of homicide offences itself is also a missed opportunity: apart from the mandatory life sentence, it is arguably the serious harm rule that currently creates the most injustice in the law of homicide. As the Law Commission found in research involving discussion groups of members of the public in 2005:[4]

> *…hitting someone on the arm with a wooden club with the intent to cause serious harm but not to inflict any life-threatening injury was seen as less serious. If the victim in these latter cases subsequently died, perhaps in the course of treatment for a broken arm, participants frequently suggested that this should not be viewed as murder because death was "accidental", since the offender's act carried no apparent risk of death.*

Provocation – words and conduct

Both the Law Commission in its 2006 report and the government in its consultation paper propose a dual partial defence to replace that of provocation, the two limbs of which may be pleaded separately or in combination. The first limb relates to killing in response to fear of serious violence; the second, essentially, to highly provocatory words or conduct. In the government's formulation the requirement of a loss of self-control, which had been removed by the Law Commission, is reinserted, although it need not be 'sudden'. It must be the case that a person of the defendant's sex and age, with a normal degree of tolerance and self-restraint and in the circumstances of the defendant, might have reacted in the same or a similar way to the defendant. The government's definition provides expressly that an act of sexual infidelity cannot amount in itself to conduct satisfying the second limb.

The debate regarding the government's reforms to provocation demonstrates the perils of regarding the partial defence as justificatory, rather than excusatory, in origin: that is, in relating it to the conduct of the victim rather than the emotional state of the offender. In its response to *Partial Defences to Murder*, JUSTICE warned of the risks of the justificatory approach:

> *We prefer the excusatory to the justificatory basis, as the latter focuses on the wrongful conduct of the victim in provoking or causing the emotional distress, and may be considered to blame the victim for their fate.*

The effect of this upon victims' families, as well as upon social attitudes to homicide, can be very damaging.

Harriet Harman's comments, above, make clear that she sees the potential categorisation of infidelity as provocation as an attempt to excuse domestic violence, and as 'blaming the victim'. However, the government's own approach to the second limb of the defence makes clear that they consider placing some measure of blame upon the victim legitimate, provided that it occurs when the jury thinks that this is justifiable. It is available when the provocatory words/conduct 'amount to an exceptional happening' and cause the defendant to have 'a justifiable sense of being seriously wronged'. A value judgment by the jury is therefore called for and their discretion is only fettered in the specific circumstances of sexual infidelity. It is usually bad practice to specify one circumstance that cannot fall within legislation in this way. As the Bar Council and Criminal Bar Association (CBA) point out in their joint response to the government's consultation, what will be the effect where infidelity is one amongst several elements of conduct claimed to be provocative?[5] Further, Ms Harman refers to this defence as 'our own version of honour killings'. However,

'honour' killings can occur as a result of conduct other than actual, or suspected, infidelity for example, marriage to a spouse without family approval. These circumstances have not been specifically excluded and so implicitly may come within the partial defence, provided that the other ingredients are made out. Although most jurors would not find that killing in response to such conduct would pass the reasonable person test or give rise to a 'justifiable sense of being seriously wronged', it would only take the presence of three jurors sharing the values of an 'honour' killer to result in a hung jury in these circumstances. This is possible but unlikely; perhaps more important is the symbolic value of the specific exclusion: a signal is given regarding infidelity but not regarding other conduct. Indeed, many people reading the legislation or reading/hearing media coverage about it would be likely to apply their own perception of what is 'justifiable' to their understanding of the law.

The specific exclusion of infidelity suggests that, while in most circumstances the government trusts a jury to reach the 'right' interpretation of what might give rise to a 'justifiable sense of being seriously wronged', in this case such confidence is absent. There are echoes here of the fears voiced in the Home Office's 2006 consultation *Convicting Rapists and Protecting Victims – Justice for Victims of Rape*, which discussed the prevalence of 'rape myths' and suggested that general expert evidence should be given to counteract them. However, the 'rape myths' mentioned generally concerned the victim's credibility – behaviour after sexual assault, reasons for failing to report an offence, etc. This is quite a different issue from that raised by the government's proposal specifically to exclude sexual infidelity from the law of provocation. The legislation is deliberately leading on social standards that the government suspects a jury would not otherwise follow. Opinion is divided even amongst the establishment: our newest Law Lord and former Lord Chief Justice Lord Phillips recently said in a speech that 'I must confess to being uneasy about a law which so diminishes the significance of sexual infidelity as expressly to exclude it from even the possibility of amounting to provocation. Nor have ministerial statements persuaded me that it is necessary for the law to go that far.'[6]

