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Ascertaining the Boundary of Legitimate Judicial Intervention

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Ascertaining the Boundary of Legitimate Judicial Intervention

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-and-

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Introduction and Overview

The purpose of this dissertation will be to examine critically how the judiciary have, so far, approached their enforcement role under Sections 3(1) and 4(2) of the Human Rights Act 1998¹ and what problems and prospects lie ahead; in particular following the extremists who have created a dilemma upon the United Kingdom², and America, which brought in swift laws in an effort to address detention of terrorist.³ In supporting this dissertation, a broad approach will be taken. This broad approach will draw not only on the case law but the constitutional relationship between judiciary and Parliament in settling human rights disputes.

The relationship between how the judiciary decides cases and how they perceive their role within a constitution cannot be underestimated. It cannot be ignored by the legal practitioner, either, and has become a perennial field of study in many jurisdictions, and the implications on practice are immense.

¹ Hereafter the 'HRA'

² The Government, in realising that detaining suspected international terrorists while undertaking the process of arranging deportation, would be incompatible with Article 5(1)(f) have prepared the ground by making a derogation order

³ The policy changes were not limited to the United States, as a large number of countries responded to the threat of terrorism. With terrorist actions around the world, including in Madrid, Bali, Russia, Morocco, and Saudi Arabia. Terrorism politics is truly global.

The judiciary, it will be argued, do not reason to their decisions in a proverbial vacuum. It shall be argued that they are highly influenced by the surrounding constitutional context concerning contentious issues of Parliamentary democracy, equality, separation of powers and so on.

The approach of this dissertation, therefore, is to engage in case analysis and to consider surrounding constitutional issues that come to have a bearing upon judicial adjudication⁴. It will be the purpose of this dissertation to ascertain out of the case law the substantive commitments members of the judiciary make in deciding cases. This will enable a duly considered analysis of the judiciary's enforcement role under Sections 3(1) and 4(2) and what factors are important in determining how they exercise this power.

Importantly the dilemma of terrorism has had a broad impact upon the decision maker and the Government and 'proportionally' have not always been the victor when looking to protect those of who saw the HRA as the corner stone to democracy.

⁴ For instance terrorism laws came under scrutiny both by the UK courts and the European Court of Human Rights, where detention without charge was a violation of the Convention on Human Rights.

In particular in light of the Global threat through terrorism, it will be necessary to examine in great detail⁵ how the Convention on Human Rights;⁶ embraced or otherwise rejected any compromise. In particular the use of Torture has been at the forefront of the investigation in the way that the judiciary has failed in most cases to remedy the obvious violations of the HRA.

We shall look at the newly formed Special Independent Appeals Tribunal,⁷ who it will be ventilated fail to adhere to the Convention in the procedure/s adopted⁸ It shall be argued that the use of 'closed' evidence before the SIAT is in its self a violation of the Convention/s as well as the HRA.

It shall be argued that the workings of the SIAC, in failing to adhere to the common law principles, let alone the HRA has caused concern to those who hold the HRA dearly, which even outraged a Senior Politician as "degradable"⁹. The secrecy deployed by the SIAC does to not lend itself to the spirit of the HRA, yet such deficiencies, almost go unchecked by the

⁵ Critically analysed in Chapter 8.

⁶ Hereafter the Convention

⁷ Hereafter SIAC

⁸ For instance the use of closed evidence and the restriction placed upon the Special Advocate in being unable to take proper and full instructions.

⁹ Mr. Jack Straw MP

judiciary. For completeness consideration will be given to a number of case studies, at the speed in which determinations are made by the SIAT¹⁰

Conversely, this dissertation selectively draws upon the case law of both the European Court of Human Rights¹¹ and domestic courts, domestically, both post and pre HRA cases will be considered and analyzed to ascertain how the judiciary understands their role, precipitated by the statute itself.

On the pan-European level, European Court¹² cases will be analyzed, with particular emphasis on how they have come to characterise rights in question, and the bearing this can have on domestic courts. Of course, the varying judicial approaches need to be put in context, and this dissertation will aim throughout to make this connection clear.

Detailed reference is required to the reasons behind the HRA, its legislative history and how Parliament settled on its key provisions, and again it should be borne in mind that the threats

¹⁰ Chapter 9

¹¹ Hereafter the 'ECtHR'

¹² Discussed in Chapter 4

that society are now faced, were not within the contemplation of the Convention, nor was the global stage for terrorism.

This understanding plays an important part in locating the HRA in a constitutional context embracing many different (and in some cases, diametrically opposed) ideals. Particularly, it will be argued that there is an internal constitutional tension that itself brings to bear on how the judiciary operate under Sections 3(1) and 4(2); which leads to highly divergent and opposed views on determining what human rights is, when they are engaged, when they are breached, and how they are enforced, the latter being of immense importance to those suffering such violations.

However, this dissertation will go further than merely connecting the influence of constitutional context on the case law, and will make some claims as to how the judiciary should be approaching their role under Sections 3(1) and 4(2). This normative aspect of the dissertation, which calls for a new approach embracing greater Parliamentary scrutiny of human rights, is deemed entirely necessary to set new practical guidance on the judiciary's enforcement role.

It is because of the surrounding constitutional context, coupled with the HRA, which has distorted judicial decision making out of a definitive shape. A new approach is essential to provide practical guidance on the vexed enforcement mechanisms under Sections 3(1) and 4(2).

In support of this broad approach, this dissertation will be divided into eleven chapters. Chapter 1, provides an overview, whilst chapter 2, visits the background and takes a historically survey the passage of the HRA and why it was considered necessary, what it sets out to achieve, whom it protects and whom it is enforceable against; given that the statute effectively incorporates the Human Rights and Fundamental Freedoms¹³, time will be spent analysing how the Convention operates, the obligations it places on member states, and how aggrieved parties can seek redress to the European Court.

Moreover, the judicial method of the European Court, as resonant in the case law, will be given some consideration. Particularly, it will be examined; how human rights are characterised – whether they confer a negative or positive¹⁴

¹³ Hereafter the 'Convention'

¹⁴ Discussed in Chapter 1

obligation or both, whether they are absolute or subject to qualification as 'necessary in a democratic society', whether they afford a wide or margin of appreciation. Thereafter, it will be stressed that the success of any human rights regime depends crucially on the strength of its enforcement mechanisms. Further consideration shall be given whether the HRA is a political compromise¹⁵ existing to protect both Parliamentary sovereignty and respect for human rights. The problem of trading this middle ground is epitomized both in Section 3(1) and the subsequent case law. Particularly, it will be argued that there is some difficulty resonant in the case law in restricting what is constructively 'possible' in Section 3(1).

How this uncertainty is open for manipulation will be considered by examining a number of cases and judicial reasoning thereto. It is however noteworthy that despite the intentions and the approaches taken, that the problems now faced with world domination of terrorism and safety of others that despite the intention, a balance will have to [and is] be drawn in balancing the rights of all¹⁶ whilst ensuring that the place of travel is not so restricted by the threat of violence against those the HRA

¹⁵ Considered in Chapter 5

¹⁶ This would be in accordance with the HRA, whilst dealing with the safety of citizens when balanced with the constant threat of terrorism.

was meant to protect. It follows that this was never a feature either in the early fifties and proceeding years. Judicial enforcement will be considered and the uncertainty in perspective – to seek to explain the constitutional context in which the Human Rights Act operates, and why Section 3(1) could reasonably be open to quite intensive interpretation amounting to effective entrenchment of human rights. This point will be supported through the examination of judicial case law where judicial members have adopted broad and narrow perspectives on controversial social problems¹⁷.

Chapter four will then consider the important issue of how human rights are characterised, will aim to demonstrate judicial enforcement under Sections 3(1) and 4(2) is on uncertain ground, so too are the concepts expressed in the Convention. Given this human rights uncertainty, the courts are frequently adjudicating on open textured questions with them articulating what is necessary in a democratic society. Given the need for a certain enforcement mechanism, and taking into account the flimsy nature of human rights jurisprudence, four different models will then be presented. These models will present

¹⁷ For instance the recent case of *YL –v- Birmingham City Council*, where the dilemma remains in the meaning of 'Public Authority'.

different ways in which the judiciary can approach their interpretative obligation, and the purpose here will be to outline a preferred model to guide future enforcements in accordance with Sections 3(1) and 4(2).

Having dealt with the problems faced by the judiciary as well as the dilemma caused in protecting the rights and obligations of the state, it is necessary to consider in chapter 8 whether there is any place for the HRA, and whether Terrorism has now diminished the hope of a codified set of rules which were meant to protect the foundation of a civilized society of which such protection could lead to the withdrawal from the Convention¹⁸, based upon the need to protect, detain and draw a balance in both protecting the rights of the populace whilst maintaining the powers to detain those who may be intent upon causing mass destruction upon those the HRA was meant to protect.

It is upon the checks and balance that should be incorporated in protecting society, upon those wishing to destroy the fabrication of society itself. In essence this raises the issue whether we can have a system that looks to protect the rights of all, whilst failing to allow periods of detention in order to establish

¹⁸ This is permitted on six months Notice to the Secretary-General of the Council of Europe.

cogency of those held in detention? We shall look at the approach of the judiciary in attempting to address the imbalance whilst maintaining the spirit of the HRA.

Having made a case for greater use of Section 4(2) it will then be argued on the practical side in chapter 10 that the development of a Human Rights Commission¹⁹ would improve human rights law by enabling a finer textured debate and deliberation on what human rights actually consist of, thus bringing a greater understand to the conceptual problems that may have arisen.

The commission, it will be argued, could compliment greater Parliamentary debate on human rights, and how legislation should be drafted so as to be Convention compatible. Indeed this shall be the remit for the new Commission, and therefore close examination shall be focused upon in ascertaining its value and worth. Final deliberations will be left to Fairness and Freedom, from the final report of the equalities review²⁰

¹⁹ Coming into force in October 2007

²⁰ The Final Report of the Equalities Review

CHAPTER 1

HUMAN RIGHTS BACKGROUND AND CONTEXT

The European Convention on Human Rights (hereafter “the Convention”) treaties passed by the Council of Europe²¹ in an effort to stop any reoccurrence of the atrocities and acts of cruelty ever happening again following the Second World War. Of course the aftermath was immense and the need to protect ones rights had never been at the forefront as this period of time in history.

The Convention was heavily influenced by British values. The debate over the Convention was British inspired. The drafting of the Convention was British led. The values entrenched in the Convention were British through and through. The Convention itself was ratified first by Britain. We exported our values and our rights to Europe. And in the HRA, for the first time brought them home to Britain, and therefore Human rights are British rights.

The HRA sets out a framework of common standards by which we expect to be treated. It represents the freedoms, which a

²¹ Which was a group of Nations invited by Sir Winston Churchill, following the Second World War

pluralist society accepts - freedom of speech, freedom of thought, freedom to have a private life, freedom from death, from unfair imprisonment, from degrading or inhuman treatment or torture.

Many myths have developed about what the HRA does, and the nonsense decisions it causes. Myths which damage public confidence in the HRA and which can cause decision makers to forget their common sense²²

Of course terrorism was not a focal point when the treaties were passed and as we shall see below, that the courts along with the Government have found great difficulty in balancing one person's rights against another, when contrasted with the need to protect against the atrocities, such as 9/11, a period thereafter which experienced legislative changes in the shortness of time, and never experienced before only during times of hostilities.

Such changes were never envisaged during the pre-ratification of the Convention, and yet the legislators in those early years, could have never envisaged the self-destruction of minority parties, prepared to cause maximum damage upon society,

²² Lord Faulkner; addressing the National Association of Head Teachers Annual Conference 2007

which remains subject to political debate on an almost weekly basis.

The fundamental responsibility of the state to protect its citizens against terrorism should not in itself pose a problem as the states should be able to take appropriate steps²³ to take appropriate action to protect the safety of its citizens in the balancing exercise and therefore will not offend against some rights which of course are absolute whatever the circumstances²⁴ As we shall see although the courts are ready to apply proportionality²⁵, and this can only be applied to achieve a legitimate aim.

A New Constitutional Era

On 14th May 1997, the Labour Government announced in the Queen's Speech that it intended to effectively incorporate into domestic law Convention Rights. It then set out its proposals for incorporation of the Convention in 1997 in a White Paper, Rights Brought Home. The Human Rights Bill, described as what was probably the greatest change in legislative history: The

²³ Arising from Article 2 of the Convention itself.

²⁴ For instance Article 3, prohibition of torture and see *Z -v- United Kingdom* (2001) failure to protect children from abuse and neglect over a 4 year period.

²⁵ Although proportionality does not appear anywhere in the text of the Convention.

language of the Articles, within the Convention is [was] so embracing that one MP commented...

"It is language which echoes right down the corridors of history. It goes deep into our history and as far back as Magna Carta"²⁶

The Human Rights Act came into force on 2nd October 2000 and effectively incorporated²⁷ into the United Kingdom (hereafter "the UK") law certain rights and freedoms set out within the body of the Convention. The HRA covers England, Wales, Scotland and Northern Ireland.

From the outset this Convention is a binding international agreement that the UK assisted to draft and has sought to comply with for over half a century²⁸. The Convention enshrines fundamental civil and political rights; however until the HRA it did not form or was incorporated as part of the UK law²⁹.

²⁶ (Hansard, 6 February 1987, col.1224). Sir Edward Gardner MP QC, commented on the language of the Articles in the Convention

²⁷ This has not been fully incorporated because Article 13 on the requirement of an effective remedy is not included in the statutory scheme.

²⁸ Ratified in March 1951 and entered into force on 3 September of that year it has now been ratified by all forty-one States of the Council of Europe.

²⁹ Rights Brought Home: The Human Rights Bill @ Para 1.10 CM 3782

Human Rights Enshrined in Protocols

The Convention³⁰ outlines a broad range of rights available to state citizens that are enforceable against the government. For example, Article 2 provides for the right to life. Article 3 protects from torture and inhumane or degrading treatment or punishment. Article 4 protects from slavery and forced or compulsory Labour. Article 6 provides the right for a fair trial. Traditional ideas of civil liberties are also enshrined. Article 9 provides for freedom of thought, conscience and religion, Article 10 for freedom and expression and Article 11 for freedom of association and assembly.

There are also numerous protocols that member-states signed subsequently to the Convention. For completeness Section 1, of the Convention (Articles 1-18) sets out the rights and freedoms of individuals under the Convention, now supplemented by several Protocols³¹ providing further rights, with further Protocols dealing merely with procedural and organisational matters.

³⁰ Convention rights" means the rights and fundamental freedoms set out in: (a) Articles 2 to 12 and 14 of the Convention, (b) Articles 1 to 3 of the First Protocol, and (c) Articles 1 and 2 of the Sixth Protocol, as read with Articles 16 to 18 of the Convention

³¹ A protocol is a later addition to the Convention, so as to be more flexible and clear. For instance, Article 1 of Protocol 13; abolition of the death penalty.

These cover, for example, matters such as right to property (article 1), the right to education (article 2), the right to free and fair elections, the abolition of the death penalty in peacetime (articles 1 and 2 of the sixth protocol), restrictions on political activity of aliens (article 16) and prohibition of abuse of rights (article 17).

These rights are known as Convention rights and have a domestic impact on areas of law such as crime, family, housing, employment and education. By Article 1 of the Convention, countries who have signed up to the Convention must secure the above rights for everyone in their jurisdiction and individuals must also have an effective remedy to protect those rights in the country's courts³² without the need to go to the ECtHR³³.

