# JUSTICE

## Judicial Review and Human Rights Update

Jonathan Auburn, *11 King's Bench Walk*
Caoilfhionn Gallagher, *Doughty Street Chambers*
John Halford, *Bindmans*

JUSTICE Annual Human Rights Law Conference 2016
Friday 14 October 2016
#JHRC16
@JUSTICEhq
www.justice.org.uk

JUSTICE

Bindmans

## JUDICIAL REVIEW & HUMAN RIGHTS

JUSTICE Annual Human Rights Law Conference

14th October 2016

doughty street chambers

11KBW

JUSTICE

Bindmans

## Judicial Review and Human Rights

Chair:

Angela Patrick, Doughty Street Chambers

Speakers:

John Halford, Bindmans

Jonathan Auburn, 11 KBW

Caoilfhionn Gallagher, Doughty Street Chambers

doughty street chambers

11KBW

JUSTICE

## Overview

- Many significant judicial review cases with a human rights element over the past year.
- We are focusing upon three key themes:
  (1) Cuts and resources *(CG)*
  (2) Redress for historic wrongdoing *(CG & JH)*
  (3) Access to justice *(JH & JA)*

JUSTICE

Caoilfhionn Gallagher, Doughty Street Chambers

## 1. CUTS AND RESOURCES

JUSTICE

## Context: The 'Austerity Agenda'

- Coalition Government legislated for £21bn in welfare cuts between 2010 and 2015.
- 2015: Government announced further £12bn in cuts to 2017/18.
- Austerity measures raise human rights & equality concerns.
- Adverse effects on marginalised & vulnerable groups.
- Particularly severe effects upon women & people with disabilities – both more likely to be affected & less likely to be able to take steps to mitigate or avoid the impact of cuts: see e.g. UN OHCHR, *Report on Austerity Measures and Economic and Social Rights* (2013)

JUSTICE

## Context: Austerity & Gender

Compared to men, women make up a disproportionate number of:

- **Housing benefit claimants:** 1 million more women than men
- **Lone parents:** 91% of lone parents are mothers
- **Victims of serious domestic violence:** overwhelmingly women
- **Carers:** 73% of those who receive Carers' Allowance are women. Around a million women 'missing' from the UK workforce due to a lack of the types of flexible work opportunities required to balance work and caring commitments.
- **Low-paid workers:** Almost two-thirds (63%) of those earning £7 per hour or less are women.
- **Pensioners living in poverty:** Women's average personal pensions are only 62% of the average for men and they make up the majority of pensioners living below the poverty line.
- **Benefit claimants overall:** Benefits make up a much greater percentage of women's income than men's (on average, 1/5 of women's income is made up of welfare payments and tax credits compared to 1/10 for men) (Fawcett Society).

JUSTICE

## Legal Challenges

- Key difficulty: local/ national challenges?
- Localism agenda and Discretionary Housing Payments (DHPs).
- Evidential difficulties in showing shortcomings of DHPs as test case claimants atyically have solicitors & are routinely granted DHPs.
- Possible mechanisms to challenge central Government policy:

**(1) Human Rights Act 1998?** Article 14, taken with Article 1, Protocol 1 and/ or Article 8.

**(2) Common law?** Rationality – where a bright line rule" is drawn (*R (Tigere) v. SS Business, Innovation & Skills* [2015] UKSC 57, [2015] 1 WLR 3820); proportionality; asking right questions (*Tameside)*; & development of principles re duty to consult.

**(3) Equality Act 2010, s. 149 (public sector equality duty)?** - a public authority must have "*due regard*" to the need to eliminate discrimination, harassment and victimisation and to advance equality of opportunity.

## Key Welfare Cuts

| | |
|---|---|
| LHA | •Maximum housing benefit calculated using Local Housing Allowance (LHA) scheme<br>•Previously LHA rates calculated using average of rents in the area & reviewed annually<br>•Comparison now: not average; 30th centile. |
| Benefit cap | •No welfare claimants will receive in total more than the "average annual household income" after tax and national insurance.<br>•Original cap: £26,000 pa – but bulk of this is housing costs & never seen by claimant.<br>•2016: reduced to £23,000 pa in London; £20,000 pa elsewhere. |
| Bedroom tax | •Working age housing benefit claimants deemed to have a spare bedroom in social housing lose 14% of their housing benefit.<br>•Those with two or more "spare" bedrooms lose 25%. |
| Council tax | •Council tax benefit transferred to local councils.<br>•Depends on local decision making. |
| Legal aid | •Lower cut-off to claim legal aid and for means testing.<br>•Affected areas include family law cases (divorce, child custody,) immigration and employment. |
| Tax credits | •Working tax credit frozen.<br>•Tax credits and family benefits limited to the first two children only. |

## Benefit Cap

2 settlements of importance, & 2 cases (one broad, one targeted)

| | |
|---|---|
| Settlement: *MG* | • MG: single mother living in Westminster; 4 young children<br>• Made homeless as a result of another reform (LHA)<br>• Temporary accommodation: £525 pw<br>• Result: cap left her with minus £25 pw for food, clothing, basic necessities of life<br>• Her & her baby son original claimants in SG/ JS case but secured social housing & cap no longer applied |
| Settlement: Women's Refuges | • Exemptions to benefit cap for certain types of supported accommodation, but women's refuges not included<br>• Issue before Court of Appeal in *SG/ JS* & permission granted by Supreme Court<br>• However Secretary of State then conceded the issue<br>• Regulations made to exempt women's refuges: Housing Benefit and Universal Credit (Supported Accommodation) (Amendment) Regulations 2014 (SI 2014/771)<br>• New Bill: no exemption in clause 7; Women's Aid publicly called on DWP to confirm exemption will be made; exception has now been made (September 2016) |

## Key Cases: Benefit Cap

| | |
|---|---|
| Broad Challenge: *SG/ JS* | • *R (JS/ SG) v. SSWP* [2015] UKSC 16,[2015] 1 WLR 1449<br>• Issue: 2/3 of those affected by benefit cap single women, & majority lone parents.<br>• Indirect discrimination challenge under Article 14 ECHR.<br>• Very tight decision: 3-2 split on whether there was a breach of UNCRC (majority held there was) but different 3-2 split on whether there was a breach of Article 14 (majority held there was not – but different reasoning).<br>• Critical paragaphs: [76] & [77] (no viable alternative to meet legitimate aims of policy).<br>• Note: cf asylum support challenge currently before High Court re children. |
| Targeted Challenge: *Hurley* | • *R (Hurley) v. SSWP* [2015] EWHC 3382 (Admin), [2016] PTSR 636<br>• Issue: households with someone receiving higher rate DLA exempt from benefit cap, resulting in 98% of full-time carers (receiving Carers' Allowance) being exempt – those caring for children or partners. But those caring for adult children or other adults not exempt.<br>• 73% of those in receipt of Carers' Allowance are women.<br>• Good evidence re inadequacy of DHPs.<br>• Collins J: discrimination unjustified – breach of Article 14.<br>• Secretary of State did not appeal & Lord Freud in January 2016 announced in Parliament exemption for carers under new regime.<br>• Amendment now made (September 2016). |