This debate reinforces the view of provocation expressed by Quick and Wells:[7]

> *Provocation's concession to human frailty sits uncomfortably in a criminal law which is premised on the denial of explanations based on individual circumstances. Provocation therefore never knows quite where to place itself in the turmoil of competing realities and tensions, and tends to function as a distorting echo of contemporary fears and concerns.*
>
> *…*
>
> *Is not the fact that juries do allow provocation in seemingly undeserving cases confirmation that it is not in the rules and doctrine that law's edges are defined (after all provocation in many appeal cases is given a restrictive interpretation) but in cultural attitudes and perceptions.*

There are of course many positive examples of social reform where legislation has preceded and encouraged a change in public opinion, notably in the field of equality. However, there are inherent risks and problems in the justificatory approach adopted by the government. First is the problem that where the 'words and conduct' defence succeeds the jury will have found that the defendant's sense of being seriously wronged was 'justifiable' and that a person with normal degree of tolerance and self-restraint might have acted in the same or a similar way. As Mackay and Mitchell have said, this 'is likely to focus attention on the behaviour of the victim'.[8] Because of the government's failure to legislate on the structure of homicide, the defence also continues to reduce murder to manslaughter (rather than second degree murder or a similar formulation), which in the context of a justificatory approach increases the perception that a more venial offence has been committed because of the victim's words or conduct. While sentencing may remain heavy, the partial defence may give rise to a public perception that the victim received his just deserts; that the defendant's conduct was not wholly unreasonable, even in intent to kill cases. The suggestion is therefore that the victim's life has been reduced in worth by his or her own words/conduct. Media coverage that the proposals received when launched encouraged this view; the *Daily Mail* described them as 'radical feminist plans to let victims of domestic abuse get away with murder'.[9]

In our response to *Partial Defences to Murder*, JUSTICE was attracted by a type of 'extreme emotional disturbance' partial defence in which the question for the jury would be:[10]

> *Does that fact that the defendant was acting in circumstances of an extreme emotional disturbance mean he should be excused for having so far lost self-control as to have formed an intent to kill or cause grievous bodily harm as to warrant the reduction of murder to manslaughter?*

This basis for the defence would be preferable in some circumstances since it focuses upon the defendant's state of mind rather than the victim's conduct. It would also bring cases such as *Doughty*[11] within the partial defence – where the victim's conduct has led to extreme emotional disturbance but could not be described as giving rise to a justifiable sense of being seriously wronged. Such cases are likely, as Professor Spencer has noted, to fall through the gap between the new provocation and diminished responsibility defences.[12] However, the 'extreme emotional disturbance' defence above creates gaps of its own, since

it focuses on the 'loss of self-control' criterion which has been criticised for favouring male defendants who kill in anger.

Much of the difficulty in this area arises from the application of the serious harm rule and the mandatory life sentence for murder. The *Doughty* case would not have presented a problem in the Law Commission's 2005 consultation paper formulation as the defence would only have been applicable in intent to kill cases – an intention to kill being unjustifiable in these circumstances. The government's approach demonstrates the pitfalls of adopting the Law Commission's proposals on partial defences without considering that they were devised for a different scheme of offences.

There is another aspect of the government's proposed 'words and conduct' defence which is troubling – the requirement of an 'exceptional happening'. Apart from being a phrase that nowhere forms part of normal speech, this criterion is so vague as to be virtually meaningless. Surely words or conduct that might provoke a 'normal' person in the circumstances to act with the intention to cause death or serious harm are likely to be exceptional per se? Further – as the Bar Council and CBA say in their joint response to the consultation[13] – by reference to whom are the words and conduct to be exceptional? The jury? The defendant? Certain conduct, such as domestic violence and sexual abuse, is unfortunately all too common in our society. Will this fall within the definition? The criterion of an 'exceptional happening' should be abandoned as confusing and redundant.