Characterization of human rights

Of great importance is how the human rights in question are characterised. The strength of particular human rights depends upon the extent to which member states must ensure compliance. Whether member states can depart from human

³² Unlike post HRA, when one need to make an application direct to the European Court

³³ Hereafter referred to as the European Court

rights depends on whether the right in question provides for a derogation or qualification. Under Article 15, member states can derogate from the Convention where this is necessary for national security³⁴.

Further, many human rights are subject to qualifications. These rights are defined in two stages, the first provides the right and the second defines the permissible qualifications to that right.

This enables a member state to argue that the abridgment of a human right is necessary, for example, for quelling a riot or insurrection, public safety, economic-well being, and the protection of health or morals. Qualifications of this type are to be found, for example in Article 2 on the right to life, Articles 8 on privacy and 10 on freedom of expression. This list is by no means exhaustive, but illustrative of the manner in which rights can be subject to qualification to take into account wider social factors.

³⁴ The exceptions to this are Article 3, 4(1) and 7.

When looking to the qualifications, the European Court will take into account that the Convention is a 'living instrument'³⁵. Further, there is a need for proportionality that requires the member state doing no more than is necessary in order to achieve a result, which is itself lawful and reasonable. In essence there must be a reasonable relationship between the means used and the end result.

However, Articles 3, 4, 6 and 7 have no such qualifications. They are absolute rights where the primary consideration for the European Court is establishing whether the right has been engaged or breached, rather than arguments for the Respondent government that the Article in question should not justifiably apply.

Another important way to characterize the scope of human rights is in terms of the duty they place upon member states. This duty can be either 'negative' or 'positive', or even both³⁶. Negative rights involve the classic examples of 'freedom from' torture³⁷, or 'freedom to' express and form political associations.

³⁵ A term employed in *Salmouni v France* [2000] 29 EHRR @ 403, and subsequently as the basis for an argument extending privacy rights to environmental rights in the lower chamber decision in *Hatton v UK*.

³⁶ This distinction may be considered crude and characterised, and it is recognised that in many scenarios the distinction collapses, but for the purposes of this introduction into human rights law, it will suffice.

³⁷ This is a good example of an 'absolute' rights

The member state is expected to refrain from activity that would run contrary to these rights. Positive rights, on the other hand, are a lot more problematic in that they require the member state to be proactive in not only protecting the rights, but also securing them. *Osman v UK*³⁸ tested the limits of this positive obligation, where the European Court found that the UK government failed to provide adequate protection to murdered parents after receiving repeated information about the dangerousness of the murderer.

The European Court described this case as an extreme example of police failure, and therefore perhaps not applicable where the consequence of their inaction was not so obvious.

This distinction between 'positive' and 'negative' rights will be returned to in Chapter 4 when discussing how desirable it is for courts to be adjudicating on these matters. In the meanwhile suffice to say this is a judicial device to establish the extent of a member state's duty under the Convention.

³⁸ *Osman-v-UK* (1998) 29 EHRR 245

Member State Obligation

The role of the European Court will be to determine whether the member state has complied with the terms of the Convention, and the member state is constructed to include all branches of government³⁹.

The UK government, too, have created executive and judicial provisions with regard to the Convention and human rights generally. By Section 2 of the Human Rights Act, all national courts and tribunals must take into account the case law of the European Court. Section 6 binds public authorities⁴⁰ from government departments and courts to functional public bodies running nursing and residential homes.

Section 6⁴¹ therefore adds a new head of review – human rights illegality - to the traditional approach of illegality, irrationality and procedural impropriety.⁴²

³⁹ For example, in *Price v UK* (2002) 34 EHRR @ 53; the European Court stated that both the sentencing judge and the prison service (both the executive and judicial branches) were at fault in incarcerating disabled women without taking her disability into consideration.

⁴⁰ That is pure public authorities or bodies undertaking a function of a public nature. See Section 6.

⁴¹ The meaning of public authority has caused substantial problems and subjected to debates by the Lords see Seventh Report of Session 2003–04– HL Paper 39 HC 382

⁴² See: *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* (1948) 1 K.B. 223, 229, Lord Greene M.R. pointed out that different grounds of review "run into one another." A modern commentator has demonstrated the correctness of the proposition that grounds of judicial review have blurred edges and tend to overlap with comprehensive reference. See Fordham, *Judicial Review Handbook*, 2nd Ed, pp. 514-521.

A point arises to the extent to which the HRA has horizontal effect that is, enabling individuals to bring claims against other individuals⁴³.

The courts have hesitantly developed limited horizontal effect by applying the HRA to the common law⁴⁴.

Locus Standi

In 1966 the UK accepted that an individual person⁴⁵, and not merely another State, could bring a case against the UK to the European Court. Successive administrations in the UK have maintained these arrangements⁴⁶.

From the outset it should be noted that a finding by the ECtHR of a violation of a Convention right does not have the effect of automatically changing UK law and it shall canvassed that any remedy is a matter for the UK government and Parliament alone to amend or otherwise deal with the offending legislation.

⁴³ Douglas and Others v. Hello! Ltd. [2001] Q.B. 967; Campbell v MGN Ltd [2004] UKHL 22; Venables and Another v News Group Newspapers and Others 8 January 2001, [2001] 9 BHRC 587, (2001) — Human Rights Act 1998, s 12, Sch 1, arts 2, 3, 8 10

⁴⁴ As in Douglas v Hello Ltd, [2001] Q.B. @ 967. The argument goes as follows – the HRA requires domestic law to be Convention compliant, so therefore in the context of privacy, the common law right of 'breach of confidence' was upgraded to encompass Article 8 rights. By introducing Article 8 tangentially through the common law, individuals can in limited circumstance bring a claim against other individuals.

⁴⁵ Person includes Companies, under the HRA, as without this it would infringe Articles 6, & 14 respectively

⁴⁶ White paper on The Human Rights Bill CM 3782

However the UK has agreed to abide by the decisions of the Court⁴⁷.

It follows that, in cases where a violation has been found, the State concerned must ensure that any deficiency in its internal laws is rectified⁴⁸ so as to bring them into line with the Convention⁴⁹. In essence: -

"The incorporation of the Convention on Human Rights into domestic law is perhaps the most significant element in the government's programme of constitutional reform. It will give birth to a major new jurisprudence, borne out of challenges brought by lawyers; and over time, a culture of respect for human rights will permeate the whole of our society"⁵⁰.

Proportionality has throughout the decades placed a part in common law and therefore it is useful to visit the former decisions in light of the procedure now adopted in ensuring compatibility with the HRA. The cases below will demonstrate the courts in interpretation and or attempting to strike a balance between policy, decisions have maintained a balance of natural justice, involving the rights of prisoners, balanced with

⁴⁷ Like all other States who are parties to the Convention.

⁴⁸ Subject to certain caveat's discussed below.

⁴⁹ Rights Brought Home: The Human Rights Bill @ Para 1.10

⁵⁰ Lord Chancellor Lord Irvine of Lairg addressed the implication of the Human Rights Act In his Keynote Address, at the Annual Conference of the Bar 9th October 1999.

proportionality, which gave way to the Convention on Human Rights, following a number of decisions from the ECtHR.

A thread throughout is to protect prisoners from disproportionate policies affecting those rights, rather than to adhere to a blanket 'policy', which on the face of it may violate ones human rights.

The courts have focussed substantially in striking out offensive policies, which fall foul of the HRA, whilst attempting to strike a balance between security and the need to protect those at risk through abusive policies as touched upon below.

Unsurprisingly the courts have been drawn to the rights of prisoners, who at one stage were thought to have very few given their incarceration within the prison system. It is upon this premises that we shall focus below upon proportionality, and striking a fair balance.

Whilst throughout this dissertation we shall focus upon the rights under the HRA, it may be useful for elucidation to consider a number of propositions concerning rights, and these can be expressed as 'absolute' as will appear throughout along with 'limited' and 'qualified' rights.

In summary not all rights are the same and some call upon adhering to some more than others, providing qualification is given for any departure from those rights⁵¹

In essence rights and any departure thereto is solely dependant upon the right/s in question, that the HRA looked to protect. Terrorism for instance has featured a great deal in recent times, and the various decisions surrounding incarceration of the suspects for substantial periods of time without charge or trial has arguably run foul of the HRA.

Whilst we shall focus upon the problems encountered in great detail within the body of this dissertation, for now we shall visit three types of rights outlined above. In essence not all Convention rights operate in the same way. It is now useful to look at the ramifications of 'absolute', 'limited' or 'qualified' in nature. In chapter 5 we shall demonstrate the problems of derogation.

In the case of absolute rights; States cannot opt out of these rights under 'any' circumstances; not even during war or public emergency. There cannot be any justification for interference

⁵¹ For instance abolition of the death penalty is not subject to any qualification to depart from it, as it is absolute, however self defence of a police officer may be under Article 2.

with these rights and they cannot be balanced against 'public' interest.

Such rights are prohibition of torture and inhumane or degrading treatment⁵² and the prohibition of slavery⁵³ Limited rights; are rights that are not balanced against the rights others, but which are limited under the explicit and finite circumstances. An example is the right to liberty and security⁵⁴

Qualified rights; are rights that can be interfered with in order to protect the rights of other people or the public interest. An inference with qualified rights may be justified where the state can show that the restriction is 'lawful' in accordance with the law, which must be established, accessible and sufficiently clear.

With regard to a legitimate aim, the restriction must pursue a permissible aim as set out in the relevant Article. Public authorities may only rely on the expressly stated legitimate aim when restricting the right in question.

⁵² Article 3.

⁵³ Article 4(1)

⁵⁴ Article 5.

Some of the protected interests are national security⁵⁵ the protection of health and morals, the prevention of crime and the protection of the rights of others.

In essence this raises the issue whether the restriction is necessary in a democratic society. The answer is simply for a restriction to be necessary in a democratic society there must be a rational between the legitimate aim to be achieved and the policy/ decision, which restricts person's rights.

Perhaps a good example of this is simply that if the restriction would make no difference in achieving the aim, then the restriction would be unlawful. In cases, which fall outside this ambit, then a policy/decision should be no more restrictive than it needs to be in order to achieve its objective, otherwise known as the 'proportionality'.

This means that the exercise of the rights guaranteed under the Convention and their protection by the courts has to be done in a way that is proportional to the needs of society. Limiting the rights may be permitted only if it is genuinely done to meet an

⁵⁵ Of which we shall see has come under substantial pressure in attempts to deal with detainees under the Terrorism Act 2000.

objective which is of general interest recognised by the European Union or the need to protect the rights and freedoms of others. What this does is offer a defence against the state overriding an individual's rights through disproportionate action.

In essence the use of proportionality raises the issues whether the restriction itself is necessary in a democratic society. To this end the restriction must fulfill a pressing social need and if so must be proportionate to that need.

The principle of proportionality is at the heart of the qualified rights are interpreted, although; the word itself does not appear anywhere, in the text of the Convention.

The principle can perhaps most easily be understood by saying don't use a sledgehammer to crack a nut'. When taking decisions that may affect any of the qualified rights, a public authority must interfere with the right as little as possible, only as far as is necessary to achieve the desired aim.

In essence one must look to inquire what is the restriction being applied and or sought to determine whether the restriction

is proportionate or not. This for example can be carried out by applying the following test: -

- (1) What is the problem that is being addressed by the restriction?
- (2) Will the restriction in fact lead to a reduction in that problem?
- (3) Does a less restrictive alternative exist, and has it been tried?
- (4) Does the restriction involve a blanket policy or does it allow for different cases to be treated differently?
- (5) Has sufficient regard been paid to the rights and interest of those affected?
- (6) Do safeguards exist against error or abuse?
- (7) Does the restriction in questions destroy the very essence of the Convention rights at issue?

It is the above are issues that the judiciary will take into account when considering whether ones rights have been violated.

In the case of R –v- Secretary of State for the Home Department ex parte Daly;⁵⁶ on 31 May 1995 the Home Secretary introduced a new policy ("the policy") governing the searching of cells occupied by convicted and remand prisoners in closed prisons in England and Wales. The policy was expressed in the Security Manual as an instruction to prison governors in these terms⁵⁷: -

"17.69: - Staff must accompany all searches of living accommodation in closed Prisons with a strip search of the resident prisoner.

17.70:- Staff must not allow any prisoner to be present during a search of living accommodation (although this does not apply to accommodation fabric checks).

17.71:- Staff must inform the prisoner as soon as practicable whenever objects or containers are removed from living accommodation for searching, and will be missing from the accommodation on the prisoner's return.

⁵⁶ 2001 UKHL-26

⁵⁷ HM Chief Inspector of Constabulary was at once set up, following an escape from prison of a number of category A prisoners... The report of the inquiry, presented to Parliament in December 1994 (Cm 2741)

17.72:- Subject to paragraph 17.73, staff may normally read legal correspondence only if the Governor has reasonable cause to suspect that their contents endanger prison security, or the safety of others, or are otherwise of a criminal nature. In this case the prisoner involved shall be given the opportunity to be present and informed that their correspondence is to be read.

17.73:- But during a cell search staff must examine legal correspondence thoroughly in the absence of the prisoner. Staff must examine the correspondence only so far as necessary to ensure that it is bona fide correspondence between the prisoner and a legal adviser and does not conceal anything else.

17.74:- When entering cells at other times (e.g. when undertaking accommodation fabric checks) staff must take care not to read legal correspondence belonging to prisoners unless the Governor has decided that the reasonable cause test in 17.72 applies."

The origin and background of the policy

On 9 September 1994 six categories 'A' prisoners, classified as presenting an exceptional risk, escaped from the Special Security Unit at HMP Whitemoor.

An inquiry led by Sir John Woodcock, formerly HM Chief Inspector of Constabulary, was at once set up. The report of the inquiry;⁵⁸ revealed' extensive mismanagement; malpractice at Whitemoor.

The escape had been possible only because prisoners had been able, undetected, to gather a mass of illicit property and equipment.

This in turn had been possible because prisoners' cells and other areas had not been thoroughly searched at frequent but irregular intervals, partly because officers seeking to make such searches had been intimidated and obstructed by prisoners, and partly because relations between officers and prisoners had in some instances become unacceptably familiar so that staff had been manipulated or "conditioned" into being less vigilant than they should have been in security matters.

⁵⁸ Ibid

In its report⁵⁹ the inquiry team made a number of recommendations. One of these was that cells and property should be searched at frequent but irregular intervals. In other words, there was to be no standard or pattern to be established which would put the prisoners on notice.

Following a strip search each prisoner was to be excluded from his cell, during the search, this was to avoid intimidation.

The inquiry team gave no consideration at any stage to legal professional privilege or confidentiality. The policy was introduced to give effect to the inquiry team's recommendation on searching of cells.

The legal background of which this policy was made can best be summarized as follows: -

Any custodial order inevitably curtails the enjoyment, by the person confined, of rights enjoyed by other citizens. He cannot move freely and choose his associates as they are entitled to do. It is indeed an important objective of such an order to curtail such rights, whether to punish him or to protect other members of the public or both.

⁵⁹ Ibid

But the order does not wholly deprive the person confined of all rights enjoyed by other citizens. Some rights, perhaps in an attenuated or qualified form, survive the making of the order, and it may well be that the importance of such surviving rights is enhanced by the loss or partial loss of other rights.

Among the rights which, in part at least, survive are three important rights, closely related but free standing, each of them calling for appropriate legal protection: the right of access to a court; the right of access to legal advice; and the right to communicate confidentially with a legal adviser under the seal of legal professional privilege.

As we shall see below, the UK has fallen short in certain circumstances in comply with the above.