January 2016: *R (A & Rutherford) v Secretary of State for Work and Pensions* [2016] EWCA Civ 29, [2016] HLR 8

## Bedroom Tax

**Disability Cases**

- 3 Court of Appeal cases - inconsistencies between them.
- *Burnip v. SSWP* [2012] LGR 954. Note (i) DHPs inadequate to justify discrimination; & (ii) CA's reference to the group being easy to identify & small in number.
- *R (MA) v. SSWP* [2014] PTSR 584 – unsuccessful broader challenge. CA distinguished Burnip for a number of reasons, including improvement in DHPs & size of class.
- But note position of disabled children, exempted between High Court & Court of Appeal stage.
- *R (A & Rutherford) v Secretary of State for Work and Pensions* [2016] EWCA Civ 29, [2016] HLR 8: held *Burnip* applicable, not *MA*, to these two groups.

**Sanctuary Scheme (gender)**

- Extreme facts – A's life & physical safety at risk.
- Challenge under both Article 14 & using PSED.
- Secretary of State did not consider gender at all or domestic violence in particular, despite strong link between homelessness & DV.
- Small class, easy to identify (as in *Burnip*) & consequences of not exempting them devastating.
- Successful in CA (on Article 14).
- Heard (with *MA* & *Rutherford*) in SC in February & March 2016, before a 7-judge court. Judgment awaited.
- General matter of principle re Article 14: "manifestly without reasonable foundation" test for justification.

## What's next? What more can be done?

**Local Level**

- Cuts to local budgets leading to poor decision-making by cash-strapped authorities
- Challenges to local authority policies – e.g. housing allocation schemes with minimum residence requirements (impact upon women fleeing DV)
- Challenges to individual decisions, e.g. to refuse DHP or classify rooms as bedrooms

**National Level**

- Benefit cap – other specific challenges possible, e.g. maternity allowance issue.
- Reduced benefit cap – possibility of a broader challenge?
- Bedroom tax – targeted challenges which focus upon existing exemptions & where line has been drawn more likely to be successful.
- Asylum support cuts.

John Halford, Bindmans, & Caoilfhionn Gallagher, Doughty Street Chambers

## 2. REDRESS FOR HISTORIC WRONGDOING

## Redress for Historic Wrongdoing

- Key recent developments in this area, both in terms of legal principle (e.g. *Keyu v. Secretary of State for Foreign and Commonwealth Affairs* [2015] 3 WLR 1665) & politically (IICSA Inquiry; 'SpyCops' / Undercover Policing Inquiry; impact of *Hillsborough Inquests* conclusions; ongoing pressure on Home Secretary to announce an inquiry into *Orgreave*).
- Pressure from Hillsborough bereaved families for:
  (i) a 'Hillsborough Law' concerning a duty of candour on public bodies in inquest proceedings;
  (ii) equality of arms in inquest funding.
- Important feature of the Hillsborough Inquests, following the approach in the 7/7 inquests, was the use of pen portraits of the deceased. Idea based on Air India Inquiry in Canada.

## Hillsborough

- Article 2 inquests although deaths in 1989.
- Basis: ECtHR jurisprudence since *Re McKerr* [2004] 1 WLR 807. *(JH examining in more detail).*
- *Silih v. Slovenia* (2009) 49 EHRR 37, [159]: procedural obligation to carry out an effective investigation has evolved into *"a separate and autonomous duty"* capable of binding the State even when the death took place before the entry into force of the Convention in the State concerned. The ECtHR set out criteria for deciding when such a duty to investigate a prior death will arise—one of the criteria being that *"a significant proportion of the procedural steps required… will have been or ought to have been carried out after the critical date"* (at [163]).
- Criteria developed further in *Janowiec v. Russia* (2014) 58 EHRR 30, [145]-[149]: save in certain exceptional cases, period of time between death & critical date must have been "*reasonably short*" & generally no more than 10 years, & a major part of the investigation must have been carried out, or ought to have been carried out, after entry into force of Convention.
- *Re McCaughey's application for JR* [2012] 1 AC 725: Supreme Court concluded (6-1) that an inquest held after the HRA came into force, into a death which occurred pre-HRA, had to satisfy the investigative obligation.

# Can public law deliver accountability for historical wrongdoing?

John Halford, Bindmans LLP

## The five routes to accountability

- Political/campaigning pressure e.g. Shipman, Lawrence, phone hacking.
- Criminal prosecution.
- Accountability to international bodies/tribunals, e.g. ICC, ECtHR.
- Public and human rights law e.g. *Kennedy and Black v Lord Advocate* 2008 SLT 195, Litvinenko, Finucane, Batang Kali.
- Civil claims (s.33 Limitation Act1980 creates a limited, fairness-based discretion to extend time in personal injury and death cases arising from post 1954 events e.g. the Mau Mau case, *Mutua and others v Foreign and Commonwealth Office* [2012] EWHC 2678 (QB).



## Batang Kali: the massacre

- On 11 December 1948, British troops entered and took control of the rubber tapping plantation village of Batang Kali, Selangor in what was then Malaya.
- They separated the women and men and, after injuring then shooting one man dead on the ground where he lay, began a series of interrogations to establish whether the remaining villagers supported Communist insurgents. Men and women were subjected to mock executions.
- Next morning, the women, children and one man were put on a truck. The troops then escorted 23 of the men out from the longhut where they had been held and, within minutes, all had been shot dead. The bodies were left in groups, one was beheaded and the village was burned to the ground.

## Batang Kali: the cover up

- The killings were portrayed as a military victory at the time, but in 1970 six of the soldiers involved presented themselves, first to the press and then to the Metropolitan Police, to confess that they had murdered the male villagers. The resulting police investigation was terminated prematurely by the government against the wishes of the officers involved who described the reasons as "political". Malaysian eyewitnesses were not interviewed, no bodies were exhumed and those in command at Batang Kali were never questioned as all these steps had been planned for the later stages of the investigation.
- In 1993, a Malaysian police investigation began, but was also blocked by the British government.



## Batang Kali: the campaign and the litigation

- In 2008, a campaign began in Malaysia to press for a British public inquiry into what had happened and its cover-up.
- The inquiry was refused by the government in 2010, a decision then challenged in judicial review proceedings brought by family members of those killed at Batang Kali, *R (Keyu and others) v Secretary of State for Foreign and Commonwealth Affairs and another*.
- The claim was refused by the Divisional Court , the Court of Appeal and, on 25 November 2015, by the Supreme Court ([2015] UKSC 69).