Provocation – fear of serious violence

The defence of killing in response to a fear of serious violence, in the Law Commission's formulation, was more a partial defence of excessive self-defence than of provocation. The government has complicated the picture by reinserting the requirement of a loss of self-control. A 'fear of serious violence' partial defence would be apposite in two sets of circumstances: killings in self-defence/defence of another where the degree of force used was excessive; and killings by victims of domestic abuse where the fear is of violence that is serious but not immediate – for example, while the abuser sleeps.

These two circumstances are very different and it is important to consider whether they can both appropriately be dealt with by a single partial defence. To turn first to the 'excessive self-defence' scenario: this could apply both to law enforcement professionals and ordinary citizens. It should only apply where the defendant genuinely believed that his actions were necessary to prevent death or really serious injury to himself or others. It should be recalled that the law of self-defence is fairly generous, recognising that in the heat of the moment a person being attacked should not be expected to 'weigh to a nicety' the appropriate degree of force to use in self-defence.[14] However, where a person acts in good faith to prevent death or serious injury it is wrong to label him as a murderer even if the jury considers the degree of force he believed to be appropriate to be unreasonable.

The violence that is feared in these situations should, axiomatically, be immediate or imminent, since otherwise it would not be necessary to apply lethal force or force occasioning serious harm resulting in death to neutralise the threat. Some cases of this type – in particular those involving armed police and other law enforcement professionals – will under the government's proposals be outside the ambit of the partial defence because the 'loss of self-control' requirement has been reinstated. It is in the nature of their training that law enforcement professionals are not expected to lose their self-control in responding to a dangerous situation. While the defence should not be available to those who abuse their power or act in bad faith, those who genuinely (but unreasonably) believe their actions are necessary to prevent serious injury or death should not face a murder conviction and mandatory life sentence. The current lack of a partial defence of this type may be one reason why prosecutions of law enforcement professionals in these circumstances are so difficult to achieve.

Some commentators believe that the requirement of a 'loss of self-control', even though it need not be sudden, will disqualify battered women who kill from the partial defence:[15]

> *At present, the woman who assassinates her abusive partner while he is asleep falls outside the defence of provocation (at any rate, in theory) because she kills him in "cold blood". And in future she would fall outside the new defence too, because she would not have "lost her self-control".*

Cases where the woman is suffering from a recognised medical condition at the time of the killing (which could include for example post-traumatic stress disorders, severe depression, etc) may be able to make out the new diminished responsibility defence. However, if a woman cannot prove diminished responsibility, the loss of self-control criterion may prove a stumbling block. Of course, not all killings of abusive partners should fall within the 'fear of serious violence' or any other partial defence: the difficulty of the existence of a partial defence rather than mitigating features for sentencing in these circumstances is that a dividing line must be found. There may be cases where the defendant cannot prove diminished responsibility but, nonetheless, the psychological effects of fear and abuse are such that she genuinely considers her actions are necessary to prevent further serious violence to herself or others (for example, children of the family). It is to be hoped that in these circumstances juries will be slow to find that there was no loss of self-control. However, were the

requirement to be removed – therefore allowing law enforcement professionals to make out the 'fear of serious violence' part of the defence – it is likely that the requirement that a person of 'D's sex and age, with a normal degree of tolerance and self-restraint and in the circumstances of D, might have reacted in the same or in a similar way to D' would prevent unmeritorious 'battered women' cases from succeeding.

The self-control requirement in relation to the fear of serious violence part of the defence may therefore be unnecessary and unhelpful. If the 'words and conduct' part of the defence is retained in a justificatory form, then arguably the 'loss of self-control' criterion (or some other reference to mental/emotional state) is required for that part of the defence since otherwise it could be perceived as a partial legitimation of the killing of those whose words or conduct are particularly worthy of condemnation.