Such rights may be curtailed only by clear and express words, and then only to the extent reasonably necessary to meet the ends, which justify the curtailment. A number of decisions had been made on diverse occasions some at odds with each other.

In R v Board of Visitors of Hull Prison, Ex p St Germain⁶⁰

Shaw LJ stated "*despite the deprivation of his general liberty, a prisoner remains invested with residuary rights appertaining to*

⁶⁰ [1979] QB 42

the nature and conduct of his incarceration . . . An essential characteristic of the right of a subject is that it carries with it a right of recourse to the courts unless some statute decrees otherwise."

In a further case of Raymond v Honey⁶¹ a point arose from the action of a prison governor who blocked a prisoner's application to a court. The House of Lords affirmed,⁶² that "*under English law, a convicted prisoner, in spite of his imprisonment, retains all civil rights which are not taken away expressly or by necessary implication . . .*"

It was held in the above case that Section 47 was held to be quite insufficient to authorise hindrance or interference with so basic a right as that of access to a court. To the extent that rules were made fettering a prisoner's right of access to the courts and in particular his right to institute proceedings in person they were ultra vires.

Further consideration was given in R v Secretary of State for the Home Department, Ex p Anderson⁶³ the prisoner's challenge

⁶¹ [1983] A.C.; 1, at p. 10H.

⁶² At page 10

⁶³ 1984] QB 778

was directed to a standing order which restricted visits by a legal adviser to a prisoner contemplating proceedings concerning his treatment in prison when he had not at the same time made any complaint to the prison authorities internally.

Reiterating the principle that a prisoner remains invested with all civil rights, which are not taken away expressly or by necessary implication, Robert Goff LJ,⁶⁴ held....."*At the forefront of those civil rights is the right of unimpeded access to the courts; and the right of access to a solicitor to obtain advice and assistance with regard to the initiation of civil proceedings is inseparable from the right of access to the courts themselves.*"⁶⁵

His Lordship continued"*As it seems to us, a requirement that an inmate should make . . . a complaint as a prerequisite of his having access to his solicitor, however desirable it may be in the interests of good administration, goes beyond the regulation of the circumstances in which such access may take place, and does indeed constitute an impediment to his right of access to the civil court.*"

⁶⁴ Giving the judgment of the Queen's Bench Divisional Court, said, at p 790

⁶⁵ The standing order in question was held to be ultra vires. At pp 793-794 the court observed:

In Campbell v United Kingdom⁶⁶ issues concerned the compatibility with the European Convention of rule 74(4) of the Prison (Scotland) Rules 1952⁶⁷ which provided that "*every letter to or from a prisoner shall be read by the Governor . . . and it shall be within the discretion of the Governor to stop any letter if he considers that the contents are objectionable.*"⁶⁸ The European Court held that the interference with the applicant's correspondence violated article 8 of the Convention⁶⁹, the court said....."*Admittedly, as the Government pointed out, the borderline between mail concerning contemplated litigation and that of a general nature is especially difficult to draw and correspondence with a lawyer may concern matters, which have little or nothing to do with litigation*".

Nevertheless, the Court saw no reason to distinguish between the different categories of correspondence with lawyers which, whatever their purpose, concerned matters of a private and confidential character. In principle, such letters are privileged under Article 8.

In essence prison authorities may open a letter from a lawyer to a prisoner when they have 'reasonable' cause to believe that it

⁶⁶ (1992) 15 EHRR 137

⁶⁷ (SI 1952/565)

⁶⁸ The Court of Session had earlier upheld this rule as valid: *Leech v Secretary of State for Scotland*, 1991 SLT 910.

⁶⁹ At p 161, Para 48 of its judgment

contains an illicit enclosure which the normal means of detection have failed to disclose.

The letter should, however, only be opened and should not be read. Suitable guarantees preventing the reading of the letter should be provided, e.g. opening the letter in the presence of the prisoner.

The reading of a prisoner's mail to and from a lawyer, on the other hand, should only be *permitted* in *exceptional* circumstances when the authorities have *reasonable cause* to believe that the privilege is being abused in that the contents of the letter endanger prison security or the safety of others or are otherwise of a criminal nature.

What may be regarded as 'reasonable cause' will depend on all the *circumstances* but it presupposes the existence of facts or information which would satisfy an objective observer that the privileged channel of communication was being abused."

The above decision was later applied in R v Secretary of State for the Home Department, Ex p Leech;⁷⁰ which concerned rule

⁷⁰ [1994] QB 198.

33(3) of the Prison Rules 1964⁷¹, which were in terms similar, although not identical, to rule 74(4) of the Scottish Rules. The decision is important for several reasons.

First, it re-stated the principles that every citizen has a right of unimpeded access to the court, that a prisoner's unimpeded access to a solicitor for the purpose of receiving advice and assistance in connection with a possible institution of proceedings in the courts forms an inseparable part of the right of access to the courts themselves and that section 47(1) of the 1952 Act which did not authorise the making of any rule which created an impediment to the free flow of communication between a solicitor and a client who contemplated legal proceedings.

Legal *professional privilege* was described as an *important auxiliary principle* serving to buttress the cardinal principles of unimpeded access to the court and to legal advice.

Secondly, it was accepted that section 47(1) did not *expressly* authorise the making of a rule such as rule 33(3), and the court observed,⁷² that a fundamental right such as the common law right to legal *professional privilege* would very rarely be held to

⁷¹ (SI 1964/388)

⁷² at p 212,

be abolished by necessary implication; however the court accepted that section 47(1) should be interpreted as conferring power to make rules for the purpose of preventing escapes from prison, maintaining order in prisons, detecting and preventing offences against the criminal law and safeguarding national security.

Rules could properly be made to permit the examining and reading of correspondence passing between a prisoner and his solicitor in order to ascertain whether it was in truth bona fide correspondence and to permit the stopping of letters which failed such scrutiny. The crucial question was whether rule 33(3) was drawn in terms wider than necessary to meet the legitimate objectives of such a rule⁷³.

"The question therefore is whether there is a self-evident and pressing need for an unrestricted power to read letters between a prisoner and a solicitor and a power to stop such letters on the ground of prolixity and objectionability."

The court concluded that there was nothing, which established objectively that there was a need in the interests of the proper regulation of prisons for a rule of the width of rule 33(3).

⁷³ As it was put, at p 212:

While section 47(1) of the 1952 Act by necessary implication authorised some screening of correspondence between a prisoner and a solicitor, such intrusion had to be the minimum necessary to ensure that the correspondence was in truth bona fide legal correspondence: since rule 33(3) created a substantial impediment to exercise by the prisoner of his right to communicate in confidence with his solicitor the rule was drawn in terms which were needed.

In the light of the decisions in Campbell and Leech, a new prison rule was made, now rule 39 of the Prison Rules 1999⁷⁴, which provides, so far as material:

(1) A prisoner may correspond with his legal adviser and any court and such correspondence may only be opened, read or stopped by the governor in accordance with the provisions of this rule.

(2) Correspondence to which this rule applies may be opened if the governor has *reasonable cause* to believe that it contains an illicit enclosure and any such

⁷⁴ (SI 1999/728).

enclosures shall be dealt with in accordance with the other provision of these Rules.

(3) Correspondence to which this rule applies may be opened, read and stopped if the governor has reasonable cause to believe its contents endanger prison security or the safety of others or are otherwise of a criminal nature.

(4) A prisoner shall be given the opportunity to be present when any correspondence to which this rule applies is opened and shall be informed if it or any enclosure is to be read or stopped."

This rule, is now accepted, applies only to correspondence in transit from prisoner to solicitor or vice versa⁷⁵. The references to opening and stopping make plain that it has no application to legal correspondence or copy correspondence received or made by a prisoner and kept by him in his cell.

Moreover the Court of Appeal decision in Leech was endorsed and approved by the House of Lords in R v Secretary of State for the Home Department, Ex p

⁷⁵ Thus alleviating the excuse say through a cell search of which the prisoner should be present discussed below

Simms,⁷⁶ which arose from a prohibition on visits to serving prisoners by journalists seeking to investigate whether the prisoners had, as they claimed, been wrongly convicted, save on terms which precluded the journalists from making professional use of the material obtained during such visits.

The House considered whether the Home Secretary's evidence showed a pressing need for a measure, which restricted prisoners' attempts to gain access to justice, and found none.

The more substantial the interference with fundamental rights, the more the court would require by way of justification before it could be satisfied that the interference was reasonable in a public law sense.

In this as in other cases there was applied the principle succinctly stated by Lord Browne-Wilkinson in R v Secretary of State for the Home Department, ex parte Pierson⁷⁷

⁷⁶ 2000] 2 AC 115

⁷⁷ [1998] AC 539, 575:

The House in R –v- Secretary of State for the Home Department ex parte Daly⁷⁸ Stated....."*From these authorities I think the following proposition is established. A power conferred by Parliament in general terms is not to be taken to authorise the doing of acts by the donee of the power which adversely affect the legal rights of the citizen or the basic principles on which the law of the United Kingdom is based unless the statute conferring the power makes it clear that such was the intention of Parliament"*

The Lords then continued... "*It is then necessary to ask whether, to the extent that it infringes a prisoner's common law right to privilege, the policy can be justified as a necessary and proper response to the acknowledged need to maintain security, order and discipline in prisons and to prevent crime'*."

Mr. Daly's challenge at this point was directed to the blanket nature of the policy, applicable as it was to all prisoners of whatever category in all closed prisons in England and Wales, irrespective of a prisoner's past or

⁷⁸ Ibis Para 40

present conduct and of any operational emergency or urgent intelligence. The Home Secretary's justification rests firmly on the points already mentioned: the risk of intimidation, the risk that staff may be conditioned by prisoners to relax security and the danger of disclosing searching methods".

The Lords did not agree with the proposition in which Lord Steyn...held "[I] *have reached the conclusions so far expressed on an orthodox application of common law principles derived from the authorities and an orthodox domestic approach to judicial review*". But the same result is achieved by reliance on the European Convention. Article 8.1 which gives Mr. Daly a right to respect for his correspondence".

While interference with that right by a public authority may be permitted only in accordance with the law and necessary in a democratic society in the interests of national security, public safety, the prevention of disorder or crime or for protection of the rights and freedoms of others, the policy interferes with Mr. Daly's exercise of

his right under article 8.1 to an extent much greater than necessity requires.

In this instance, therefore, the common law and the Convention yield the same result, this need not always be the case.

Conversely in Smith and Grady v United Kingdom⁷⁹ the European Court held that the orthodox domestic approach of the English courts had not given the applicants an effective remedy for the breach of their rights under article 8 of the Convention because the threshold of review had been set too high.

Moreover following the incorporation of the Convention by the HRA and the bringing of that Act fully into force, domestic courts must themselves form a judgment whether a Convention right has been breached (in conducting such inquiry as is necessary to form that judgment) and, so far as permissible under the HRA, grant an effective remedy.

⁷⁹ 1999) 29 EHRR 493,

Finally on this point it is interesting to note that the Prisons Ombudsman carried out a full inquiry which was reported in November 1996. In his report the Ombudsman commented:

"I entirely support the main thrust of Woodcock's recommendations regarding cell searching. It is apparent that prisoner intimidation was precluding the effective searching of prisoner accommodation in many establishments, and that this searching, which is essential for the safety and security of both staff and prisoners, is carried out far more effectively when the prisoner is absent".

This procedure has also been assisted by the introduction of the volumetric control of prisoners' in-possession property.

However, the legal privilege which must protect the confidentiality of correspondence between a solicitor and his client is too important to be sacrificed for the sake of expediency; whilst it would undoubtedly be easier for staff to search a prisoner's legal documents in his

absence; this allows legal privilege to be compromised to an unacceptable degree... *"It is clear that, in complaining about the Prison Service's cell searching policy; [the prisoner] has raised a matter which has far-reaching consequences. I believe that his complaint is a valid one and that, in searching prisoners' legal papers in their absence, the Prison Service is compromising the legal privilege, which ensures that correspondence between a solicitor and his client will remain confidential. I therefore uphold [the prisoner's] complaint. Security Group has previously drafted a revised version of section 68.3 of the Security Manual".*

"This revised version allowed the prisoner to remain in the cell while his legal documents are being searched, after which the documents are sealed in a box or bag, thus avoiding any possible compromise of legal privilege. "I consider that the Security Manual should be amended to incorporate this revised method of cell searching."

The Ombudsman's investigations revealed that, following a complaint by a prisoner confined in HMP Full Sutton, a procedure had been developed in that prison to meet the

wishes of prisoners who objected to the searching of their legal documents in their absence. The procedure was simply ... *"If the prisoner objects to his legal documents being searched in his absence DST⁸⁰ staff place the documents in a bag, seal the bag using a numbered reception seal and give the prisoner a copy of the seal number. The bag is left in the prisoner's cell while the search is being carried out. When the prisoner returns, he checks the seal on the bag to ensure that it has not been tampered with and the documents are searched in his presence."*

In essence the importance of 'proportionality' is the thread throughout the above illustrations within the body of the case law.

The contours of the principle of proportionality are familiar, as in de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing⁸¹ the Privy Council adopted a three-stage test. Lord Clyde observed;⁸² that in determining whether a limitation is

⁸⁰ [Dedicated search team]

⁸¹ [1999] 1 AC 69

⁸² , at p 80

arbitrary⁸³ or excessive the court should ask itself...

"Whether:- *"the legislative objective is sufficiently important to justify limiting a fundamental right; the measures designed to meet the legislative objective are rationally connected to it; -and- the means used to impair the right or freedom are no more than is necessary to accomplish the objective."*

Clearly, these criteria are more precise and more sophisticated than the traditional grounds of review. What is the difference for the disposal of concrete cases?

Academic public lawyers have in remarkably similar terms elucidated the difference between the traditional grounds of review and the proportionality approach: see for instance Professor Jeffrey Jowell QC, "Beyond the Rule of Law: Towards Constitutional Judicial Review"⁸⁴; Craig, *Administrative Law*⁸⁵ Professor David Feldman, "Proportionality and the Human Rights Act 1998", essay in *The Principle of Proportionality in the Laws of Europe*⁸⁶

⁸³ (by an act, rule or decision)

⁸⁴ [2000] PL 671

⁸⁵ 4th ed (1999), 561-563;

⁸⁶ (1999), pp 117, 127 et seq.

The starting point is therefore to address the issue whether there is an overlap between the traditional grounds of review and the approach of 'proportionality'.

Most cases would be decided in the same way whichever approach is adopted. But the intensity of review is somewhat greater under the proportionality approach.

Making due allowance for important structural differences between various Convention rights, which I do not propose to discuss, a few generalisations are perhaps permissible.

I would mention three concrete differences without suggesting that my statement is exhaustive.

First, the doctrine of proportionality⁸⁷ may require the reviewing court to *assess* the balance, which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions.

Secondly, the '*proportionality*' test may go further than the traditional grounds of review inasmuch as it may

⁸⁷ Ibid

require attention to be directed to the relative weight accorded to interests and considerations.

Thirdly, even the heightened scrutiny test developed in R v Ministry of Defence; Ex p Smith [1996]⁸⁸ is not necessarily appropriate to the protection of human rights. It will be recalled that in Smith the Court of Appeal reluctantly felt compelled to reject a limitation on homosexuals in the army.

The challenge based on article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms⁸⁹ foundered on the threshold required even by the anxious scrutiny test.