## The Art 2 ECHR investigatory duty

- A "separate and autonomous duty … to carry out an effective investigation" into any death which occurs in suspicious circumstances: *Šilih v Slovenia* (2009) 49 EHRR 996 §159 and *Janowiec v Russia* (2014) 58 EHRR 30 §142.
- The investigation's broad purpose is "to secure the effective implementation of the domestic laws safeguarding the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility": *Al-Skeini v UK* (2011) 53 EHRR 18 §163.
- An investigation must be independent in both institutional and practical terms, transparent and with family involvement: *El-Masri v Macedonia* (2013) 57 EHRR 25 §184.



## Present day activation of an Art 2 ECHR duty to investigate historical deaths summarised

There must be a bridge between the deaths and the Convention on the basis of:

- 'Convention values'; or
- a 'sufficient temporal connection' between the deaths and the 'critical date';

and, in either case there must also be:

- a bridge to the present day through a recent triggering event or failure.

For HRA purposes, there may be a further requirement that the triggering event is after 2 October 2000.

## ‘Convention values’

- A ‘genuine connection’ between past events and a present day investigatory duty can arise where what is alleged and the supporting evidence are of such seriousness that the ‘fundamental values of the Convention’ are offended if there is no proper state response e.g. an inadequately investigated war crime or crime against humanity.
- Lord Neuberger noted at paragraph 88 of his *Keyu* judgment, the Grand Chamber had indicated at 149-151 of *Janowiec* that this category of wrong could not predate the ECHR itself, so this could not assist the Batang Kali families.



## A ‘temporal connection’ between the deaths and the ‘critical date’

- This type of connection will normally mean the critical date must be no more than ten years later than the deaths. But what is that date?
- If the critical date for the UK was 1953, when it signed up to the Convention and extended it to Malaya, this connection was sound in *Keyu*. If so, given all investigations up until then had been defective (indeed cover ups), the Art 2 investigatory obligation had never been discharged.
- But, if the critical date was 1966, when the UK had first recognised the right of individual petition to the ECtHR, the deaths had occurred more than 10 years before then.



## Present day ‘revival’ for Art 2 purposes

- A present day positive obligation in relation to events in the past arises “when a plausible, credible allegation, piece of evidence or item of information comes to light”: *Šilih* §144.
- “…later events or circumstances may arise which cast doubt on the effectiveness of the original investigation and trial or which raise new or wider issues and an obligation may arise for further investigations to be pursued”: *Hackett v UK* (Application No. 34698/04 (10 May 2005



## Batang Kali: the majority of the Supreme Court’s approach to temporal connection

- With the exception of Baroness Hale, the Supreme Court’s justices did not accept the critical date was 1953, but rather 1966. It followed that the deaths had occurred more than ten years before the critical date and so the temporal connection was insufficient.
- This approach is very difficult to square with international law: obligations under a treaty in principle apply as at the point of ratification: see Art 24 Vienna Convention on the Law of Treaties. There is no reason for applying any different rule to the Convention. The United Kingdom was bound, by treaty, to observe the Convention from 3 September 1953.

## A temporal connection in other cases?

- But the effect of the Supreme Court approach in *Keyu* is that suspicious deaths that occurred between 1966 and 1976 will meet the temporal connection criterion.
- If sufficiently weighty and compelling new evidence now comes to light about, then the Art 2 investigative duty will be activated.
- This potentially could embrace many killings in Northern Ireland, especially those falsely presented as sectarian killings.



## A further temporal barrier to domestic enforcement?

- The *Keyu* majority decided not to determine whether *In re McKerr* [2004] 1 WLR 807 remained good law on the question of the retrospective application of the HRA. In that case the House of Lords had held that there was no Art 2 right to an investigation of a death of a person who died before the Act came into force except where an investigation had already begun but had yet to be concluded at that date.
- This was questioned in *In re McCaughey (Northern Ireland Human Rights Commission intervening)* [2012] 1 AC 725 in the light of *Silih*. It also sits uncomfortably with the statutory purpose of the HRA which is to ensure that ECHR obligations are mirrored in domestic law.
- *McKerr* will need to be addressed in a future Supreme Court case.



## Batang Kali: the majority of the Supreme Court's approach to revival

- The majority in the Supreme Court went on to hold that, even if the genuine connection test had been met, the Batang Kali families may have waited too long to enforce the investigatory duty. Their view was that the legal challenge ought to have been brought in response to the abandonment of the 1970 investigation, presumably by way of a petition to Strasbourg within a year of that date.
- They were unpersuaded there were further revivals of the duty when the Malaysian investigation took place in the 1990s or in the 2000s when its products were married to those of the 1970 investigation and analysed.



## Justification for refusal to investigate at common law: proportionality

- The families had an alternative position which was that, tested to the exacting standards of proportionality, the exercise of ministerial discretion to refuse them an inquiry was unjustifiable.
- For this argument to succeed, they had to establish that proportionality had superseded *Wednesbury* as the standard for justification for discretionary decisions either in all cases or at least those involving fundamental rights or interests.
- The Supreme Court declined to reach a decision on whether proportionality was now the proper standard of review. In the majority's view, the result of the case would be the same regardless of whether the Respondents' decisions were assessed to a proportionality or *Wednesbury* standard.

## Justification for refusal to investigate at common law: *Wednesbury*

- The families' ultimate fall back position was that it was irrational to refuse an inquiry, bearing in mind the factors the Divisional Court had identified as relevant to such a decision: the evidence of what had occurred and its questionable legality; the potential for establishing the facts, learning from events, preventing a reoccurrence, catharsis, rebuilding confidence and understanding; accountability and promoting good race relations; and cost/benefit.
- In a powerful dissent (paras 305-313 ) Lady Hale sets out why, in her view, public and family interests were insufficiently weighed in the balance when discretion was exercised to refuse the inquiry the families sought. The majority disagreed.



## *Keyu*: a qualified victory?

- Legal responsibility established.
- Innocence of the victims established.
- The official account challenged and culpabilty demonstrated.



## *Keyu*: what next?

- ECtHR admissibility decision on *Keyu* itself is pending.
- An appeal is pending against the decision in *Re Finucane* [2015] NIQB 57 (in which the investigatory duty was found to apply to a 1989 killing of solicitor Patrick Finnuane, under the Convention values and temporal connection tests – treating 2 October 2000, surprisingly, as the critical date - coupled with new evidence of state collaboration, but a remedy was withheld).
- Other litigation in Northern Ireland is underway in relation to ineffective inquests.