Diminished responsibility

The government's stated intention in this area is to codify, while modernising, the existing law of diminished responsibility. However, on examining the government's draft clauses it is apparent that they risk narrowing the defence in important respects. The requirement of a 'recognised medical condition' is in some respects to be welcomed, since it will hopefully bring the legal and medical tests closer together, which is important when expert medical evidence will be received. The more specific requirements of the new defence, however, may make it harder to use in 'sympathetic' cases such as consensual mercy killing by a family member, particularly in relation to the acceptance of pleas. While, as JUSTICE said in our response to *A New Homicide Act to England and Wales?*,[16] the 'avoidance of fictions and fudges' is important to the rule of law and legal certainty, being able to do justice in individual cases in the context of such a serious offence and the mandatory life sentence is of course also extremely important.

The most significant narrowing of the defence may be the introduction of the requirement that the relevant mental impairment 'causes, or is a significant contributory factor in causing', the defendant's conduct. It remains to be seen how easily this requirement will be fulfilled in practice, but the problem remains that in many cases it may be merely a matter of speculation whether the mental impairment was a significant contributory factor. As Mackay and Mitchell have said:[17]

> *one of the advantages of the second limb may be that because it is so vague it gives psychiatrists a degree of flexibility that may well be lost in this new formulation. Rather, psychiatrists will now have to testify as to the causative role of the accused's abnormality at the time of the killing. Unless it can be shown that this role was "significant" D will fail in his plea even if all the psychiatric evidence is to the effect that there was a relevant substantial impairment arising from an underlying condition.*

The other objection that JUSTICE has made to the government's formulation is that it omits the Law Commission's consideration of 'developmental immaturity' from the defence. As Lord Phillips has recently said:[18]

> *It is surely offensive to justice that a child whose brain has not yet developed to the extent necessary to provide the self-control that is found in an adult should be unable to pray this fact in aid, at least as a partial defence.*

While it is hoped that adults (and children) with a medically recognised learning disability or autistic spectrum disorder will be able to make out the defence if such a condition substantially impairs their ability to, for example, understand the nature of their conduct, a child of 10 whose age alone puts them at a similar disadvantage in comparison to an adult will not be eligible to plead diminished responsibility on those grounds.

The narrowing of diminished responsibility is particularly significant in the context of the narrowing of the provocation defence, since more cases will fall through the 'gap' between the two specific defences. The gap is vulnerable to the criticism that:[19]

> *The proposition that people can be divided into the normal and the abnormal has obvious attractions, but whether such a distinction is sound is open to question.*

Both psychological and provocatory factors may be important in the same case: for example, when a person who has suffered child sexual abuse reacts violently to a sexual assault as an adult.

Conclusion: too little, too soon?

The government's proposed reforms to homicide do not go nearly far enough to remedy the injustices caused by the current law, and are likely to create further injustices of their own, in addition to a flurry of appeals until authoritative judicial interpretations of the provisions are given. The proposals on complicity fail to take up the Law Commission's *Participating in Crime*[20] proposals in relation to offences generally and so would result in one regime for complicity in homicide; another for inchoate offences;[21] and a third for other offences – all of which may arise in the same case. Lord Phillips was recently described as saying that:[22]

> *the proposals for the law on complicity, if murder occurred when a group of people were involved, were very complex and would be a nightmare for a judge to sum up. The proposals might be fair but that was achieved at the expense of the requirement that the law should be simple for everyone to understand and the jury to apply, he said. If the law were to be changed, it should be done in a way that made the jury's task simpler.*

Much that the government has proposed is, therefore, dysfunctional in the absence of structural reform of homicide and general reform of complicity. Professor Sullivan has said that:[23]

> *[i]f a Homicide Bill is introduced to Parliament before any general reform of complicity is in place, it should not contain any clauses relating to secondary liability in first degree murder or an offence of unlawful killing… the proposals contained in [Law Commission consultation paper] No. 177 are likely to prove controversial and should be subjected to the kind of scrutiny and debate only possible within a general review of complicity.*

The Law Commission reported on both aspects some time ago[24] after consultation, and it is unclear why the government cannot proceed with much needed general reform. If this is not to be done, although the aim of producing better justice for abused women who kill in circumstances where they should not receive a life sentence is laudable, it is by no means clear that this will be achieved. Further, the government's proposals omit other areas where injustice currently occurs and are likely in some cases – often where they have altered the Law Commission's formulations – to result in injustice or confusion in themselves. The problem is perhaps not that they are too little, too soon but that although timely they are incomplete and, in parts, unfit for purpose.