The European Court of Human Rights came to the opposite conclusion: Smith and Grady v United Kingdom⁹⁰. The court concluded, ⁹¹..."*the threshold at which the High Court and the Court of Appeal could find the Ministry of Defence policy irrational was placed so high that it effectively excluded any consideration by the*

⁸⁸ QB 517, 554

⁸⁹ (The right to respect for private and family life)

⁹⁰ (1999) 29 EHRR 493

⁹¹ at p 543, Para 138:

domestic courts of the question of whether the interference with the applicants' rights answered a pressing social need or was proportionate to the national security and public order aims pursued, principles which lie at the heart of the court's analysis of complaints under article 8 of the Convention."

In other words, the intensity of the review, in similar cases, is guaranteed by the twin requirements that the limitation of the right was necessary in a democratic society, in the sense of meeting a pressing social need, and the question whether the interference was really proportionate to the legitimate aim being pursued.

Chapter 3

Human rights and common law understandings of freedom and liberty

An important consideration of how the judiciary receive the HRA is how they themselves perceive their common law role with regards to freedom and liberty.

For instance over the years there has been a birth of a specialist administrative Court Office, of the High Court dealing with applications by way of judicial review which very often dealt with procedure irregularities along with a failure to carry out a statutory duty.

Remedies such mandamus and certiorari⁹², are a main daily feature within the Administrative courts. A regular feature is immigration, housing, and such other matters that call for the courts to consider cases in finite detail including statutory interpretation, rights and remedies.

⁹² Now Mandatory Order and quashing Order

In essence it is the role of the judiciary experienced in considering whether a government or local authority have carried out their obligation and or statutory duty within the terms of the statutory provisions being called in to question. Such rights, and obligation are a feature within the HRA, and the courts over the years have been creative when justice required.⁹³

It is from this breed of judiciary that are now deliberating in the Court of Appeal and the House of Lords. It is noteworthy that the judiciary in these specialist courts would not substitute the decision, but merely grant or otherwise their deliberations upon the failure or otherwise of the decision reached based upon a 'procedural' irregularity⁹⁴

It will however be seen that the judiciary very often apply the same test to the HRA as they did and do when hearing matters outlined above. Consideration of pre and post Act, will demonstrate that the approach is not necessarily compatible with the HRA⁹⁵.

⁹³ ;Ridge v Baldwin [1964] AC. @ 40,

⁹⁴ For instance the procedure adopted may have offended against the notion of Natural Justice, or the fettering of discretion to name a few, as in the case of Ridge –v- Baldwin Ibid.

⁹⁵ Discussed below.

In contrast the HRA instils within the UK a new approach both to be taken in the procedure to be adopted in both civil and criminal cases⁹⁶. Tribunals and committees and other decision and administrative bodies are called upon to adhere to principals of natural justice prevails both against procedure and bias⁹⁷.

A right to a fair trial is a feature within the HRA; some would say such a right is a landmark itself; however this has been built within the body of our Common Law, upon the premises of 'fair play' and justice⁹⁸.

Applicants faced with appealing decisions involving housing benefits, and going before the Housing Benefit Review Board, were often left in doubt as to fairness of the procedure and decision making body, as those presenting the authorities case was employees of the members sitting in judgment.

Conversely the same system applied to many Tribunals and Committees who sat to hear complaints against

⁹⁶ Article 6 HRA for instance

⁹⁷ *Bryan v UK* 21 EHRR @ 342, Held a developer could challenge an enforcement notice as a breach of Article 6. "In the context of planning appeals the very existence of this power available to the executive, whose own policies may be in issue, is enough to deprive the inspector of the requisite appearance of independence, notwithstanding the limited exercise of the power in practice and irrespective of whether its exercise was or could have been in issue in that case

⁹⁸ *Ridge -v- Baldwin*. Ibis

refusal of a school place for their child, only to find that the make up of the Committee included a council member, who may be best placed of fielding his council's position, by finding that parents objecting to an allocated school⁹⁹ upon the ground/s that the school so allocated fails to meet that academic excellence, is in itself underpinning the council's position on education¹⁰⁰

This not to say that the administration was tainted, however to those appealing such decisions would leave the Committee room pondering whether any decision may be tainted,¹⁰¹ as the councillor/s reminded the parents that like schools; were available within the catchment area,¹⁰² and effectively they should not be so judgemental.

Of course it was unwise to decry the allocated school as this would often lead to refusal of the appeal and of course the parents appealing their preferred school would only want to feel that their case had been decided

⁹⁹ Under the Education Act.

¹⁰⁰ This was a constant complaint of many parents that the writer acted for, when appearing before the Committee of the LEA.

¹⁰¹ R –v- Lancashire County Council ex parte R, was a case in which the education authority had put in place a restriction on a popular school who could accommodate more children in the school but had put the 'policy' in place to fill under achieving schools within the area.

¹⁰² This is within the terms of the Education Act 1980 (as amended) when allocating schools.

upon its merits; rather than a 'policy' decision which was merely being upheld by the appeal committee.

Fair play and adherence¹⁰³ was the main requirement in such circumstances and therefore the judiciary are reminded of the above principal¹⁰⁴ for all within the context of the rules that they have to administer.

It follows therefore that the courts themselves will have to adopt a new approach [and many have] and aspire in considering the matters before them.

Article 6 relates entirely to procedure and applies wherever there is a determination of person's civil rights. In, Condon v The United Kingdom the Court of Appeal considered cases on appeal, the ECtHR held that the Court of Appeal; in merely considering the safety of the applicants' conviction was in breach of their fundamental rights within the HRA¹⁰⁵.

¹⁰³ To fair play and Natural Justice.

¹⁰⁴ The civil procedure rules in part one tells judges that they have got to deal with cases justly and that goes on to say that not only must they try and get the right result they must also ensure that there is a level playing ground, that they are dealt with equally.

¹⁰⁵ Condon v. The United Kingdom. Application. No. 35718/97. Judgment given at Strasbourg, May 2, 2000

The "Court of Appeal was concerned with the safety of the applicants¹⁰⁶ conviction, rather than had he received a fair trial....

The question whether or not the rights...guaranteed to an accused under Article 6 of the Convention was secured cannot be assimilated to a finding that his conviction was safe....¹⁰⁷"

The decision was later followed and endorsed by the Court of Appeal, Lord Woolf C.J: ... *"It would be unfortunate if the approach of the European Court of Human Rights and the approach of the Court of Appeal were to differ. Section 3 of the Human Rights Act now required all acts of the UK Parliament to be read in a way that was compatible with Convention rights"*¹⁰⁸

Such a task is not easily defined because those seeking remedies may be faced with further ambiguities as those entrusted by Parliament to administer the terms within the body of the HRA, which may be as inconsistent as the issue being challenged.

¹⁰⁶ Classified as 'victims' under the HRA

¹⁰⁷ *Condon v The United Kingdom*. Application No. 35718/97 @ Paragraph 65

¹⁰⁸ *The Times* (London), November 21, [2000]

The creativity of the judiciary at times has interoperated a particular meaning in order to do justice; however justice to one is very often an injustice to another.

It is upon this creativity that has caused inconsistencies within the HRA. This can be demonstrated when consideration is given to the core of the HRA.

In essence the in order to enforce a 'right' the only redress under section 6 of the HRA is against a public authority, it is upon this premises that the following chapter will focus upon. It will be seen however a greater dilemma is caused in trying to tackle this task, as many arguments are canvassed in order to catch other elements and bring them into the body of the HRA, to offer greater protection to those relying upon the rights.

Whether such an ambit is necessary is a bone of contention as far as the writer is concerned, and therefore a great deal of analytical exploration is called for to explore other remedies prevalent within other Statutory provisions, available as safeguards.

Chapter 4

Enforcement Uncertainty

Public Authority [the Dilemma]

The meaning of "Public Authority" has caused untold difficulty in ascertaining who or what is a Public Authority in days of contracting out ones duty.

It is somewhat surprising that as the HRA refers throughout to 'Public Authority' the government failed to include any definition within the HRA¹⁰⁹.

It may have been thought that given monumental change over the past thirty years in reorganising government that the HRA should not be narrowly defined¹¹⁰.

It should be noted that Section 6(1) of the HRA states that *"[i] t is unlawful for a public authority to act in a way*

¹⁰⁹ However, @ Para. 2.2 of The Human Rights Bill [Rights Brought Home] Cm No. 3782 a host of definitions are set out therein. One suspects the omission was to allow the judiciary greater flexibility.

¹¹⁰ For example, Contracting Out Act 1994, or arrangements made under Sec 101 of the Local Government Act 1972.

which is incompatible with a Convention right", therefore the concept of a "public authority" is crucial to the reach and effectiveness of the HRA.

"Public authority" has never been adequately defined, but the HRA effectively recognises that there are two different types of public authority – 'core' and 'hybrid' public authorities, although this terminology is not used in the HRA.

A core public authority, such as a local authority or the police, must not act in a way, which is incompatible with a Convention right, unless one of the section 6(2) exemptions applies.¹¹¹

A hybrid public authority is one, which carries out some "functions of a 'public' nature" (s.6 (3) (b)), but is exempted for particular acts if they are private.¹¹²

The meanings given to "functions of a public nature", and to a lesser extent section 6(5)'s "private acts", are the key, to determining the scope of the HRA.

¹¹¹ This is essentially when other primary legislation conflicts with Convention right.

¹¹² (s.6 (5)).

Of course the purpose of the HRA, has so often been said, was to ensure that people whose rights under the Convention had been violated would have an effective domestic remedy in the courts of this Country, as required the Convention¹¹³, and would not have to seek redress in the European Court of Human Rights in Strasbourg.

In the Labour party's consultation paper, Bringing Rights Home¹¹⁴: Labour's Plans to Incorporate the Convention into United Kingdom Law by Jack Straw, stated.....

"We take the view that the central purpose of the ECHR is to protect the individual against the misuse of power by the state". The Convention imposes obligations on states, not individuals, and it cannot be relied upon to bring a case against private persons"...

"For this reason we consider that it should apply only to public authorities - government departments, executive agencies, quangos, local authorities and other public services. An appropriate definition would be included in the new legislation and this might be framed in terms of

¹¹³ by article 13 of

¹¹⁴ December 1996.

bodies performing a public function. We would welcome views on this."

The Government's white paper¹¹⁵, *Rights brought home: the Human Rights Bill* explained....."The definition of what constitutes a public authority is in wide terms. Examples of persons or organisations whose acts or omissions it is intended should be able to be challenged include central government (including executive agencies); local government; the police; immigration officers; prisons; courts and tribunals themselves; and, to the extent that they are exercising public functions, companies responsible for areas of activity which were previously within the public sector, such as privatised utilities." ¹¹⁶

It should also be noted that Home Secretary¹¹⁷, Mr. Jack Straw, at the second reading of the Bill in the House of Commons¹¹⁸ stated..."Under the Convention, the Government are answerable in Strasbourg for any acts or

¹¹⁵ The Government's white paper, *Rights brought home: the Human Rights Bill* (1997) (Cm 3782), explained the resulting clause in the Bill thus:

¹¹⁶ (Para 2.2)

¹¹⁷ As he was then

¹¹⁸ Hansard (HC Debates) 16 February 1998, col 773):

omissions of the state about which an individual has a complaint under the Convention.

The Government has a direct responsibility for core bodies, such as central Government and the police, but they also have a responsibility for other public authorities, in so far as the actions of such authorities impinge upon private individuals".

The House of Lords noted in a recent case addressing the meaning of 'public authority'... "The Bill had to have a definition of a public authority that went at least as wide and took account of the fact that, over the past 20 years, an increasingly large number of private bodies, such as companies or charities, have come to exercise public functions that were previously exercised by public authorities.¹¹⁹ "

Two points emerge clearly from these extracts.¹²⁰ One is that it was envisaged that purely private bodies, which were providing services, which had previously been provided by the state, would be covered.

¹¹⁹ As per Baroness Hale in *YL –v- Birmingham City Council* UKHL 27

¹²⁰ As per Baroness Hale, in *YL* Ibid.

The second is that the Government was anxious that any acts for which the United Kingdom might later be held responsible in Strasbourg would be covered by the domestic remedies. Hence the definition would go 'at least as wide' as that.

Strasbourg case law shows that there are several bases upon which a state may have to take responsibility for the HRA's of a private body.

The state may have delegated or relied upon the private body to fulfill its own obligations under the Convention: as in Van der Musselle v Belgium,¹²¹ in which the provision of legal aid was delegated to the Belgian bar which required young advocates to provide their services pro bono; or, perhaps, in Costello-Roberts v United Kingdom¹²² where the fact that education is itself a Convention right was influential in engaging the state's responsibility for corporal punishment in private schools.

The State may have delegated some other function which is clearly a function of the state to a private body:

¹²¹ (1983) 6 EHRR 163

¹²² (1993) 19 EHRR 112

as in Wóś v Poland¹²³, where the Polish Government delegated to a private body the task of allocating compensation received from the German Government after World War II.

The State may itself have assisted in the violation of Convention rights by a private body: as in Storck v Germany,¹²⁴ where the police had assisted in the illegal detention of a young woman in a private psychiatric hospital by taking her back when she ran away.

Above all, the State has positive obligations under many articles of the Convention to take steps to prevent violations of an individual's human rights.

The above include taking general steps, such as enacting laws to punish and deter such violations: as in X and Y v The Netherlands¹²⁵, where Dutch law did not afford an effective remedy to a mentally disabled girl who had been raped by a relative of the directress of the care home where she lived.

¹²³ (Application No 22860/02) (Unreported) 1 March 2005

¹²⁴ (2005) 43 EHRR 96

¹²⁵ 8 EHRR 235 [1985]

They also include making effective use of the steps which the law provides: as in Z v United Kingdom (2001),¹²⁶ in which a local social services authority did not use its powers to protect children whom they knew to be at risk of serious abuse and neglect.

Positive obligations arise under each of the articles most likely to be invoked by residents in care homes. Article 3 may afford them protection against inhuman and degrading treatment.

Conversely Article 8 may afford protection against intrusions into their privacy, restrictions on their contacts with family and the outside world, and arbitrary removal from their home.

Equally Article 5 may afford protection against deprivation of liberty. Regrettably, examples abound in the literature of care homes where acts, which might well amount to breaches of articles 3 or 8, are commonplace but might not amount to the criminal offence of ill treatment or neglect.¹²⁷

¹²⁶ 34 EHRR 97

¹²⁷ As per Baroness Hale in YL Ibid.

The following example is taken from Jenny Watson,
Something for Everyone¹²⁸:

"The impact of the Human Rights Act" and the need for a Human Rights Co; "An agency worker told us about going into a residential care home for older people at breakfast time. She was instructed to get the residents up and onto their commode. She was then told to feed them breakfast.

When she started to get the residents off their commodes first she was stopped. The routine of the home was that residents ate their breakfast while sitting on the commode and the ordinary men and women who worked there had come to accept this as normal."

The Human Rights Act - Changing Lives¹²⁹ (British Institute of Human Rights)¹³⁰: In an Article it was noted...

"A learning disabled man in a care home became very anxious about bathing after slipping in the bath and injuring himself. Afterwards, in order to reassure him and build his confidence once again, a carer, usually female,

¹²⁸ (2002) (British Institute of Human Rights)

¹²⁹ (2007)

¹³⁰ From Sonya Sceats

would sit in the room with him as he bathed. His female carer's felt uncomfortable with the arrangement".

A discussion of the human rights principle of dignity had served as a 'trigger' for [one carer] and together with co-workers she was able to develop solutions that would both protect the man's dignity, whilst also providing him with the support he needed."

It is interesting to note that knowledge of the HRA and the dignities of others were at the forefront of the carer's mind in this particular case.