John Halford, Bindmans LLP, and Jonathan Auburn, 11 KBW

## 3. ACCESS TO JUSTICE

# The eight tools every Legal Aid defender must own

John Halford, Bindmans LLP

## Context 1: LASPO and its application

- LASPO: primary legislation extensively overhauling the civil and criminal legal aid schemes with a view to saving money by focusing on greatest need.
- Criminal legal aid provision is based on complex contracting arrangements with providers.
- Civil legal aid is based on a 'service list' in schedule 1, part 1 (which can be updated through secondary legislation) and section 10 'exceptional case funding' for cases where it is needed to ensure compliance with ECHR and EU obligations.
- Includes extensive powers to implement change and issue guidance.



## Context 2: post LASPO coming into force

- LASPO's architect (Ken Clarke) is succeeded as Lord Chancellor by a series of non-lawyers: Chris Grayling, Michael Gove and Elizabeth Truss.
- Grayling introduces further changes immediately in the 'Next Steps' programme that are driven by cost cutting and ideology. These seek to reduce legal aid provider numbers for criminal legal aid, cut down eligibility scope in civil legal aid (targeting particular services and/or classes of people) and put hurdles in the path of applicants, such as telephone gateways and the exceptional cases procedure.
- The LAA's decision-making becomes increasingly politicised.



## Tool 1: gather evidence of impact

E.g.:

- *IS* and *Gudanaviciene & Ors v Director of Legal Aid Casework* [2014] EWHC 1840 (Admin) and [2014] EWCA Civ 1622; [2015] EWHC 1965 (Admin) and [2016] EWCA Civ 464 - evidence demonstrates the operation of exceptional case funding scheme leads to very few grants of funding under s.10 and many absurd decisions.
- *R (Public Law Project) v Lord Chancellor* [2014] EWHC 2365 (Admin), [2015] EWCA Civ 1193, [2016] UKSC 39 – evidence shows the types of applicants that would fail the proposed test, despite their obvious need for services having been anticipated by LASPO.
- *Todner and others v Lord Chancellor* (HT-2015-000373 and C0/5533/2015 - settled and so unreported) – evidence shows chronic, systemic failures in the crime duty contract procurement process.

## Tool 2:
## demand fair consultation before change

*R (London Criminal Courts Solicitors Association and Criminal Law Solicitors Association) v Lord Chancellor* [2014] EWHC 3020 (Admin) – challenge to proposals for 'two tier contracting' for duty work. Applying *Coughlan*, Burnett J holds the failure to consult on the content of two important externally-commissioned reports was unfair:

> "In the context, in particular, of a decision which would so profoundly affect the way in which the market in criminal legal aid operates, indeed pose a threat to the continued existence of many practices, in my judgment it was indeed unfair to refuse to allow those engaged in the consultation process to comment upon the two reports, which included the assumptions applied by KPMG, and which in turn determined the number of contracts for Duty Provider Work. The consultation paper did not identify the assumptions, or even the nature of the assumptions, that would lead to the decision on numbers…. The failure was so unfair as to result in illegality."



## Tool 3:
## ensure the statutory scheme is not dismantled through secondary legislation

- The *Public Law Project* case proactively challenged proposals for a residence test that would have meant advice and representation being withheld from those parliament had identified as needing it the most on the basis that they were not physically here or did not have (or could not prove) more than 12 months' lawful residence.
- The government readily admitted this would mean withholding legal aid from a far greater proportion of people who were not British, or did not have British origins, compared with those who would pass it (in other words, it discriminated indirectly on grounds of nationality and national origins), but argued that the discrimination was justifiable.
- It also proposed making the necessary changes to the legal aid scheme by secondary legislation.



## *Public Law Project:* the rulings

- The Divisional Court led by Moses LJ gives a damning judgment against the residence test, holds that the draft statutory instrument to be used to introduce it will be *ultra vires* and that the discriminatory features are unjustifiable whether tested against the Human Rights Act 1998 framework or common law principles of equal treatment. Importantly, the court finds that legal aid is not analogous to a welfare benefit and so withholding it on a discriminatory basis called for the strictest scrutiny.
- Overturned on appeal by the Court of Appeal led by Laws LJ.
- The Supreme Court restores the Divisional Court's decision on vires and allows the appeal; no decision is made on the discrimination issues.
- Presently unclear whether the residence test will be revived in primary legislation.



## *Rights of Women*

*R (Rights of Women) v Lord Chancellor and Secretary of State for Justice* [2016] EWCA Civ 91:

- Regulations remove legal aid for the majority of family law domestic violence cases, unless a person can prove that they were a victim of abuse within the previous 24 months, even if there may be an ongoing risk. Obtaining legal aid becomes particularly difficult for survivors of non-physical abuse.
- The Court of Appeal holds the statutory purpose is subverted - a "formidable catalogue of areas of domestic violence" would not be reached by a statute whose purpose is to reach just such cases.
- The Court acknowledges costs saving was an aim of LASPO, but places 'need' at the centre of the statutory purpose.

See also *R (Ben Hoare Bell Solicitors) and others v Lord Chancellor* [2015] EWHC 523 (Admin).

## Tool 4:
## ensure guidance on the law for decision-makers is legally accurate

In *IS* and *Gudanaviciene* ([2014] EWCA Civ 1622) the Court of Appeal finds the s.10 exceptional funding guidance unlawful because:

- s.10 funding is not based on an exceptionality test and is to be assessed by reference to the requirements of the Convention and Charter - Legal Aid would have to be granted if the Director concluded there would be a breach, or if not, it was appropriate to grant legal aid having regard to any risk of a breach;
- it had purported to set out the refusal of legal aid would breach Article 6 ECHR and Article 47(3) Charter only in rare and extreme cases; and
- it was incompatible with Article 8 ECHR in immigration cases because the procedural protections of Article 8 ECHR that apply in immigration cases were not recognised.



## Tool 5:
## challenge systems that create an unacceptable risk of unfairness

The principle originates in *R (Refugee Legal Centre) v Secretary of State for the Home Department* [2005] 1 WLR 2219:

> "no system can be risk-free. But the risk of unfairness must be reduced to an acceptable minimum. Potential unfairness is susceptible to one of two forms of control which the law provides. One is access, retrospectively, to judicial review if due process has been violated. The other, of which this case is put forward as an example, is appropriate relief, following judicial intervention to obviate in advance a proven risk of injustice which goes beyond aberrant interviews or decisions and inheres in the system itself. In other words it will not necessarily be an answer, where a system is inherently unfair, that judicial review can be sought to correct its effects."



## The *IS* system challenge

The *IS* litigation continues ([2015] EWHC 1965 (Admin); [2016] EWCA Civ 464 ) in order that the functioning of the exceptional funding scheme could be tested.

- Collins J holds there are a series of problems with the ECF scheme. He held that the Legal Aid guidance as to whether to provide exceptional funding in certain cases was so rigid and complicated it was unlawful.
- Laws LJ (in the majority) holds there were obvious flaws in the process of the ECF scheme which had resulted in unfairness in certain individual cases, but it was important to distinguish a bad scheme and one that has operated badly. Collins LJ judgment was undermined on the basis that he had not shown how each of his individual criticisms of the scheme added up to a systemic unfairness. Briggs J dissents.
- Permission to appeal is being sought and if successful, the case will be considered by the Supreme Court.