Sally Ireland is Senior Legal Officer (Criminal Justice) at JUSTICE.

Notes

1 G Hinsliff, 'Harman and Law Lord clash over wife killers', *The Observer*, 9 November 2008.
2 Ibid.
3 JR Spencer, 'Messing up Murder', *Archbold News*, September 2008.
4 Law Commission, *A New Homicide Act for England and Wales*, CP 177, p261, Appendix A.
5 *The Home Office and Ministry of Justice – Murder Manslaughter and Infanticide: proposals for reform of the law; A Joint Response on behalf of the Law Reform Committee and the Criminal Bar Association of the General Council of the Bar* (available from www.criminalbar.com).
6 *The Independent*, 'Judge backs infidelity defence for killers', 7 November 2008.
7 O Quick and C Wells, 'Getting Tough with Defences', Crim LR [2006] 514-525 at pp523 and 525.
8 R Mackay and B Mitchell, 'But is this Provocation? Some thoughts on the Law Commission's Report on Partial Defences to Murder', Crim LR [2005] 44-55, p55.
9 E Pizzey, 'Erin Pizzey, champion of women's rights, says radical feminist plans to let victims of domestic abuse get away with murder are an affront to morality, www.dailymail.co.uk, 29 July 2008.
10 JUSTICE, *Response to Law Commission consultation paper 173 on partial defences to murder*, February 2004.
11 (1986) 83 Crim App R 319. *Doughty* concerned the crying of a baby.
12 Cf JR Spencer, n3 above.
13 Cf n5 above.
14 Lord Morris of Borth-y-Gest in *Palmer v The Queen* [1971] AC 814 at p832.
15 JR Spencer, n3 above.
16 JUSTICE, *Response to Law Commission Consultation No. 177 A New Homicide Act for England and Wales?*, May 2006.
17 R Mackay and B Mitchell, n8 above, pp53-54.
18 F Gibb, 'Law lord criticises plan to scrap defence of provocation for men who kill wives', *The Times*, 7 November 2008.
19 R Mackay and B Mitchell, n8 above, p52.
20 Law Com No 305.
21 Cf Serious Crime Act 2007, Part 2.
22 Cf F Gibb, n18 above.
23 GR Sullivan, 'Complicity for First Degree Murder and Complicity in an Unlawful Kiling', Crim LR [2006] 502-513, p503.
24 2006 and 2007, respectively.

Book reviews

Making Rights Real: The Human Rights Act in its First Decade

Ian Leigh and Roger Masterman
Hart Publishing, 2008
335pp £40.00

Pre-empting what will undoubtedly be a wave of publications considering the impact of the Human Rights Act 1998 (HRA) around its tenth anniversary, Making Rights Real chooses to mark the anniversary of the Act passing through Parliament.

Leigh and Masterman consider that ten years on, and in the face of possible reform in the shape of a new bill of rights, it is an appropriate time to reflect on the contribution of the HRA to the promotion and protection of human rights in the UK. The publication concentrates on the relationship between the legislature, judiciary and executive, and considers the impact upon the traditional doctrines of Parliamentary sovereignty and separation of powers.

The authors state their purpose as not to focus on areas of substantive law, but to critically assess whether the HRA provides an accessible and effective domestic remedy for violations of the European Convention on Human Rights (ECHR). Running throughout is the theme of the HRA model as a collaborative exercise between the arms of government. The authors frequently return to this and are critical of whether the three branches achieve a shared responsibility for the promotion and protection of human rights in the UK as was proposed. Another pertinent question that resonates in the publication is whether the HRA has delivered on its promise to bring about a new 'rights culture' in the UK.

Making Rights Real sets out to measure the impact of the HRA first by examining the architecture of the legislation and how the judiciary, parliament and the executive have adapted to the new roles set out for them. Part two considers the impact of the HRA in different legal spheres, addressing its application in the contexts of judicial review, the criminal trial, anti-terrorism measures, applicability and remedies.

Chapter one describes the main features of the HRA and examines the causes that shaped the legislation. It opens with a description of the political climate into which the HRA was born and which it continues to operate in.