However as the government has promised time and time again, it is the training that may bring about a change of attitudes, although arguably one would have hoped that ones dignity and privacy would have been a natural concept and seen as a negative to act outside this ambit within a particular calling.

There is, of course, a difference between the negative obligation of the state to refrain from violating an individual's rights and the positive obligation of the state to protect an individual from the violations of others. The

case of Storck v Germany¹³¹ is a good example of the willingness of the Strasbourg court to find several reasons for holding a state responsible for violations caused by private bodies. "The most effective way for the United Kingdom to fulfill its positive obligation to protect individuals against violations of their rights is to give them a remedy against the violator"¹³².

The Act only requires public authorities to act compatibly with the rights and freedoms that the HRA protects. The HRA places no direct obligation on private bodies or individuals to comply with basic human rights standards. Public authorities are defined in the HRA as including core public authorities, like local councils.

These bodies are required to comply with human rights standards in everything they do. Private bodies that perform "functions of a public nature" should, in the performance of those functions, also be treated as public authorities for the purposes of the HRA.¹³³

¹³¹ (Ibid, 2005) 43 EHRR 96

¹³² As per Baroness Hale in *YL*, Ibid.

¹³³ ("Functional Public Authorities").

It is common ground that it is the nature of the function being performed, rather than the nature of the body performing it, which matters under Section 6(3)(b).

The case of Poplar Housing and Regeneration Community Association Ltd v Donohue¹³⁴ relied too heavily upon the historical links between the local authority and the registered social landlord, rather than upon the nature of the function itself which was the provision of social housing.

The question of which bodies fall within the definition of 'public authority' is however of great significance.

The answer to this question determines how effectively the basic rights and freedoms in the European the "ECHR" or "Convention" are secured in the United Kingdom and the extent to which UK law provides an effective remedy where an individual's rights and freedoms are violated.

¹³⁴ [2002] QB 48

In 2004, the Joint Committee on Human Rights published an important report¹³⁵ on the meaning of "public authority" under the HRA¹³⁶.

It concluded that the development of case law on the definition of Functional Public Authority¹³⁷ had led to real gaps and inadequacies in human rights protection in the UK, which ministerial statements during the passage of the Human Rights Bill indicate, were not intended by Parliament.

These gaps in human rights protection have arisen because some courts have sought to identify Functional Public Authorities by looking at the character of the institutional arrangements of the body, i.e. the extent to which the body is controlled or funded by a core public body, rather than the 'character' of the function that it is performing.

¹³⁵ Seventh Report of Session 2003-04, The Meaning of Public Authority under the Human Rights Act, HL

¹³⁶ (The "2004 Report").

¹³⁷ *Callin and Others v. Leonard Cheshire Foundation*, [2002] EWCA Civ 366

This has, for example, meant that the rights of an elderly person are unlikely to be protected by the HRA when a local council pays for care to be provided in a private care home.

By contrast, the same person's rights would be protected if the care were provided by the local authority in a care home it runs itself. This context is the area which has caused most difficulty and debate since the enactment of the HRA.

Lord Bingham¹³⁸ in the House of Lords¹³⁹ during the progress of the Human Rights Bill commented that "*It is the function that the person is performing that is determinative of the question whether it is, for the purposes of the case, a [functional] public authority.*"

Conversely Liberty considered that the elderly person's rights should be protected by the HRA regardless of the nature of the body that delivers the care. At the outset

¹³⁸ A view shared by Liberty as expressed in the 2004 Report

¹³⁹ And by Ministers

Liberty acknowledged that it would not always be easy to identify when a function is or was "of a public nature".

It follows without any statutory guidance then this will need to be determined on a case-by-case basis by the courts. The appropriate question for the courts to ask is, however, whether the function in question is one for which the State has taken responsibility in the public interest.

It is noteworthy however at this stage of discussion that there have been a number of debates in the House of Lords (and also later case law) whereupon the House concluded¹⁴⁰... *"that the application of the functional public authority provision in section 6(3) (b) of the Human Rights Act leaves real gaps and inadequacies in human rights protection in the UK, including gaps that affect people who are particularly vulnerable, to ill-treatment. We consider that this deficit in protection may well leave the UK in breach of its international obligations to protect the Convention rights of all those in the*

¹⁴⁰ Minutes of Evidence taken before the Joint Committee on Human Rights, 8 December [2003], HL Paper 45,

*jurisdiction and to provide mechanisms for redress where those rights are breached*¹⁴¹.

Equally the joint committee concluded... *"We have taken the view, however, that it would be undesirable to amend section 6, for a number of reasons. As well as being too early in the experience of the Act's implementation, it would be likely to sacrifice the flexibility of the Act and to inhibit its capacity to adapt to changing social circumstances and thereby ensure comprehensive and consistent human rights protection.*

*It would be difficult to devise a magic formula to provide a comprehensive and precise definition of public authority, and any attempt to do so would, in our view, be likely to create as many problems as it solves*¹⁴²".

The Joint Committee concurred... *"We have considered whether the gap in protection could be closed by specifying the bodies whose activities fall within the ambit of the Act... We conclude that this is both impractical and undesirable. It would risk restricting the*

¹⁴¹ Enquiries to Nick Walker (Sec to the HL) by the author (22 February 2005) revealed that despite the Government being chased for a response to the seventh Report, none had been received. He conformed that he was hopeful that a response would be received within the next few weeks.

¹⁴² Para 149 of Minutes of Evidence taken before the Joint Committee on Human Rights, 8 December 2003, HL Paper 45,

category of bodies in ways that would exclude those which should be held responsible under the Act. It would also be based on a misconception of the Act's scheme - it is not particular bodies which fall within the ambit of section 6(3) (b), it is particular functions¹⁴³".

"An attempt to define public functions in statute would be a more promising route to resolving the problem, but it would still be open to many of the objections which we identify to attempting to list public bodies. Nor have we been able to discover any convincing formulation of how to do so"¹⁴⁴.

In short it would appear that the Committee whilst concerned with the lack of any decision nonetheless perceived the difficulties faced by the legislator in applying such a definition, this calls into question the enormity of the task, and the undesirability of trying to hold a particular provider to fall within such a definition.

That said no doubt substantial costs would and are caused to the very members of society that the HRA was meant to assist, and arguably protect.

¹⁴³ Para 149 of Minutes of Evidence taken before the Joint Committee on Human Rights, 8 December [2003], HL Paper 45

¹⁴⁴ Ibid @ 151

Conversely the judiciary have found it difficult in finding a 'public law function' in what can be described a 'private law matter', whilst they have been extremely inventive in finding such an existence of public law function in would appear that in exercise of such a task, the decisions that will be outlined below are more confined in cases of embodying certain breaches of 'natural justice' which have arisen, although with certain caveats being applied¹⁴⁵

On one hand it is desirable not to attempt to define 'public authority', on the other; no definition can lead to uncertainty that as now arisen. It is worthy considering a number of cases where the judiciary have made attempts to balance the rights of citizens which accord to the rules of 'natural justice,' and not necessarily the HRA, however in so doing have attempted to underpin the legislation in reaching their deliberations.

¹⁴⁵ See for instance R (H) v Mental Health Review Tribunal 2001] EWCA Civ @ 415, 99

For example in R v Servite¹⁴⁶ Moses J expressed regret that a 'precedent' prevented him from holding a charitable housing association a public authority¹⁴⁷

Grosz, Beatson and Duffy¹⁴⁸, wrote: "*This class of public authority will include professional bodies such as the Law Society, the Bar Council and the General Medical Council which exercise regulatory and disciplinary functions; private commercial organizations exercising public functions such as security companies operating privatised prisons, private schools, a railway company in the exercise of its regulatory functions, industry based ombudsmen, university visitors, regulatory bodies such as the City Panel on Takeovers and Mergers, those recognised under the Financial Services Act 1986, the Stock Exchange, the Association of the British Pharmaceutical Industry, the Press Complaints Commission, the Advertising Standards Authority and other media or commercial regulators*"

¹⁴⁶ R v Servite House ex parte Goldsmith [2002] LGR @ 55

¹⁴⁷ Housing Associations are now provided for specifically within the HRA.

¹⁴⁸ Grosz, Beatson and Duffy, *Human Rights* (2000).

The above examples are not so limited, as it is the function of the body that can bring it within the scope of the HRA. In Poplar Housing¹⁴⁹ the Court of Appeal gave consideration, whether a registered Housing Association was a public authority under The Housing Act in relation to one of its tenants.

The court held: "*that because a body performed an activity which otherwise the government or a 'public body' would be under a duty to perform, it did not mean that such performance was necessarily a 'public function.'*"¹⁵⁰

It is a *feature* or a combination of features, which impose a 'public character' or 'stamp' on the HRA.

Statutory authority for what is done can at least help to mark the act as being public; so can the extent of control over the function exercised by another body which is a 'public authority'.

In essence the argument evolves around the premises that the more closely the acts that could be of a 'private

¹⁴⁹ Poplar Housing and Regeneration Community Association Ltd v Donoghue [2001] EWCA Civ @ 595

¹⁵⁰ Lord Woolf @ Para. 58.

nature' are enmeshed in the activities of a 'public body'; the more likely they are to be public.¹⁵¹

Lord Woolf held, "*that the facts of each particular case would be crucial and that on the situation before him in this 'borderline' case that it was capable of being a 'public authority'.*"

In R (A)¹⁵² it was held that a decision by the managers of a private psychiatric hospital to alter care and treatment of a patient was an act of a 'public nature', and therefore susceptible to judicial review,¹⁵³ as they were a public authority for the purpose of the HRA.

The borderline cases discussed in Poplar would depend on the function it was carrying out. In Ashton Cantlow Parochial Church Council¹⁵⁴ the House of Lords held, that Parochial Church Council could be a 'hybrid' public authority under Section. 6 (3) (b) because it performed certain functions of a 'public nature'.

¹⁵¹ Ibid @ Para. 65.

¹⁵² R (A) v Partnerships in Care Ltd [2002] 1 WLR @ 2610.

¹⁵³ This can be explained by the statutory control under the regulations to be found within the Registered Homes Act 1984 and the Mental Health Act 1983.

¹⁵⁴ Ashton Cantlow Parochial Church Council v Wallbank [2003] UKHL @ 37.

It follows therefore upon the above premises that the courts will look at the provisions of some statutory control being prevalent as above, however consideration has to be given whether they are of a contractual nature.

In R v Disciplinary Committee ex parte Aga Khan¹⁵⁵ the courts were not prepared to find a 'public law' function, because they were derived purely from contractual relationships between a club and those who agreed to be bound by the rules of racing.

Sir Thomas Bingham MR¹⁵⁶ suggested the government would have created a public body to exercise the Jockey Clubs functions if the Jockey Club were not to do so; nevertheless, its functions were not governmental because its powers derive only from an agreement between the parties¹⁵⁷

Hoffman LJ¹⁵⁸ remarked in Datafin¹⁵⁹ "*shows that the absence of a formal public source of power such as statute or prerogative is not conclusive. Governmental power may be exercised de facto as well as de*

¹⁵⁵ R v Disciplinary Committee of the Jockey Club ex parte Aga Khan [1993] 2 ALL ER 853

¹⁵⁶ As he was then.

¹⁵⁷ Ibid @ 923(g)

¹⁵⁸ As he was then.

¹⁵⁹ R -v- Panel on Take-over and Mergers Ex Parte Datafin Plc [1987] QB @ 815

jure...what one has here is a privatisation of the business of government itself".

In light of the above whilst the Jockey Club has powers that may be described in many ways 'public', they are in sense governmental¹⁶⁰

In contrast it was the nature of its function in Datafin;¹⁶¹ that lent its self-open to judicial review, as it was performing a 'public duty'¹⁶².

In R v Governors of Haberdashers¹⁶³ it was held that a college that was set up pursuant to the exercise of the Secretary of States power¹⁶⁴ and the manner in which they provided education was subject to detailed regulations made by a statutory instrument.

A distinction was however drawn between the above case and private schools, whilst a private school would be providing education and subject to a complaint to the Secretary of State who held the power to strike such schools of the register, that in itself did not make the

¹⁶⁰ As per Hoffman LJ @ 931 (H) – 932 (A)

¹⁶¹ R –v- Panel on Take-overs and Mergers Ex Parte Datafin Plc [1987] QB @ 815P. 931 (d) & (h)

¹⁶² Ibid court prepared to intervene because of the 'nature of the function', as per Sir John Donaldson MR
ibid @ 825[c]

¹⁶³ R V Governors Haberdashers Askes Hatcham College Trust ex parte T [1995] ELR @ 350

¹⁶⁴ Under s 105 (1) of the education & Reform Act 1988

school susceptible to judicial review, as the power of existence is consensual and not by statute, as such decisions were not made in the exercise of any 'public law' duty or function¹⁶⁵

Equally, a school that offers assisted places may be subject to the jurisdiction of the court. In R v Cobham Hall School ex parte S¹⁶⁶ a school was held to be exercising a 'public' law function.

Dyson J said... "The school is exercising a public law function and is In selecting pupils for assisted places and purporting to reallocate an assisted place, the school is exercising a public function, with a statutory underpinning of the Act and the regulation"¹⁶⁷

Dyson J drew the distinction between the functions of private bodies and their activities; he said, "... [N]ot all activities of private bodies (such as private companies) are subject to only to private law."¹⁶⁸ He drew the

¹⁶⁵ Ibid R v Governors of Haberdashers at page 357 (f)

¹⁶⁶ 1998] ELR 389. R v Cobham Hall School ex parte S

¹⁶⁷ Ibid @P. 397-398 (a)-(c)

¹⁶⁸ Ibid

distinction between the companies that may be subject to the courts jurisdiction in circumstances when "its decisions are subject to duties conferred by statute or when, by virtue of the function it is performing, or possibly its dominant position in the market, it is under an implied duty to act in the public interest"¹⁶⁹

In Service Moses J reviewed an abundance of authorities and was unconvinced that despite Service being required to register under the Registered Homes Act 1984¹⁷⁰, Service had entered into a commercial contract for the provisions of community care, that in itself did not place upon them a public law duty.

There was no statutory underpinning, save for a statute that allowed a local authority to enter into 'private' arrangements. Accordingly his Lordship did not feel bound by the precedents that had been before the courts on similar points.

In considering the statutory underpinning that the courts have attempted to introduce in such cases [above] largely depends upon the function and how they 'acquire'

¹⁶⁹ Ibid @ 398

¹⁷⁰ As it was then.

a 'duty' to act in such a way, which has led to the courts intervention.

It should however be remembered that the width of such a concept of public authority under the HRA is of immense importance in determining the ambit of those bodies, which must not be incompatible with the rights under Convention.

In short cases decided before the HRA were focused upon reviewing the lawfulness of the decision under judicial review¹⁷¹, of a decision, action or failure to act, however cases seeking to challenge such a decision were challenging the exercise of that public function, and not performing a function of a 'public nature'.

Conversely *Servite* was a decision that did not fall within the terms of a public function, unlike *Datafin*.

In *Ashton Cantlow Parochial Church Council*¹⁷² whist the House of Lords considered the Parochial Church Council could be a 'hybrid' public authority under Section 6 (3) (b) because it performs certain functions of a 'public

¹⁷¹ Ibid

¹⁷² Ibid *Ashton Cantlow Parochial Church Council v Wallbank* [2003] UKHL.

nature', they were carrying out a 'private' rather than 'public function' when enforcing a lay rector's liability for chancel repairs, and therefore unlike the Court of Appeal, Parochial Church Council, were not under an obligation to act in a manner compatible with the Convention.