## Tool 6:
## expose unjustified discrimination

- There must be a lawful assessment of: the risk of any discrimination that would breach the Equality Act 2010 (which does not apply to the making of legislation itself); to equality of opportunity; and good relations between people with different characteristics.
- The common law principle of legality assumes Parliament has not authorised the executive to take away fundamental rights, particularly not on an unequal basis (argued but not determined in *Public Law Project*).
- Legal aid is intended to be an equalising measure. Discriminatory outcomes access to justice must be justified under the HRA and common law to a strict standard, according to Moses LJ in *Public Law Project*. Laws LJ disagrees, preferring a 'manifestly without foundtion' test. The Supreme Court leaves the issue undetermined.
- Scope for challenges to primary legislation is hinted at by Moses.

## Tool 7: challenge unlawful procurement exercises

- E.g. *Todner and others* – a judicial review and multi party procurement challenge to the contract award decisions on duty contracts. Had the decisions been lawful, 567 contract would have been awarded to the current 1400 firms. Gove concedes part way through the proceedings facing evidence of wide scale, systemic errors.
- In future procurements which will be governed by the Public Contracts Regulations 2015 pending any post-Brexit repeal, the LAA is bound to act consistently with general principles of EU law, including transparency, good administration, proportionality, equal treatment and non-discrimination between different types of tenderer.



## Tool 8: ensure parliamentarians remain fully aware of access to justice being undermined

E.g.:

- Joint Committee on Human Rights.
- Joint Committee on Statutory Instruments.
- Public Accounts Committee.
- Indvidual MPs and peers.
- Supporting JUSTICE, the Public Law Project, LAPG.



# THE "NO SUBSTANTIAL DIFFERENCE" DEFENCE IN SECTION 31, SCA

**JONATHAN AUBURN, 11KBW**

## THE STATUTE: SECTION 31 SCA

- amendments to s.31 SCA
- introduced by s.84, CJCA 2015
- applies at both permission & substantive stages
- ct may consider of own motion or must if asked
- "whether the outcome would have been substantially different if the conduct complained of had not occurred", "highly likely"
- not if "reasons of exceptional public interest"

## CASES

- *R (Logan) v LB Havering* [2015] EWHC 3193 (Admin), [2016] PTSR 603
- *R (Hawke) v Secretary of State for Justice* [2015] EWHC 3599 (Admin)
- *R (Kingston upon Hull CC) v Sec of State for Bus, Innovation & Skills* [2016] EWHC 1064 (Admin)
- *R (Collins) v Notts CC* [2016] EWHC 996 (Admin)
- *R (Griffiths) v CQC* (20 May 2016)

## key case for Cs*: Logan v LB Havering*

- challenge to change to council tax reduction scheme (replaced 100% reduction with 85%)
- held: EIA not circulated to all LA members, so insufficiency of "due regard" *per* s.149 EA
- LA raised s.31 no difference defence
- Blake J deeply sceptical …

## Logan (ctd)

para 55: consideration of this issue "should normally be based on material in existence at the time of the decision and not simply post-decision speculation by an individual decision maker. Any other course runs the risk of reducing the importance of compliance with duties of procedural fairness and statutory or other requirements that certain matters be taken into account and others disregarded. Indeed, it would undermine the efficacy of judicial review as an instrument to ensure that the rule of law applies to decision making by public authorities, by deterring claimants from bringing a case or the court from granting permission by a declaration by a decision maker who has failed to obey the law to the effect that obedience would have made no difference. Whatever else Parliament may have intended to achieve by this legislation, I cannot infer that it included so draconian a modification of constitutional principles. It may well be that the new provision was only intended to apply to somewhat trivial procedural failings that could be said to be incapable of making a material difference to the decision made."

## *Hawke v Secretary of State for Justice*

- PSED challenge to refusal to relocate prisoner closer to disabled wife
- para 60: rejects argument that it would emasculate the PSED provision
- para 61: distinguishes Logan on the basis that in Logan there were other reasons for refusing a declaration, so Blake's words obiter
- outcome: dismissed JR

## other cases

- Kingston upon *Hull CC v SoS for BIS*: wrong test applied by decision-maker; not highly likely that outcome would have been same so s.31 n/a
- *Collins v Notts CC:* strong factually for D, credible allegations of fraud by C / provider giving rise to suspension of C as provider
- *Griffiths v CQC:* s.31 applied at permission stage to consultation challenge to closure of hospital; D did not have responsibility for hospital at time

## issues [1]: time for raising issue

- amendment to CPR 54.8(4): if D wishes to take point at permission stage, must raise it in SGs
- BUT: s.31 - clear that duty also on court to raise
- *Hawke v SSJ:* issue arose after judge gave order and while counsel were drawing it up
- suggest CPR 54.8(4) still a valid objection for Cs
- CPR 54.11A: court can direct hearing on issue (??)

## issue [2]: level of threshold

- s.31 "highly likely" "that not …"
- inexact wording & numerous negatives
- leaves much open to judicial discretion
- compare similar issue under common-law: denial of relief where result "inevitably" same
- is "highly likely" much lower than "inevitably"?
- take care with expressing the converse
- useful for Cs to look to common law principles …

## common law principles

*John v Rees* [1970] 1 Ch 345 402C-E *per* Megarry J:

"As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change. Nor are those with any knowledge of human nature who pause to think for a moment likely to underestimate the feelings of resentment of those who find that a decision against them has been made without their being afforded any opportunity to influence the course of events."

## common law (ctd)

*R v Chief Constable, ex p Cotton* [1990] IRLR 344 *per* Bingham LJ:

"… I would expect these cases to be of great rarity. There are a number of reasons for this:

"(3) It is generally desirable that decision-makers should be reasonably receptive to argument, and it would therefore be unfortunate if the complainant's position became weaker as the decision-maker's mind became more closed.

"(4) In considering whether the complainant's representations would have made any difference to the outcome the court may unconsciously stray from its proper province of reviewing the propriety of the decision-making process into the forbidden territory of evaluating the substantial merits of a decision.

"(5) … field in which appearances are generally thought to matter

"(6) [proc fairness rights] not to be lightly denied".

## issue [3] nature of evidence relied on

- *Logan*: base on contemporaneous evidence
- judges wary of *ex post facto* rationalisation
- cf *Collins v Notts CC:* D brought issue up in detailed new witness statement
- ISSUE: does *Logan* import a *Hunt v Somerset CC* type restriction on the way Ds argue s.31?

## issue [4]: application to permission

- starting point is a claim that has merit
- application at substantive stage: deny relief
  - comprehensible; mirrors common law discretion
- application to *permission stage*: effect is that a claim that has merit should not be heard
- highly unattractive
- only palatable where third party interests imp?