The book proceeds to describe the procedures established to ensure that laws are compatible with the ECHR. Addressing the legal process chronologically, chapter two considers the impact upon Parliament. The chapter includes an interesting discussion of House of Lords reform which the authors consider a missed opportunity and a reason why scrutiny of human rights laws in Parliament will always be relatively weak by international standards. There follows a description of the main mechanism available under the HRA for ensuring human rights compliance in the parliamentary process; compatibility statements under s19. The authors are wary of the potential for compatibility statements to act as a defence for pre-determined policy and so propose reform of s19 in an attempt to enhance the independence of the statements.

Progressing to consider how the HRA has influenced the activities of the domestic courts, the focus of chapter three is on the duty under s2(1) to take into account the decisions of the European Court of Human Rights. The authors consider the strength of the obligation and refer to the principle of 'no less, but no more' outlined in the case of *Ullah*,[1] which leaves s2 quite narrow. However, the concluding paragraphs argue that there are signs of a more progressive rights jurisprudence that uses s2 not just to keep up with Strasbourg but which sees British courts making their own contribution.[2]

Chapter four examines the interpretative duty imposed on the courts by the HRA and the novel compromise provided by ss3 and 4. It is suggested that while the relevant provisions undoubtedly fall short of a power to invalidate legislation, it is clear that the HRA has brought about a significant redistribution of government power. The chapter examines the limits of the interpretative powers under s3 concluding that while the scope for judicial discretion is potentially large, it is limited by the wording of the section to an interpretation that is 'possible' and also by the traditional deferential approach of the courts.

The theme of collaboration is revisited in chapter five which questions whether the HRA creates a cooperative exercise by considering the response of the legislature and executive to declarations of incompatibility made by the courts under s4. It is suggested that the success of the HRA as a co-operative measure is undermined by the tensions that now exist due to the redefined roles. The authors note the limitations of s4 in remedial terms but they demonstrate that in practice the government has not to date ignored any of the declarations issued.

The second part of the book measures the effectiveness of the HRA as interpreted and applied by the courts. Prior to the HRA coming into force, there was debate as to whether it would cause a shift in the standard of review and an abandonment of judicial deference to the executive. The authors argue that one impact of the HRA has been to accelerate a pre-existing tendency to treat review as context specific.

In assessing the impact of the HRA on the criminal trial, chapter seven suggests that by comparison with countries with a constitutional right of fair trial, the impact of Article 6 ECHR has been minimal. It is contended that the HRA has had little impact in the criminal justice sphere, although one might have expected the opposite, and the authors note that only a handful of successful HRA arguments have prevailed in criminal cases.

Chapter eight focuses on terrorism. It notes that the biggest challenge the HRA has faced was the terrorist attacks of 9/11 and tracks the legislative changes made in response to those events. While it is contended that the HRA has made little difference to the government's approach to anti-terrorism measures, with regard to the domestic courts the chapter refers to the celebrated *Belmarsh*[3] decision and claims that the sceptical attitude of the judiciary there was attributable to the HRA.

Chapters nine and ten consider applicability and remedies. Submitting that it is clear that the HRA will not be given direct horizontal application, the authors note that the question of the applicability of the HRA to private persons is necessarily connected with debates about the nature of the rights in the ECHR. Chapter nine suggests that while the HRA has brought about subtle changes in the nature of civil law remedies available against the state, the movement towards a 'culture of rights' has not accordingly contributed to a 'culture of compensation'.

In the final chapter of the publication the authors strive to provide a balanced conclusion. While measuring the successes of the HRA by the improvement of the UK's record as a respondent before the Strasbourg court and its effectiveness in granting access to individuals whose human rights have been violated, the authors are careful to note its shortcomings. Thus it is suggested that the HRA has tended to nudge common law trends already underway, rather than producing a bold change of direction. Despite the fact that human rights have become part of the public discourse in the field of anti-terrorism at least, the authors regard its inability to bring about the promised 'rights culture' a particular failing of the HRA. This is attributed to the damaging misconceptions allowed to circulate with no independent body to promote human rights values until the Equality and Human Rights Commission was established.

The concluding paragraphs consider the proposals of both political parties to bring in a British bill of rights. While the authors would certainly support a move that attempts to rekindle a generation of popular support for human rights, they advise that attempts to include 'responsibilities' in such a bill should be treated with scepticism.