Section 6(3) (b) applies to bodies performing functions of a 'public nature', and not the nature of the body, of the legal dispute in question.

In R (Heather) v Leonard Cheshire Foundation¹⁷³ the question arose whether the Leonard Cheshire Foundation were a 'public authority' for the purpose of the HRA, it was held that they were not; despite receiving public funding, regulated by the state and provided services that would have been otherwise provided by the state. The decision was based upon 'public' being used in the sense of governmental.

The anomalies are brought about by the narrow interpretation of the HRA as it is drafted widely in that it

¹⁷³ R (Heather) v Leonard Cheshire Foundation [2002] EWCA Civ 366.

refers to 'public functions.' This is more generous; than the judiciary, are applying in some cases.

That decision caused unrest and the Parliamentary Joint Commission on Human Rights launched an inquiry into the meaning of 'public authority' under the HRA¹⁷⁴

In written evidence ... "The absence from the HRA 1998 of a systematic definition of "public authority", and the variety of judicial tests which have emerged to determine what constitutes a public authority, would seem to combine to represent real uncertainty as to the applicability of human rights to those bodies and offices within the churches studied¹⁷⁵" The approach taken so far is as diverse as the wording in question.

Conversely the Government has taken a somewhat commercial approach to the difficulties faced in attempting to find a public law function to satisfy the terms of the HRA.

¹⁷⁴ Joint Committee on Human Rights –Written Evidence printed 23 February 2004.

¹⁷⁵ Ibid. Liberty have made submissions upon the absence from the HRA 1998 of a systematic definition of "public authority"

The Joint Committee on Human Rights¹⁷⁶ in their thirty-second report commented "We are extremely disappointed by the Government's new concern about driving private providers out of the market by widening the definition of "public authority".¹⁷⁷ In our view it represents a serious dilution of the Government's consistent position since the enactment of the Human Rights Act, that private providers, of services which a public authority would otherwise provide are performing a public function and should therefore be bound by the obligation to act compatibly with Convention rights in s.6 of the HRA".

In essence whilst the courts tussle with making bodies carrying out duties that would otherwise be carried out by public authorities comply with the spirit of the HRA, the Government appear to be less committed.

The Committee¹⁷⁸ was of the opinion that; the more the trend to outsourcing the provision of public services increases, the greater the importance of private providers

¹⁷⁶ The Human Rights Act: the DCA and Home Office Reviews (Sessions 2005-06)

¹⁷⁷ Page 10; Para 28.

¹⁷⁸ Ibid; Government Response to the Joint Committee on Human Rights.

of such services being bound by the obligation to act compatibly with Convention rights.¹⁷⁹

In essence the more public services are outsourced, the less will people be able to enforce their human rights directly against those providing care or other services for them, such an approach would not be in keeping with the HRA.

Therefore the judiciary rather than the Government¹⁸⁰ are best placed with the task in hand. It follows that the judiciary are inventive in their approach and this can be seen by the following cases.

In Smart¹⁸¹ Laws LJ suggested an approach which was perhaps more in keeping with the spirit of the HRA which was to give section 6 a generous interpretation and any limitation upon liabilities of public authorities for interfering in Convention rights should take place through striking a fair balance between the relevant interests, at least where prima facie interferences with rights are capable of being justified by reference to necessity and

¹⁷⁹ Para 28 (page 11)

¹⁸⁰ Who is constantly bombarded with pressure groups from the private sector, which very often is self-serving.

¹⁸¹ *Smart v Sheffield City Council* [2002] EWCA Civ 4.

proportionality, rather than liability being excluded by defining such bodies out of the scope of the s.6 duty.

A different approach was suggested by Lord Woolf in *Poplar Housing*¹⁸² who suggested the provision of requiring private bodies to enter into contractual obligations to respect the Convention rights of those they deal with, when they enter into arrangements to provide services for governmental bodies. The service users could then use the Contracts (Rights of Third parties) Act 1999 to enforce contractual clauses to respect their Convention rights¹⁸³

Above, it will be noted that speed and costs were one of the objectives that the HRA was meant to assist in those pursuing a remedy for the alleged violation of their Human Rights. A point taken; in, the Consultation document Equality and Diversity¹⁸⁴.

As above Judicial Review applications¹⁸⁵ were no strangers in defining a "public duty"; of which some

¹⁸² Ibid

¹⁸³ See also Carss-Frisk, *Public Authorities: The developing Definition* [2002] EHRLR 319.

¹⁸⁴ consultation paper entitled **Towards Equality and Diversity** Discussed in detail in the concluding chapter

¹⁸⁵ Under the old Rule 53 RSC, now provision contained in the Civil procedure Rules

statutory power exist depending upon the function, and placing such a function upon the private sector.

The Committee concluded upon the desirability in defining or providing a comprehensive list upon the meaning of public authority, when they stated "*We do not think it would be advisable to try to prescribe a comprehensive list of persons or bodies who are public authorities for the purposes of the Human Rights Act, and we recognise that seeking to define "public authority" generally would not be desirable because of the knock-on effect on other areas of law*"¹⁸⁶

The Governments response concurred with the view expressed by the earlier Committee¹⁸⁷ in that "formulating a comprehensive test of public authority status, of general and wide application, would be a very difficult task, and such a test would remain subject to judicial interpretation".

¹⁸⁶ At Para 29 Ibid

¹⁸⁷ Seventh Report of Session 2003-04

In the review¹⁸⁸ the Government announced that they would be arguing the point further in a case due to be heard before the Court of Appeal¹⁸⁹

The meaning of 'Public Authority' came before the Court of Appeal in the case of Johnson -v- Havering¹⁹⁰ whereupon a private care home, when accommodating residents under arrangements made with a local authority for the implementation of the authority's obligations under s 21 of the National Assistance Act 1948, was not exercising a public function for the purposes of s 6(3)(b) of the HRA.

The change in the residents' legal position occurred when homes were Convention for the Protection of Human Rights and Fundamental Freedoms.

The Committee¹⁹¹ upon realizing the difficulties encompassed by the meaning within the terms of Section 6(3)(b) of the HRA dismissed any attempts of placing its own meaning to local authority, e.g. function but thought

¹⁸⁸ Para. 31. (Page 11)

¹⁸⁹ Johnson -v- Havering.

¹⁹⁰ R (Johnson and others) v Havering London Borough Council; YL v Birmingham City Council and others [2007] EWCA Civ 26

¹⁹¹ Ibid @ Para 29.

that it may not be insuperable obstacles to drafting a simple statutory formula which makes clear that any person or body providing goods, services or facilities to the public, pursuant to a contract with a public authority, is itself a public authority for the specific purposes of the HRA.

Such a suggestion would not be without difficulties, as surely this would raise issues that fell outside the necessary domain, that may not necessarily be a direct service but an indirect provider which would normally fall outside such a scope, however with such a definition be drawn into the arena by the very nature of the wording, rather than the 'type' of service provided.

This dilemma was recently addressed in the House of Commons¹⁹², whereupon a number of difficulties were recognised in the courts approach in attempting to define 'Public Authority' once again.

The Lord Chancellor made it clear that privatised or contracted-out public services were intended to be brought within the scope of the HRA. The "public

¹⁹² 9th January 2007

function" definition, we were told, emphasised the function rather than the institutional status of the body performing it.

It was considered that a private security company would be performing a public function if it were running a prison under contract with the Government. It would be within the terms of the HRA. But when a private security company is providing a service to another private company, it does not come within the provisions of the HRA.

It was recognised that since the HRA came into force, a series of court cases have turned on whether a particular private company or organisation providing services was within the ambit of the HRA.

The result has been to undermine, or even to overrule, the comprehensive and wide interpretation of "public authority" which was originally intended.

It is common ground that it is the nature of the function being performed, rather than the nature of the body performing it, which matters under section 6(3)(b).

The case of Poplar Housing and Regeneration Community Association Ltd v Donoghue¹⁹³ relied too heavily upon the historical links between the local authority and the registered social landlord, rather than upon the nature of the function itself which was the provision of social housing.

The committee¹⁹⁴ identified that one particular case has left utter confusion over that question commonly known as the Leonard Cheshire case.

It will be recalled that the local authority-funded residents of a care home run by the Leonard Cheshire Foundation, a private charity, wanted to challenge the decision to close down the home and disperse the residents, who claimed that that broke their right to respect of their home under article 8 of the Convention.

However, the Court of Appeal found that managers of the care home did not constitute a "public authority" within the definition of section 6(3) (b) of the HRA, so residents could not enforce their human rights against the care home even though the council still held its

¹⁹³ [2002] QB 48 Ibid

¹⁹⁴ Ibid

obligations to them under article 8, regardless of its contract with Cheshire Homes.

In 2004, after reviewing that judgment and other cases that had turned on the definition of "public authority"¹⁹⁵, the Joint Committee on Human Rights concluded that the test that was being applied by the courts was "highly problematic."

That has resulted in many instances of an organisation standing in the shoes of the state but without responsibility under the HRA, leading to a serious gap in the protection that the law was intended to offer.

It is argued that this gap is not just a theoretical legal problem, but also a problem with significant and immediate practical implications. As many services previously delivered by public authorities become privatised or contracted out to private suppliers, so the law has failed to adapt to that reality.

The implications of that failure extend across the range of especially vulnerable people in society, including elderly people in private residential care or nursing

¹⁹⁵ 9 Jan 2007: Column 151

homes, tenants in housing association properties, children outside the maintained education sector, or looked-after children in receipt of children's services.

In its 2004 report, the Joint Commission on Human Rights examined several possible solutions, including: amending the HRA, to clarify the responsibility of organisations to protect human rights in carrying out public functions; protecting human rights through the terms of the contracts between public authorities and private providers of public services, backed by authoritative guidance on when an organisation was likely to be a "public authority" for the purpose of the HRA; and the development of case law on the meaning of "public authority".

The Committee's views were that amendment of the HRA would be likely to create as many problems as it solved and would be too soon after the HRA's implementation, and that guidance on the formulation of contracts and best practice would be helpful but could not provide a complete or enduring solution, so the Government should

intervene in the public interest as a third party in cases where they could argue for a broad interpretation.

Three years on from the Joint Commissions on Human Rights report, there have been a number of significant developments.

In November 2005, the Government published guidance to local authorities on contracting for services in the light of the HRA.

The Government intervened in the case of the Crown on the application of Johnson and others v. London Borough of Havering¹⁹⁶ to argue that the meaning of "public authority" covers elderly and vulnerable people who are receiving care from a private provider on behalf of a public authority. In this case as others private care homes are provided funds from the local authority, which are often topped up by the resident. In some cases residents are 'self-funding' and therefore not reliant upon the local authority for funding of their costs.

The above case considered whether local authority care homes that were transferred to the private sector

¹⁹⁶ Which was heard together with the case of YL –v- Birmingham City Council & Others

remained public authorities in respect of local authority placed residents.

The Government was unsuccessful in their/its deliberation and the matter came before the Court of Appeal¹⁹⁷.

The Court of Appeal, headed by the Master of the Rolls¹⁹⁸ considered two appeals the gist of which is summarized below.

The court was concerned with two appeals. Mr.¹⁹⁹ Johnson and others, all of whom are resident in a care home maintained by the London Borough of Havering²⁰⁰ under the provisions of section 21 of the National Assistance Act 1948²⁰¹ who sought to prevent the transfer by Havering of the residents' and other care homes to private sector control, as a local authority is in principle empowered to do under section 26 of the 1948 Act.

¹⁹⁷ : [2007] EWCA Civ 26

¹⁹⁸ The Master of the Rolls, Lord Justice Buxton, Lord Justice Dyson

¹⁹⁹ In C1/2006/1693 (*Johnson*)

²⁰⁰ Havering.

²⁰¹ [The 1948 Act]

The Official solicitor represented a resident placed in a private sector care home by the responsible local authority Birmingham City Council [Birmingham]²⁰² in respect of whom the care home sought, or originally did seek, to terminate the contract for her care and to remove her from the home.

In Johnson it was contended that the transfer of control of the homes would in itself amount to a breach of the residents' rights under the Convention, principally under article 8. In YL it was contended that to remove Mr. YL from the care home would be a breach of her rights under article 8.

The claim in Havering was rejected by Forbes J, and the claim in YL by Bennett J. The two appeals were heard together; because they were thought to raise the same point, as to the susceptibility to control under the Convention of private care homes that are used by local authorities under section 26 powers: the question turned on whether; and in what circumstances, the homes are persons certain of whose functions are functions of a

²⁰² C1/2006/2226 (YL)

'public nature' under section 6(3) (b) of the Human Rights Act 1998.

In YL the issue arose directly from the proposed action of the care home, and the proceedings took the form of a preliminary point to determine whether the care home, the second defendant in the action brought by the Official Solicitor, asked to address the question that in providing care and accommodation for [Mrs. YL] was it exercising a public function for the purposes of section 6(3) (b) of the HRA.

The way in which the central issue arose in Havering was rather more elusive. J's claim was based upon the contention that whilst she at present enjoyed Convention rights, conspicuously but not exclusively Article 8 rights, against Havering as a public authority, those rights will be lost, or at least substantially diminished in content, if her home was transferred to a private body.

Havering, supported by the Secretary of State [intervening], denied that the change would involve a breach of the Convention, and that is the first issue that had to be addressed in the Johnson appeal.

Both those parties however further responded by contending that in any event nothing would be lost by the residents, because the new private owners of the homes will themselves be subject to Convention obligations by reason of Section 6(3)(b); and that point is, perhaps confusingly, was also urged by the Claimants as an alternative to the above point.

That latter issue accordingly raise's in principle the same question, as the preliminary point in YL, of which will be discussed later, following an appeal to the House of Lords²⁰³.

The point in question then, is simply; by transferring the Appellants out of their care into the hands of private carer's, [Havering] would it/they be removing or diminishing the rights that they formerly guaranteed to the Appellants.

It was argued that the Appellants would no longer be able to rely on direct breaches of their substantive rights as against either [Havering] or the private carer, for

²⁰³ UKHL 27

example breaches of their rights under Articles 2, 3, 8, 9, 10 and 14.

The only enforceable rights they would have would be in relation to breaches of [Haverings] 'positive obligations' towards them.

It was further argued that they would have no effective rights as against their carer's. That constitutes a fundamental and material diminution (and indeed in certain cases, negation) of their existing rights.

Accordingly, in discharging its statutory obligations to the Appellants under sections 21 and 26 of [the 1948 Act], [Haverings] would be failing to ensure real and effective protection of their rights and so be acting incompatibly with the Convention and unlawfully under section 6 of the HRA.

The above was based upon following the transfer, which the residents might retain some rights against Haverings, but those would be different, and less valuable, rights compared with the rights that they enjoyed against Haverings when Haverings was directly their carer.

The Court said taking Article 3 as an example; Ms Simor said²⁰⁴ *"that at present the residents had a right not to be subjected to degrading treatment by Havering"*.

After transfer, they had no such right against the care homes under Article 3, and only a right against Havering that the council would take appropriate steps, which it was far from certain would be effective, to safeguard the residents against immediate risks of degrading treatment.

Pausing upon this argument for a moment, the suggestion is some what couched that only a 'public authority' can provide a standard of care, which does not fall short of Article 3.

With respect to this contention, this could not or should not be the case; by virtue that the 'private sector' is called upon to be registered²⁰⁵ and strict standards are imposed under the Care Standards Act 2000²⁰⁶, which calls for frequent inspections and reports, in essence they are policed by those whose task it is to ensure that

²⁰⁴ In §§ 26-28 of her Grounds of Appeal

²⁰⁵ Registered Homes Act 1984, Part repealed by the Care Standards Act 2000 [24]

²⁰⁶ Ibid

standards are met within the framework of the above Act.