## issue [5] precludes declaratory relief?

Logan para 55: "I am satisfied that 'relief' in that section must be read alongside the definition of relief set out in s.31(1) that does not include a declaratory judgment and whatever the outcome of the 'highly likely' assessment, permission having been granted there are no restraints on the court delivering its judgment on the issue"

Hawke para 57: s.31(2A) "relief" includes decl only

## issue [6]: public interest exception

- s.31 "exceptional public interest"
- why "exceptional"? real limitation or verbage?
  - what is unexceptional PI?
  - if PI may merit relief, why not hear case?
- test for academic claims "good reason in the PI"
  - *R v SSHD ,ex p Salem* [1999] AC 450, 457
- query look to case law & categories of academic claims meriting hearing

## conclusion: tips for claimants

- police D's use of evidence
- quote *Logan*
- use common law cases on threshold eg *Cotton*
- push PI exception using academic claims cases

# Q&A

# Can public law deliver accountability for historical wrongdoing?

John Halford, Bindmans LLP

Introduction

1. It might be thought that one of the hardest decisions for the state to justify when faced with a judicial review would be a refusal to adequately investigate state involvement in suspicious deaths or failure to take adequate preventative measures. After all, the common law's demand for an adequate explanation of deaths of detained persons can be traced back to Coke's, *Second Part of the Institutes of the Laws of England* (1642) page 52 and *The Mirror of Justices,* attributed to Andrew Horn (1305-1328), pages 30-31. It is also discussed more recently by Lord Bingham in *R v Secretary of State for the Home Department (Respondent) ex parte Amin* [2003] UKHL 51.

2. Surprisingly then, there are only two cases in which refusal to establish a public inquiry into avoidable or suspicious deaths has been successfully challenged on conventional public law grounds: *Kennedy and Black v Lord Advocate* 2008 SLT 195 and *R (Litvinenko) v Secretary of State for the Home Department* [2014] EWHC 194 (Admin). For the most part, the duty to investigate has been established through the application of ECHR principles under the HRA.

3. Most of those principles are well established. Art 2 gives rise to a "separate and autonomous duty … to carry out an effective investigation" into any death which occurs in suspicious circumstances: *Šilih v Slovenia* (2009) 49 EHRR 996 §159 and *Janowiec v Russia* (2014) 58 EHRR 30 §142. The "essential purpose of an investigation" is a broad one, namely: "to secure the effective implementation of the domestic laws safeguarding the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility"; with an investigation "broad enough" to address "all the surrounding circumstances, including such matters as the planning and control of the operations in question": *Al-Skeini v UK* (2011) 53 EHRR 18 §163. At the heart of the investigative duty is a response by the authorities "in order to prevent any appearance of impunity", which is "essential in maintaining public confidence in their adherence to the rule of law", as well as "preventing any appearance of collusion in or tolerance of unlawful acts": *El-Masri v Macedonia* (2013) 57 EHRR 25 §192; *Varnava and others v Turkey* (Application Nos. 16064/90 et al) (18 September 2009) §191. There is moreover a wider impact of "the right

to the truth regarding the relevant circumstances"; human rights law "underlines the great importance … not only for [an] applicant and his family, but also for other victims of similar crimes and the general public, who had the right to know what had happened": *El-Masri* §191. This "aspect" is well recognised by those (§191) who convincingly urge that the "right to the truth inure[s] to the benefit of the direct victims of the violation, as well as to their relatives" but also "to society at large" (§175), so that "they, their families and society, as a whole … know the truth regarding the violations suffered (§177). The standards of an Art 2 compliant investigation are well-established. An investigation must be: (i) independent in both institutional and practical terms: *El-Masri* §184; *Al-Skeini* §167; and (ii) effective in the sense that it is capable of leading to a determination of whether the force used was or was not justified in the circumstances and to the identification and, if possible, punishment of those responsible. The authorities must take all reasonable steps available to them to secure the evidence concerning the incident, including, inter alia, eye witness testimony and forensic evidence: *Al-Skeini* §166; *Jaloud v Netherlands* (2015) 60 EHRR 29 §186. The investigation must also be prompt, contain a sufficient element of public scrutiny, and allow for the victim to participate effectively in one form or another: *Al Skeini* §167; *Varnava* §191.

4. Two very important issues remain unresolved, however. One, recently considered by the Court of Appeal (see *Al Saadoon v The Secretary of State for Defence* [2016] EWCA Civ 811), has to do with extra-territorial reach. The other, discussed here, concerns the response of the ECHR, and the common law, to serious, unaddressed but historical wrongdoing.

<u>The Batang Kali massacre</u>

5. On 11 December 1948, British troops entered and took control of the rubber tapping plantation village of Batang Kali, Selangor in what was then Malaya. They separated the women and men and, after injuring then shooting one man dead on the ground where he lay, began a series of interrogations to establish whether the remaining villagers supported Communist insurgents. Men and women were subjected to mock executions. Next morning, the women, children and one man were put on a truck. The troops then escorted 23 of the men out from the longhut where they had been held and, within minutes, all had been shot dead. This incident is known as the Batang Kali Massacre (or 'the British My Lai'). No-one has ever been prosecuted for it. The British government has never apologised, acknowledged fault or made any form of reparation. When challenged, it denied legal responsibility for the killings, despite Malaya then

being a British Protected State, all Malayan nationals being British subjects and the troops involved being British, deployed on the instructions of the British Cabinet to protect British interests in the rubber trade.

6. The killings were portrayed as a military victory at the time, but in 1970 six of the soldiers involved presented themselves, first to the press and then to the Metropolitan Police, to confess that they had murdered the male villagers. The resulting police investigation was terminated prematurely by the government against the wishes of the officers involved who described the reasons as "political". Malaysian eyewitnesses were not interviewed, no bodies were exhumed and those in command at Batang Kali were never questioned as all these steps had been planned for the later stages of the investigation. In 1993, a Malaysian police investigation began, but was also blocked by the British government.

7. Then, in 2008, a campaign began in Malaysia to press for a British public inquiry into what had happened and its cover-up. The inquiry was refused by the government in 2010, a decision then challenged in judicial review proceedings brought by family members of those killed, *R (Keyu and others) v Secretary of State for Foreign and Commonwealth Affairs and another*. The claim was refused by the Divisional Court[1], the Court of Appeal[2] and, on 25 November 2015, by the Supreme Court[3]. Only a positive ruling by the European Court of Human Rights, to which the victims' families now turn, can now secure a public inquiry.

8. So, subject to what happens in Strasbourg, is the Batang Kali case simply to be consigned to legal history as a novel, but unsuccessful and "thoroughly stale" claim, which is how it was described by Treasury Counsel Jonathan Crow QC in the Supreme Court?