This comprehensive publication combines elements of political commentary with an in-depth explanation of the mechanics of the HRA, a valuable consideration of recent case law and a topical analysis of its impact in different contexts. The end result is the balanced assessment the preface promises, if somewhat to the detriment of the real criticism that is sometimes hidden among the attempts to balance. The authors are concerned that the preoccupation with separation of powers distorts the HRA and its success, which is intriguing since they themselves frequently engage with these arguably important constitutional questions. Making Rights Real should appeal to a range of audiences as it contains an accessible outline of the HRA and discusses the most important cases that have arisen in the subsequent jurisprudence, both of which will be illustrative for new students of human rights law in the UK, and yet it simultaneously manages to develop more scholarly ideas of constitutional reform that will be of interest in a more academic forum.

Hayley Smith, human rights intern, summer 2008, JUSTICE

Civilizing Security

Ian Loader and Neil Walker
Cambridge University Press, 2007
pp264 £48.00

What does it mean for individuals to be secure? What is the relationship between security and the state? In an age of preoccupation with the notion of 'security', fuelled by concern about the 'war on terror' and crime and disorder, these are timely questions.

This book by Ian Loader and Neil Walker attempts to answer them. The authors argue that security is a valuable 'public good'[4] and that the state has an indispensable role in providing and sustaining it. This argument is made in two stages.

The first part of the book is devoted to a critical survey of various forms of state scepticism. Four sceptical views of the state are discussed, all of which the authors claim to identify in contemporary political vernacular. These variously depict the state as 'meddler', 'partisan', 'cultural monolith' and 'idiot.'

The 'meddler' perspective regards the state as prone to interfere in individual rights and interests. The 'partisan' state, a conception originating in socialist and anarchist politics, strengthens the interests of the powerful and is perceived as a force to be struggled against. The 'cultural monolith' state, via the police in particular, reinforces a particular cultural order in ways that are inimical to minority interests and practices. Finally, the 'idiot' state, owing to its 'bureaucratic remoteness', is incapable of acquiring the knowledge to provide effective security.

The authors do not deny that each of these caricatures contains insight. Their point, however, is that they all run the risk of dismissing the real potential of the state to promote security. The most interesting theme here is what the authors regard as an unfortunate antagonism common to many theories of the state's role in security. This antagonism tends to regard security and liberty as necessarily at odds with one another, so that the 'security lobby' sees security as justifying the curtailment of liberty, whilst the 'liberty lobby' fears that democracy fuels demands for greater security at the expense of civil liberties. The two halves of 'liberal democracy' are left pulling against one another.

The second part of the book puts forward a positive case that seeks to move beyond the constraints of this dichotomy. Here the authors set out in detail their utopian goal of 'civilising' security, and explain how the democratic state can and should be central to this project.

The key to Loader and Walker's central argument, which lapses into academic jargon rather too often, is that security is a 'thick' public good. Translating this into non-academic language, this means three things. First, if security provides for one, it provides for all. To protect one member of a community from a terrorist attack is also to protect all other members; to apprehend a serial killer as he stalks his prey is to protect all potential future victims. Second, security has an inherently social dimension. Roughly, that means that the above logic works the other way round. If security provides for all in the social environment, it also enhances the security of the individual. Thirdly, security helps to constitute an idea of

'common publicness', that sense of community which is essential to the good society. More specifically, security is a state of well-being in which the community can live together confidently in the face of risk.

The authors claim these elements of security require it to be publicly provided, and this is where the state comes in. There is a slight sense here that the authors are knocking down a straw man; despite the various anti-statist perspectives explored in the first half of the book, it is rare to hear anybody – outside the American libertarian fringe, perhaps – suggest that anyone but the state is best placed to guarantee security. The further, more interesting, argument is that the state is in a unique position to produce 'civilised' security, so long as its virtues are promoted and its vices minimised. This ambitious task can be achieved by what, with another seminar-room phrase, the authors label 'anchored pluralism.' What this means is that the state has a pluralist and open-minded approach to community concerns when providing security, and checks are in place to prevent undue meddling, bias, uninformed decision making and cultural imperialism. 'The four Rs' of civilising security – 'resources', 'recognition', 'rights' and 'reasons' - are what make all the difference.