Indeed the reason why a number of local authority's are opting out of providing care homes is simply because they cannot keep pace with the continued changes in standards imposed by the agencies whilst the private sector struggle to maintain the ever increasing demands upon them, leading to a loss of 745 care homes in 15 months²⁰⁷, both public and private sector.²⁰⁸ Nonetheless the standards have to be maintained and therefore such a transfer cannot arguably lead to the risk of degrading treatment²⁰⁹

Mr. Justice Buxton stated on the above point²¹⁰.... " *Article 3 addresses not lack of consideration or inadequate care standards, but the much more serious territory of degrading treatment that is akin to inhumanity. If a resident in a care home, public or private, were to be treated in that way, then first almost certainly breaches of the criminal law would be involved; and secondly such breaches, and the inhumane treatment generally, would*

²⁰⁷ Leading to 15,100 lost places

²⁰⁸ Report by Age Concern: Care Home Closures Ref/IS/10

²⁰⁹ Article 3.

²¹⁰ Para. 11.

engage the responsibilities of the local authority for the welfare of the residents, under section 21(2) of the 1948 Act, and its responsibility to enter and inspect the private care home under section 26(5) of the 1948 Act'.

In these extreme and hopefully hypothetical circumstances the potential problems for the residents would not lie in the absence of legal protection, but in the difficulty of the abused resident in accessing that protection: whether by taking proceedings herself against the home, or by informing the responsible local authority so that it could take action. Thus, to the extent that article 3 has any more than a theoretical role to play in such a case, the resident does not suffer any significant loss of that protection by the transfer of immediate control of her residence from the public to the private sector".

His Lordship continued... *"Article 8 raises different issues. Having submitted, to my mind entirely convincingly, that care homes, public or private, were subject to rigorous standards of services, quality of staff, extent of facilities, and record-keeping and other procedures for*

the protection of the residents, which are required by the CSA, and supervised by the Commission for Social Care Inspection. Indeed, and ironically enough, it had been concern expressed by the Commission about the present standards in some of Havering's own facilities that had contributed to the decision now complained of to seek the assistance of the private sector. These rules, it was suggested, again convincingly, well exceeded in terms of day-to-day protection for residents anything that they could gain through the application of article 8. In this respect, therefore, the residents lost nothing in article 8 terms by the transfer."

The issue with regard to article 8 is not the importance of the right to respect for the home, which is not in dispute, but the significance for respect of that value of the difference between the 'public' and the 'private' regimes.

Lord Walker²¹¹ in his speech in M v Secretary of State for Work and Pensions²¹²; concluded "*in general terms that because the touchstone of article 8 is respect for the*

²¹¹ Article 8 jurisprudence undertaken by Lord Walker of Gestingthorpe.

²¹² [2006] 2 AC 91 [62]-[83]

relevant rights, the interference with the citizen has to be of some seriousness before article 8 will be engaged.

Caution must be exercised before applying that insight as if it were a statutory rule. Nonetheless, that approach reinforces the conclusion in this case that the change in the residents' legal position that occurs when the homes are transferred from public to private control is insufficient to amount to a breach of the Convention'.

It was further canvassed in the Johnson case²¹³ that the argument that a change from 'public' to 'private' provision necessarily entails a breach of Article 8 must further entail that any privatisation of services in respect of which the National Government has or arguably the Convention responsibilities will in itself result in a breach of those responsibilities.

The root objection, loss of direct action under the HRA against the actual provider, must be the same in every case. As Havering pointed out, that at a stroke puts every local authority with social services responsibilities

²¹³ Para. 21.

in breach of the HRA, since all of them use private sector provision to a greater or lesser extent.

His Lordship continued..... *"It is notorious that privatisation, not just in the present field but over a very wide area of governmental activity, is a subject that attracts strong views. But those are views, to be adjudicated upon by the national democratic process, and a very good example of an area that the Convention will enter only with considerable diffidence".*

While section 6 of HRA requires a generous interpretation of who is a public authority, it is clearly inspired by the approach developed by the courts in identifying the bodies and activities subject to judicial review. The emphasis on public functions reflects the approach adopted in judicial review by the courts and textbooks since the decision of the Court of Appeal in *Datafin*²¹⁴.

In the *Tower Hamlets*, in transferring its housing stock to Poplar does not transfer its primary public duties to Poplar. Poplar is no more than the means by which it seeks to perform those duties.

²¹⁴ [1987] QB 815

The act of providing accommodation to rent is not, without more, a public function for the purposes of section 6.

What can make an act, which would otherwise be private; public is a feature or combination of features, which impose a public character or stamp on the act. The more closely the acts that could be of a private nature are enmeshed in the activities of a public body, the more likely they are to be public²¹⁵

The argument can be explained in the following way. The HRA is not an ordinary English statute. Rather, it is the vehicle through which the jurisprudence of the Convention, as understood by the ECtHR, is made available in the English domestic legal order. Section 6(3)(b) was thus included in the HRA in an attempt to replicate in the domestic jurisdiction the range of bodies in respect of whose activities within the UK; liability would attach under the jurisprudence of the ECtHR.

²¹⁵ As per; Mr. Justice Buxton

It is not just a quibble to say that it is very difficult to find within that jurisprudence any direct parallel to a private body becoming a 'public authority', therefore a body for which the state is directly responsible in the ECtHR, because it performs some public functions; and therefore that is not least because, if, for instance, a private care home is in respect of some of its activities a public authority in Convention terms, the whole of the Convention jurisprudence, and the whole of those articles of the Convention set out in Schedule 1 to the 1998 Act, apply to that part of its activities.

Arguably the monocular concentration on the assertion of the rights of the individual against the state that inspired section 6 causes no, or at least not much, difficulty when applying section 6(3)(b) in relation to what have been called the absolute obligations, such as that arising under article 3.

Further Article 8(2) provides that a "public authority" may interfere with the exercise of the article 8 right when that is in accordance with the law and which is necessary in a democratic society in the interests of national security,

public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health and morals, or the protection of the rights and freedoms of others.

The public authority's actions that interfere with a citizen's private or family life have therefore to be judged by that standard. But the language and assumptions of article 8(2) are all redolent of the powers and discretions of public authorities in the full sense of the expression; that is, bodies that actually have power and responsibility to do something about national security or the protection of morals.

This essentially 'public nature' of the Article 8 balance; was indeed one of the reasons motivating those who, at the time of the passing of the HRA, warned against facile assumptions that the language of the Convention could simply be applied to transactions between private individuals.

In YL –v- Birmingham City Council²¹⁶ the House of Lords considered once again the meaning of Section 6(3)(b) of

²¹⁶ UKHL 27

the HRA, and the Appellants argument that the terms of public authority should be given a wide and generous construction. It was interesting to note that Lord Bingham²¹⁷ and Baroness Hale²¹⁸ came to the conclusion that "the company, in providing accommodation, health and social care for the appellant, was performing a function of a public nature".

This was a function performed for the appellant pursuant to statutory arrangements, at public expense and in the public interest.

Baroness Hale commented²¹⁹..."I have no doubt that Parliament intended that it be covered by section 6(3)(b). The Court of Appeal was wrong to reach a different conclusion on indistinguishable facts in R (Heather) v Leonard Cheshire Foundation [2002] 2 All ER 936.

Furthermore, an act in relation to the person for whom the public function is being put forward cannot be a "private" act for the purpose of section 6(5) (although other acts, such as ordering supplies, may be). The company is therefore potentially liable to the appellant

²¹⁷ Of Corrnhill, dissenting.

²¹⁸ Of Richmond. Both of whom gave dissenting judgments

²¹⁹ Paras. 73-74

(as well as to the council) for any breaches of her Convention rights”.

Baroness Hale concluded..... “We have not been concerned with whether her rights have been or might be breached in this case. It is common ground that the company may seek to justify any invasions of her qualified rights. Whether 'the rights of others' for this purpose includes the rights of the company itself is a question for another day...

“But it is also common ground that the company, being a 'non-governmental organisation' for the purpose of article 34 of the Convention, may complain of violations of its own Convention rights, as pointed out by Lord Nicholls in Aston Cantlow²²⁰, ..” *Any court would have to strike a fair balance between competing rights*”.²²¹

Whether this is correct can be examined from two perspectives, both of which are contentious, but one of which is probably clearer than the other.

²²⁰ [2004] 1 AC 546

²²¹ Para 11.

Firstly, is this right as a matter of public policy? In other words, regardless of the legal correctness of the decision, is this the way things should be?

The better view, as a matter of principle, is surely that Southern Cross is carrying out functions of a public nature and section 6(3)(b) therefore applies, although the section 6(5) exemption may still be relevant in certain circumstances.

This conclusion is the only one that gives full effect to the HRA and is based on the simple premise that the provision of care and accommodation to the elderly, whether fully or partly funded by a local authority, is a public function.

This is the view laid out in the opinions of Lord Bingham²²² and Baroness Hale²²³. Therefore, even though Southern Cross is operating as a profit making enterprise, residents placed in one of its homes by a local authority are entitled to the protection of the HRA.

²²² Para 19

²²³ at 61-72

It has been suggested that protection for residents like Ms YL is best entrusted to a contractual approach, but this does not give an adequate level of protection for some of the most vulnerable members of society²²⁴

As a matter of policy this expansionist approach to "public functions" is that preferred by the Joint Committee on Human Rights and seemingly the DCA. It also surely reflects Parliaments intentions in passing the HRA.

Even if we accept that in a perfect world the public good and public policy are best served by Southern Cross being viewed as carrying out functions of a public nature, the second question to be asked of the YL judgment is whether it is correct as a matter of law.

As the HRA did not define "functions of a public nature" the courts are effectively being asked to decide what can be considered to be 'public' on a function by function

²²⁴ (See Paul Craig, 'Contracting Out, the Human Rights Act and the Scope of Judicial Review', *Law Quarterly Review*, 2002 and Catherine M Donnelly, 'Leonard Cheshire Again and Beyond: Private Contractors, Contract and S.6 (3) (B) of the Human Rights Act', *Public Law*, 2005).

basis, as recognised by Lord Nicholls;²²⁵ and Lord Bingham.²²⁶

It is interesting to note that Lord Neuberger acknowledges in YL ²²⁷ that the test applied in any individual case will be constructed to justify a policy based decision. "The majority has clearly reached a view on the policy and they don't agree with me. Be that as it may, have they reached the legal decision within the loose framework that the legislation and previous decisions have defined.

On the face of it; the judgments appear to acknowledge the criticisms of earlier decisions, which concentrated too much on the nature of the institution, in question.

Instead they appear to analyze the function concerned. However, on closer inspection the majority appears to have been too influenced by the nature of Southern Cross as an institution, reflecting their opinions on the policy forces behind this issue.

²²⁵ At Para 12 of *Aston Cantlow*

²²⁶ At Para 5 of YL

²²⁷ At Para 128

So in all three opinions of the majority it is possible to detect a thread running through them, which is concerned with Southern Cross as an institution, and a profit-making institution.

This is most noticeable in Lord Scott's speech²²⁸ and Lord Mance's,²²⁹ but it runs deeper in the majority's thinking than simply those two paragraphs.

That is why Lord Neuberger can list seven factors that suggest Southern Cross was performing a public function²³⁰ (and still discount them all); are, in summary form:

- a. The existence and detailed nature of statutory regulation and control over care homes;
- b. The provision of care and accommodation for the elderly and infirm is a beneficial public service;
- c. The elderly and infirm are particularly vulnerable members of society;

²²⁸ At Para 26

²²⁹ At Para 117

²³⁰ (Para 154)

d. The care and accommodation was provided pursuant to the local authority's statutory duty to arrange its provision;

e. The cost of the care and accommodation is funded by the local authority pursuant to its statutory duty;

f. The local authority has power to run its own care homes to provide care and accommodation for the elderly and infirm;

g. The contention that section 6(3) (b) should apply to a contracting-out case.

While he rightly states that none of these factors are on their own sufficient²³¹ he is, therefore, not giving them sufficient weight when considered together, this is hardly surprising.

Moreover this judgment has effectively raised the bar for other functions; however despite this it is difficult to say, when no prior definition exists, that they have got this completely wrong.

²³¹ At least with the HRA as it currently is

As a matter of law it seems that this function could have quite easily been 'public' or 'private' and it all comes down to the circularities inherent in a policy-driven definition, which is supposed to prove that policy!

It is tempting to draw the conclusion that the majority are basically saying that both interpretations may be valid, but because they don't like one of them the legislation should have been more explicit, again it is interesting to note that Lord Bingham praises the draftsman's wisdom at²³², while Lord Neuberger criticizes the drafting.²³³

It should be remembered that prior to the HRA Ms YL would clearly have had no domestic action against either Southern Cross or Birmingham in defence of her Convention rights. Whether such an action was necessary in light of the arguments canvassed is doubtful. Of course there were always rights available to Mrs. YL, which have been sufficiently canvassed above.

²³² Para 5

²³³ At Para 130.

The HRA would clearly give her rights against Birmingham if they were accommodating her, but as the position is not clear with regards to Southern Cross then perhaps pre-HRA the position can be viewed as unaltered.

Of course, this only works if you don't see care and accommodation for the elderly as a public function. The problem still remains though; how can this be phrased in the HRA or what else can be changed?

This of course is only relevant if you accept the proposition that YL runs counter to the prevailing policy.

The minimum requirement on Birmingham CC under the 1948 Act is simply to arrange her accommodation and they haven't contracted out the arrangement, so unless there is to be an incredibly semantic debate about whether "provision" necessarily includes "arrangement" we probably haven't advanced very far, at least in terms of care homes.

So how is Article 8(2) to be applied in the case of, for instance, a private care home that needs a resident to leave because the home is going into liquidation?²³⁴

The terms of Article 8(2) really make no sense so if the care home is to be treated as a public authority, article 8 will have been translated into the domestic jurisdiction as conferring no conditional but absolute rights.

To try and reconcile the leverage behind the 'actual' argument regarding both Articles 3 & 8,²³⁵ is somewhat difficult, when considered with the safeguards now in place²³⁶ it is submitted that private homes are more susceptible to closure due to inadequate funds being paid by the local authority for the care being provided; it is upon these premises that local authorities wish to transfer such a responsibility to the private sector. Such action would be less of a burden upon the 'public' purse, however in taking such an approach, this lessens the impact of the HRA on those that arguable need the

²³⁴ Or wishes a resident to leave for the kind of reasons that apply in the case of Mrs. YL?

²³⁵ This is based upon the argument, which has been targeted at care homes in order to bring home the need to define the terms of Sec 6(3) (b) HRA.

²³⁶ Care Standards Act, which allows for monthly inspection (unannounced) and the provisions to speak with the residents in private to listen to any concerns. (Regulation 26)

protection, which of course was at the forefront of the Government given the intervention of her case [Mrs. YL]

Equally national standards are increased almost monthly, whilst the fees remain the same. Yet local authorities themselves cannot keep pace and closures are the end product of the updated standards, which is meant to protect the residents of these homes.

There is nothing to suggest that standards in private residential homes are any less than those run by local authorities, although concern has been raised by the British Institute of Human Rights²³⁷ who reported on treatment of residents of residential care homes that clearly amounts to a breach of their human rights.

Cases include the circumstances of home closures or notice to individuals to leave homes, and inhuman and degrading treatment such as elderly residents being fed breakfast while on the commode.