9. Or perhaps it should be remembered more charitably as part of an "honourable crusade" which could not succeed because, as Lord Kerr thought (see para 285 of his Supreme Court judgment):

> "[t]his is an instance where the law has proved itself unable to respond positively to the demand that there be redress for the historical wrong that the appellants so passionately believe has been perpetrated on them and their relatives.

[1] [2012] EWHC 2445 (Admin); (2012) 109(35) L.S.G.22.
[2] [2014] EWCA Civ 312; [2015] Q.B.57; [2014] 3 W.L.R 948; [2014] 4 All E.R. 99.
[3] [2015] UKSC 69; [2015] 3 W.L.R. 1665; [2016] H.R.L.R. 2.

That may reflect a deficiency in our system of law."

10. This note suggests that neither should be the case's epitaph, that it will be remembered for much more and that the three courts' orders are certainly no reflection of the true outcome.

Law: temporal scope of Art 2 ECHR

11. To begin with, *Keyu* raised important and far reaching questions about the retrospectivity of the UK's international obligations under the European Convention on Human Rights ('ECHR') and, to the extent they are retrospective, their domestic enforceability through the Human Rights Act 1998 ('HRA'). The answers did not assist the families of those killed at Batang Kali, but they are likely to help others when new evidence comes to light of serious wrongdoing in the past.

12. It is now settled law that Art 2 creates an autonomous and detachable duty to investigate deaths occurring in suspicious circumstances.

13. In a line of cases beginning with *Brecknell v United Kingdom* (2007) 46 EHRR 957 followed by *Silih v Slovenia* (2009) 49 EHRR 996, *Janowiec v Russia* (2013) 58 EHRR 792 and *Harrison v United Kingdom* (2014) 59 EHRR SE 1. Strasbourg has recognised this duty will sometimes have retrospective effect. There are two main possibilities.

14. First, a "genuine connection" between past events and a present day investigatory duty can arise where what is alleged and the supporting evidence are of such seriousness that the fundamental values of the Convention are offended if there is no proper state response. Lord Neuberger noted at paragraph 88 of his judgment, the Grand Chamber had indicated at 149 — 151 of *Janowiec* that category of wrong could not predate the ECHR itself, so this could not assist the Batang Kali families. Of course, there remain many serious unaddressed wrongs that post-date the Convention and some remain inadequately investigated

15. Secondly, the Convention demands investigation of deaths occurring before the "critical date" when a state's Convention obligations first arose, where relevant acts or omissions have occurred after that date and there is a temporal connection between the death and the critical date. This type of connection will normally mean the critical date must be no more than ten years later than the deaths. If the critical date for the UK was 1953, when it signed up to the

Convention and extended it to Malaya, this connection was sound. If so, given all investigations up until then had been defective (indeed cover ups), the Art 2 investigatory obligation had never been discharged.

16. For a present duty to arise on either basis, Art 2 has to be revived, however (see *Brecknell).* The Batang Kali families argued this had happened repeatedly since 1969 when compelling new evidence that the killings were unlawful first came to light through the soldiers' confessions. Further evidence came to light in the 1990s through the Malaysian investigation and, finally, in 2009 the products of both investigations were united, causing a significant shift in the state's position of the kind discussed in *Harrison.*

17. The basic framework was accepted to be legally correct by the majority of the Supreme Court. They also accepted there was new, weighty and compelling that came to light in 1969. However, with the exception of Baroness Hale they did not accept the critical date was 1953, and held it was 1966, when the United Kingdom had first recognised the right of individual petition to the ECtHR. It followed that the deaths had occurred more than ten years before the critical date and so the connection was insufficient.

18. It is difficult to reconcile the Court's majority decision with the international law principle that a treaty becomes binding as soon as it is ratified. But the effect of the decision is that suspicious deaths that occurred between 1966 and 1976 will meet the genuine connection criterion and so if sufficiently weighty and compelling new evidence now comes to light about them the Art 2 investigative duty will be activated. This potentially could embrace many killings in Northern Ireland, especially those falsely presented as sectarian killings.

19. It is important to sound two cautionary notes, however. First, the majority in the Supreme Court went on to hold that, even if the genuine connection test had been met, the Batang Kali families may have waited too long to enforce the investigatory duty. Their view was that the legal challenge ought to have been brought in response to the abandonment of the 1970 investigation, presumably by way of a petition to Strasbourg within a year of that date. They were unpersuaded there were further revivals in the 1990s and 2000s.

20. Secondly, the majority decided not to determine whether *In re McKerr* [2004] 1 WLR 807 remained good law on the question of the retrospective application of the HRA. In that case the House of Lords had held that there was no Art 2 right to an investigation of a death of a person who died before the Act came into force except where an investigation had already begun but had yet to be

concluded at that date. This was questioned in *In re McCaughey (Northern Ireland Human Rights Commission intervening)* [2012] 1 AC 725 in the light of *Silih.* It also sits uncomfortably with the statutory purpose of the HRA which is to ensure that ECHR obligations are mirrored in domestic law. *McKerr* will need to be addressed in a future Supreme Court case.

Law: the door remains ajar on proportionality

21. In the event their international law arguments failed, the Batang Kali families had an alternative position which was that, tested to the exacting standards of proportionality, the exercise of ministerial discretion to refuse an inquiry was unjustifiable. For this argument to succeed, they had to establish that proportionality had superseded *Wednesbury* as the standard for justification for discretionary decisions either in all cases or at least those involving fundamental rights or interests.

22. The Supreme Court declined to reach a decision on whether proportionality was now the proper standard of review, with the majority adding that this would be inappropriate for a five-Justice court to do so. In the majority's view, the result of the case would be the same regardless of whether the Respondents' decisions were assessed to a proportionality or *Wednesbury* standard. Notwithstanding that, each edged a little closer to accepting proportionality was the way forward for the common law. Like *Kennedy v Information Commissioner* [2015] AC and *Pham v Secretary of State for the Home Department* [2015] 1 WLR1591, *Keyu* is an important paving stone in that path.

Law: Lady Hale's dissent on rationality and the Divisional Court's public interest factors

23. The families' ultimate fall back position was that it was irrational to refuse an inquiry when correctly analysed under the framework of public interest factors to be taken into account when such a decision is made identified by the Divisional Court (see paragraphs 157-175 of their judgment): the evidence of what had occurred and its questionable legality; the potential for establishing the facts, learning from events, preventing a reoccurrence, catharsis, rebuilding confidence and understanding; accountability and promoting good race relations; and cost/benefit.

24. According to Lady Hale, *Keyu* should have succeeded on this basis. Her powerful dissent sets out why, in her view, public and family interests were insufficiently weighed in the balance when discretion was exercised to refuse

the inquiry the families sought (see paragraphs 305-313 of *Keyu).* It merits very careful consideration by those drafting representations to decision-makers arguing for positive exercises of the same discretion more recent deaths, as does the Divisional Court's discussion. The majority took a different view, concluding that practical difficulties and costs could outweigh the benefits in the mind of a rational Secretary of State.