'Resources' are crucial because the state is uniquely able to mobilise and distribute the funding necessary for security to be provided. 'Recognition' means a process of inclusive deliberation and 'public conversation' whereby disadvantaged communities, whose voices are often unheard, see their claims reflected in state decision making. In this way the community feels a sense of ownership of this process. 'Reasons' – or 'public reason' - refers to the importance of keeping checks on those who speak the loudest in this public conversation, but whose demands for more and greater security cannot be said to be in the common interest. In this way, 'recognition' and 'reason' work together to ensure a political community that is representative and democratic, and enables citizens to live confidently with risk.

The role of rights in the authors' project helps distinguish it from the antagonism already alluded to between the 'liberty' and 'security' lobbies. For Loader and Walker, rights are not only a matter of protecting the individual from the power of the state; nor are they a burden on the state in protecting its citizens, as populist politicians and police officers so often lazily contend. Rather, rights should be seen as preconditions for the police and criminal justice system to contribute positively to the security of citizens in a democratic society. Instead of thinking of them in purely individualistic terms, citizens must realise they have a collective stake in defending rights.

The central problem with this book is its verbosity. The authors' thesis does not lend itself to succinct summary. Long and convoluted sentences make some of the central concepts difficult to discern, and occasionally the reader suspects this writing style disguises a lack of clarity in the concepts themselves.

However, if one battles through the laboured lexicon, Civilizing Security does contain many interesting ideas. The central argument is refreshing, and the central aim of transcending contemporary debates – which regard liberty and security as necessarily in conflict – is both timely and important.

Helen Foot, criminal justice intern, summer 2008, JUSTICE

Notes

1 *R (Ullah) v Special Adjudicator* [2004] UKHL 26.

2 In fact another sign that the authors may be right in their observation of this trend was the recent House of Lords decision in *Re P and others* [2008] UKHL 38.

3 *A and others v Secretary of State for the Home Department* [2004] UKHL 56.

4 A term originating in economic theory, referring to something which, if provided for or enjoyed by one member of society, is provided for or enjoyed by all. Examples are a clean environment, street lighting and national defence.

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1. *Human Rights and the Future of the European Union*, published as hard copy and online, April 2008;
2. Response to House of Commons Justice Committee consultation on the Crown Prosecution Service on the role of Attorney General, April 2008;
3. Comments on the draft Constitutional Renewal Bill, April 2008;
4. Briefing on the Counter-Terrorism Bill for House of Commons Public Bill Committee, April 2008;
5. JUSTICE Student Human Rights Network electronic bulletin, Spring 2008;
6. Joint briefing with Liberty, British Institute of Human Rights, Help The Aged and Age Concern on Health and Social Care Bill for committee stage in the House of Lords, May 2008;
7. Briefing on Torture (Damages) Bill for second reading in the House of Lords, May 2008;
8. Response to *A Structured Sentencing Framework and Sentencing Commission* consultation, June 2008;
9. Submission to the Joint Committee on Human Rights inquiry into Policing and Protest, June 2008;
10. Supplementary briefing on the Counter-Terrorism Bill for report stage in the House of Commons, June 2008;
11. Briefing on the Counter-Terrorism Bill for second reading in the House of Lords, July 2008;
12. Briefing on the Criminal Evidence (Witness Anonymity) Bill for all stages in the House of Commons, July 2008;
13. Supplementary evidence to the Joint Committee on Human Rights on policing and protest, August 2008;
14. Response to Ministry of Justice consultation on investigative powers of the Information Commissioner's Office, August 2008;
15. Response to Ministry of Justice consultation on bail and murder, September 2008;
16. Response to policing green paper, *From the neighbourhood to the national - policing our communities together*, October 2008;
17. Submissions to the Home Affairs Committee and Joint Committee on Human Rights on the draft Immigration and Citizenship Bill, October 2008;
18. JUSTICE Student Human Rights Network electronic bulletin, Autumn 2008;
19. JUSTICE summary response to government consultation, *Murder, Manslaughter and Infanticide: proposals for reform of the law*, October 2008.

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