Law: responsibility reflects military reality

25. As mentioned above, one of the most extraordinary features of the *Keyu* litigation was the persistent denial of legal responsibility for the killings by the Respondents. They argued that in 1948 British troops in Malaya were legally the responsibility of either the Sultan of Selangor, or the Federal Administration, which was appointed by the Crown but semiautonomous. Either way, they argued, legal responsibility passed to the state of Malaysia upon independence.

26. Like the Divisional Court and Court of Appeal before it, the Supreme Court was having none of this sophistry and on this issue alone the Justices were unanimous. Under the pre- independence constitutional arrangements, the UK had been in complete control of the defence and external affairs of the State of Selangor and the Federation of Malaya. The British Army, while on active service there, had remained His Majesty's forces under the command of the Crown exercised through the Army Council in accordance with the King's Regulations. The Army had been deployed to further UK interests, pursuant to a command structure and orders that could be traced up to the Cabinet. Those killed at Batang Kali had been in the control of the British Army and so within UK's jurisdiction. The grant of independence in 1957 did not transfer liabilities and obligations in respect of the deaths.

27. *Keyu* is, then, a clear-sighted assessment of the reality of military command structures and the fact that legal liability responsibility should mirror them.

Facts: innocence

28. In 1948 and early 1949 the official account of the killings was that 'bandits' (a euphemism for Communists insurgents) had been lawfully and necessarily killed in the course of a pre-planned escape attempt and that "a large quantity of ammunition had been found under a mattress". Internal army memoranda observed that such villages were often "rubber tappers by day" and "bandits by night". The official account was repeated in Parliament by ministers, and adopted in the official history of the Scots Guards regiment to which the British

troops belonged ("[s]uffice to say that those killed were active bandit sympathizers").

29. When the campaign first was launched, the government responded by asserting that there was no reason to question the outcome of the past investigations and so none two reopen them or otherwise investigate. When the final refusal decision was litigated, the position was being taken that it was near-impossible to reach any conclusions about what had happened.

30. The Divisional Court saw things differently. On the basis of the available documents, it felt itself able to state:

> "...there is no evidence, 63 years later, on which any of the 10 key facts relating to what happened at Batang Kali can seriously be disputed. It is therefore both helpful and necessary to an understanding of what happened after the deaths to set the 10 facts out."

31. Those indisputable facts included that:

> "i) Batang Kali was a village on a rubber plantation, inhabited by families. They did not wear uniforms, had no weapons and were a range of ages....
>
> v) Interrogation of the inhabitants took place. There were simulated executions to frighten them, causing trauma...
>
> ix) The hut with 23 men was unlocked. Within minutes all of the 23 men were dead as a result of being shot by the patrol.
>
> x) The inhabitants' huts were then burned down and the patrol returned to its base."

32. By the Supreme Court stage, these and many more important facts had been agreed, enabling the Justices to add their own gloss to them. Lord Kerr and Lady Hale, for example, felt able to note the apparent innocence of those killed. This was hugely important for their family members, given the significance in Chinese culture of ancestral honour. The stigmatising way their family members have been described was finally mitigated

Facts: guilt

33. The Supreme Court did not stop there, however. Lord Neuberger recognised at paragraph 137 of his speech:

> "[i]t is not as if the appellants have got nowhere: in these proceedings, the Divisional Court, the Court of Appeal and now this court have all said in terms that the official UK Government case as to the circumstances of the Killings may well not be correct and that the Killings may well have been unlawful."

and at paragraph 111 he observed that, by 1969 and 1970 there was "evidence available to support the notion that they were unlawful and may have amounted to a war crime".

34. Lord Kerr went even further at paragraph 204:

> "The shocking circumstances in which, according to the overwhelming preponderance of currently available evidence, wholly innocent men were mercilessly murdered and the failure of the authorities of this state to conduct an effective inquiry into their deaths have been comprehensively reviewed by Lord Neuberger of Abbotsbury PSC in his judgment and require no further emphasis or repetition. It is necessary to keep those circumstances and that history firmly in mind, however, in deciding how our system of law should react to the demand of the relatives of those killed that the injustice that has been perpetrated should be acknowledged and accepted."

Costs: when justice demands a special costs order

29. Very occasionally, the courts will recognise that it is not in the interests of justice to award costs against an unsuccessful litigant in a public interest case.[4] Even more rarely still, such a litigant who has succeeded on certain issues, but not secured the remedy they seek, will recover some of their costs.[5]

---

[4] E.g. *R (Greenpeace Ltd) v Secretary of State for the Environment, Food & Rural Affairs* [2005] EWCA Civ 1656 at [5]

[5] E.g., this occurred in *R (Al-Jedda) v Secretary of State for Defence* [2008] a AC 332, *R (Evans) v Secretary of State for Defence* [2010] EWHC 1445, *R (Public Interest Lawyers and others) v Legal Services Commission* [2010] EWCA 3227 (Admin), *R (Hurley and another) v Secretary of State for Business Innovation and Skills* [2012] EWHC 201 (Admin), [2012] Eq LR 447 and *Al Sirri v SSHD* [2012] UKSC 54 [2013] 1 AC 745.

30. In *Keyu,* in each stage the Defendants/Respondents sought costs against the Claimants/Appellants and indicated they were minded to enforce any order made. The Courts were unimpressed. No order for costs was made at any level. The Divisional Court went further still unexplained why not in a supplementary judgement:

> "...looking at the overall justice of the case, we do not think it would either be right or fair to make an order that the claimants pay the costs of the Secretaries of State. The amounts to which the claimants would in reality be exposed might be quite substantial and in the light of the history of this matter set out in our judgment visiting on them a consequence in costs would be unjust"

Conclusion: judicial review as a truth-revealing process?

31. Most student textbooks, and not a few judgments, will instruct the reader that judicial review cases are about law not facts - that the search is only for legal truth.

32. *Keyu* tells a different story, one in which the Courts, whilst unwilling to further legal remedy sought, steadfastly refused to be complicit in the suppression of the truth which the Respondents had so effectively perpetrated for six decades. This was a judicial review claim that prompted every judge who heard it to exonerate the victims of the killings, the majority of the Supreme Court to note, in understated terms, that a war crime may well have been committed, and one of their number, Lord Kerr, to make comments that go beyond the findings of many public inquiries into similar incidents. Judicial review could not function as an alternative to the inquiry sought, but proved itself to be sufficiently flexible to reach and record more than anything that had occurred before.

33. Whether there will be state acknowledgement and acceptance of what happened at Batang Kali beyond the judiciary remains to be seen. But the three judgments overwrite six decades of lies with some important and enduring truths.

John Halford
j.halford@bindmans.com

5 October 2016