When such poor treatment occurs in privately run residential care homes, it is not satisfactory for residents to have to rely on interpreting a contract between a local

²³⁷ 9 Jan 2007: Column 152

authority and a home's managers: they should be able to enforce their human rights directly; it is of course how this is done in light of the case law thus far.

Of course such breaches in any event lend themselves to Notices being served²³⁸ as well as the possible closures²³⁹. Local Authorities have faced similar criticism regarding the standard of care over the years and the safe guards put in place are arguably sufficient once the abuse is detected. Moreover any home whether 'private; or otherwise still have to adhere to the strict criteria laid down by the relevant statutory provisions, which will be touched upon again below.

This is not to say that the checks and balances are without fault, however local authority closures are just as traumatic to the residents what ever the label placed upon the establishment.

In essence the writer has argued that the checks and balances should and to some extent are the same for either private or local authority run residential care homes.

²³⁸ For breaches under the Registration

²³⁹ For failing to be a 'fit' and proper person.

Even the stages of public hearings prior to the closure of local authority run homes, often leaves those involved that the decision as already been ratified, and whatever representations have been canvassed. The writer discussed such a proposition with a family member who attended a meeting of the local authority, of which his mother resided²⁴⁰

At that meeting which was described a 'preliminary' he [the son] was advised that the manager [of the home] had been placed at another council run home.

When he questioned further those representing the local authority why the home could not remain in full operation. The response was simply that the local authority could not continue to comply with the new 'standards' now being imposed under the Care standards Act 2000.²⁴¹ Amongst the reasons were room sizes; the need to update the fire alarm; and the possibility of major repairs to the roof and the possibility of having to replace the windows at some later stage.

²⁴⁰ Blackpool Borough Council.

²⁴¹ A statement of national minimum standards published by the Secretary of State for Health under section 23(1) of the Care Standards Act 2000.

The council was reminded that the windows were new, and the roof had been replaced recently. The son considered that the hearing was a 'sham', which appeared to be later confirmed when he received a telephone call to inquire whether he had found alternative accommodation for his ninety-nine year old mother. This was met with a complaint to his MP;²⁴² who has now questioned the procedure adopted thus far.

Of course financial inadequacy to maintain the building appeared to be behind the thrust of the local authority's argument, despite the obvious decision to close the home with or without consultation. Of course judicial review was possibly open to him, although this has its limitations, both on the remedy and the costs involved.

Although judicial review is very often an available remedy, the latter is only with respect to the procedure adopted, rather than the decision itself. In essence the failure on the part of the authority could be challenged, however this would only allow for a fresh consultation whose outcome would probably still be achieved to the

²⁴² Mr. Gordon Mardsen.

local authorities satisfaction, and not those of the residents, most of who are in their late eighties.

It has been touched upon above that private homes face the same difficulties and as the service providers of private homes they do not wish to fall under the umbrella of local authority.

The Lord Chancellor²⁴³ upon addressing the issues now more prevalent since the case of *YL*,²⁴⁴ put forward the proposition that "widening" the definition of public authority could have the effect of driving private providers out of the market.

This was somewhat extraordinary because the proposal would not widen the definition, but be exactly on "all fours" with what the then Lord Chancellor told Parliament was intended when the Bill was introduced.

It was canvassed that the appalling implication is that those in private sector care homes, who are probably more vulnerable to abuse than those "in-house" facilities,

²⁴³ Department's July 2006 review of the Human Rights Act

²⁴⁴ discussed below

are not to have a right to challenge that abuse in our courts, thus making them second-class citizens.

Their numbers are growing as local authorities continue to contract out. The contractors' commercial interests are put before the decent treatment of the elderly and vulnerable.

Of course the statement fails to take into account the criminal ramifications associated with ill treatment, such as assault, theft etc, these are adequately dealt with under long standing statutory provisions, and of course fall within the terms of the Care Standards Act 2000.

However if degrading treatment is less than the latter, then this in itself lends itself to embrace all those providing care to be accountable. The Registration criteria discussed above, would lend it self to the cancellation of the Registration within the terms of the HRA²⁴⁵.

Whilst the situation may not be ideal the Regulations within the Care Standards Act 2000²⁴⁶; does make an

²⁴⁵ Care Standards Act 2000

²⁴⁶ Hereafter "the CSA"

inroad to providing the checks and balances and puts in place a 'minimum' standard to those providing residential care. That said the HRA does not embrace certain types of accommodation being provided²⁴⁷

Whatever the label one wishes to place upon the type of occupation the courts will look to the terms of any agreement to ensure that it has not been created to circumvent the CSA.

Of course the HRA²⁴⁸ would be a useful clarification to support the underlying policy, but it wouldn't actually have helped Ms YL²⁴⁹. Some situations were hinted at in passing in YL.

Beyond that, the Joint Committee on Human Rights has looked into this twice before²⁵⁰. They considered four possible ways forward; mending legislation:

- 1) Amending legislation;
- 2) A contractual approach;
- 3) Guidance;
- 4) Judicial interpretation

²⁴⁷ A Tenancy may not be included, which depends on exclusive possession

²⁴⁸ Meaning of Public Authority Bill

²⁴⁹ Ibid

²⁵⁰ In the 7th report of 2003/04 and the 9th report of 2006/07

Their preferred solution in 2004 was to allow the interpretation of section 6 to develop in the courts, but that has failed to provide the remedy that it was probably hoped to achieve.

This possibility was recognised at Para 116²⁵¹ and the more recent report concluded that new legislation would be necessary. If there is a strong feeling that this particular case is wrong then a simple amendment to the National Assistance Act stating something like "acts carried out in accordance with these sections shall be considered to be functions of a public nature for the purposes of the HRA, however this would not be without problems.

The knock on effect is that similar acts which don't have any such statement about them may well be considered not to be public functions precisely because they will be seen to have been excluded and then the dilemma continues of having to list every single 'public function' or 'authority', which is awkward for a concept which Lord Mance rightly regards as not being immutable.

²⁵¹ of the 2007 report

This approach has been ruled out by the Joint Committee in terms of listing all public authorities, but they have given some limited support to the possibility of amending specific Acts to state that a particular function is or was public. Equally if it was the intention of Parliament to embrace protection for people like Mrs. YL, then this could [as above] be achieved, without necessarily closing the ambit for similar cases involving other providers of a different nature. It could be argued that such a definition could pave the way for elucidation of such a meaning, thus adding clarity, rather than uncertainty.

This may then provide appropriate guidance and framework for the courts to re-examine the concepts and ensure that the original intention of Parliament in 1998 is not frustrated.

Of course great play has been made between the private and public sector, in order to protect the rights of those most vulnerable to abuse; however it is noteworthy in conclusion to analyze the rights and responsibilities now that NL²⁵² has for the time being put paid to the notion that those within the private sector do not fall within the remit of the HRA.

²⁵² Ibid

Whilst one cannot argue that those most vulnerable members of society should not be protected from any form of abuse;²⁵³ then it would be more amenable to amend the Care Standards Act 2000, to embrace Article 3, in the sense that similar wording regarding degrading and other treatment could be including in a loose sense. With regard to Article 8; there are no guarantees whether 'public' or 'private' sector providers can keep a non functional home open in any event. In essence this in itself raises the issue whether the public authority should have the task in caring for our aging society. Of course what ever ones means in a resident requires 24hr care, then they shall be excused from meeting any costs as this is classed a 'nursing care, which under the scheme of things would be met in the public sector in any event.

The above is upon the promise that without the HRA then the checks and balances are lost. This however does not necessary stack up when considered fully with the private sector in any event. To this end it is worthy to visit a case decided upon under the terms of the CSA²⁵⁴

²⁵³ Ibid, when residents sat in commodes whilst eating their breakfast.

²⁵⁴ Ibid.

For instance any misdemeanors may result in the de-registration of the rest home, with the loss of places for all the residents. This of course would be damaging as well as traumatic to all those that the legislation was meant to protect. Of course society must have in place all the checks and balances to protect those most at risk, and of course one cannot compromise the dignity or safety of the above when dealing with matters of complaint.

To this end whilst Article 3 may be brought in to question by reason of the status of the particular body providing care, the end product may be just as damaging in any event. Further the viability of a rest home²⁵⁵ is as important and CSA addresses this issue square on. In the case of Cornwall County Council,²⁵⁶ this concerned the de-registration of the owners of Penhellis Care Home by the Care Standards Tribunal²⁵⁷

In a case following complaints against a private sector residential home; Cornwall County Council, welcomed the

²⁵⁵ This point is raised again, given the nature of challenges under Sec 6(3) of the HRA have recently involved Rest Homes.

²⁵⁶ See web-site posting in 2007. <http://www.cornwall.gov.uk/index.cfm?articleid=38894>

²⁵⁷ Formed within the terms of the Care Standards Act 2000 [Ibid]

decision to cancel the registration of the company which was responsible for running the Penhellis Care Home in Helston²⁵⁸

The Council stated²⁵⁹ "We continued, at public expense, to keep the home open for as long as possible, but the owners were unable to agree a sale. At that point we clearly could not continue allowing people to live in a home where their safety and quality of care could not be guaranteed."

Of course the quality of care could not be guaranteed, by reason of CSA²⁶⁰, although the CSA was the inbuilt safeguard to protect those most vulnerable. In this case there was a number of concerns expressed one which was effectively the credibility of a director²⁶¹

The report of the Tribunal hearing identified a catalogue of persistent failures by the registered proprietor, Mr. Saf Awan, to respond to requests from CSCI for evidence that he was a "fit" person to be the responsible individual for the home. It stated

²⁵⁸ As per Nigel Walker (Lib Dem) who stated "the County Council's Executive Member for Adults, is glad that clarity has been brought to the situation by the organization responsible for regulating care homes". "At the beginning many people naturally but incorrectly assumed that the County Council was responsible for the decision to move residents. We were aware of the Premium Care Home's situation and we worked hard to try and assist the transfer of the business to someone else. This would have been the ideal solution, and we are saddened that this was not achieved."

²⁵⁹ Nigel Walker Ibid.

²⁶⁰ Which sets out the minimum requirements expected within both 'public and 'private' sector providers???

²⁶¹ Mr. Awan had been struck off the Roll of Solicitors in 2001 or that, at the time, he was An undischarged bankrupt. Mr. Awan was made bankrupt on 21/05/03.

that letters were repeatedly ignored and promises were made to provide information that was never kept.

Regulations,²⁶² requires that the Company should be satisfied as to the fitness of an employee. In this case the CSCI wrote to Premium Care Homes Ltd on several occasions between 30/07/04 and 11/11/05 to establish that the required checks had been carried out with regard to Mr. Awan's²⁶³ fitness.

The Tribunal report showed that not all the directors of Premium Care Homes Ltd were in possession of all the information; which would have enabled them to make an informed decision. The Company was unaware, for example, that Mr. Awan had been struck off the Roll of Solicitors in 2001 or that, at the time, and he was an undischarged bankrupt²⁶⁴.

The Tribunal also found that the Company had failed to comply with a number of other regulations.

The above included Regulation 25, which states... *"The registered provider shall carry on the care home in such a manner as is likely to ensure that the care home will be financially viable for the purpose of achieving the aims and*

²⁶² In particular [Regulation 19](#)

²⁶³ A Director of the Company.

²⁶⁴ Ibid

objectives set out in the statement of purpose." It also requires the registered person to: "Provide such information and documents as it may require for the purpose of considering the financial viability of the home if the Commission requests."

The Tribunal was given evidence showing that not only did the Company fail to comply with requests for financial information; it also failed to respond to a Statutory Requirement Notice.

For completeness Regulation 13 states that: "If it appears to the registered person that the establishment or agency is likely to cease to be financially viable at any time within the next following six months the registered person shall give a report to the Commission of the relevant circumstances." Evidence from Mr. Awan was that the Home encountered financial difficulties shortly after registration. PAYE and National Insurance contributions on behalf of the company's employees had not been forwarded to the Inland Revenue, resulting in a winding-up petition being presented in February 2007 by Customs and Excise.

The Tribunal also ruled that the Company had failed to comply with Regulation 10 which states that: "The registered provider and the registered manager shall, having regard to the size of

the care home, the statement of purpose, and the number and needs of the service users, carry on or manage the care home with sufficient care competence and skill." ²⁶⁵

The decision to close a care home is never taken lightly and is usually the last resort after every effort has been made to get the owners to improve standards and comply with legal requirements²⁶⁶.

Penhellis Care Home is now empty of all residents, as they have been transferred to alternative accommodation.²⁶⁷

It follows that in such circumstances that the HRA would not have assisted in any event, unless of course statute imposed a duty upon a local authority to take over the running of a rest home whose management skills had fallen short of the CSA.

Of course the viability of the Rest Home was of immense importance and therefore this raises the further issue as to what would be the position if say the bank who had underpinned the

²⁶⁵ The report concludes that the Company failed to demonstrate that the Home had been managed with sufficient, competence and skill to meet the regulation.

²⁶⁶ As per the Committee.

²⁶⁷ It was noted that the intentions of Mr. Saf Awan with regard to the future of the home were unclear at that time.

business decided to call in the loan, or appoint receivers to dispose of the property.

It cannot be doubted that the same traumatic effect would nonetheless play a great deal in the upset of the residents, in being placed in other homes. In essence the HRA would not have been of any assistance, unless checks and balances were put in place to bind other outside influences, which of course would and could not be the case.

It follows that that despite the desirability of incorporating the HRA in contracts as suggested by the Joint Committee on Human Rights²⁶⁸ such a proposition would arguably be short lived and would have very little effect in cases such as the above example²⁶⁹

Further Nia Griffith; putting a question to Lord Goldsmith²⁷⁰...
"Could I move on to the meaning of public authority? In the Law Lord's decision last week in the YL case on the meaning of public authority in relation to the Human Rights Act, and obviously with the increasing involvement of voluntary and

²⁶⁸ Ibid

²⁶⁹ Cornwall County Council [Ibid]

²⁷⁰ Evidence before the Joint Committee on Human Rights, HL 394 Q251

private organisations in the delivery of public services, we obviously now have a situation where two individuals could be in very similar institutions and yet the law would be interpreted differently according to whether it was a private or local authority run home. What now is the Government's attitude to our Chairman's private Member's bill on the meaning of public authority?'

Lord Goldsmith: *"The Ministry of Justice, the responsible department for this, did, as you well know, argue consistently with the undertaking it had given to this Committee that the decision of the Court of Appeal in the YL was wrong, and narrowly, by a 3:2 majority, that was rejected. The department is not considering carefully the implications of the judgment. If I may deal directly with the point about the Chairman's private Member's bill, I think there is a real, very important issue about the definition, which would then be applied. What is a public authority requires very careful consideration...."*

On the one hand - and the Government did take the view - those bodies that were caught by the YL judgment ought to be treated as public authorities. That is what it argued. On the

other hand, there are bodies, which would be brought in by the definition in Mr. Dismore's bill, like bed and breakfast accommodation, which would be treated as public authorities.

I must say I would have real reservations about that because there is a real risk that it would frighten off a lot of people who are providing simply bed and breakfast accommodation to homeless people, which is very important if decent and humanitarian standards are to be applied to them. I think it does need careful consideration but I am not responsible for reaching the final decision as to what it should say"

Unsurprisingly there is no real formula to set the issue to rest. Of course if you removed the criteria completely and embraced those providing a specific form of care such as rest homes, then of course they would automatically assume the responsibility within the terms of the HRA. However this in itself may be a 'hollow' victory, as in the case *Premium Care Homes Ltd*, in which it will be recalled²⁷¹ the rest home encountered financial difficulties shortly after registration.

PAYE and National Insurance contributions on behalf of the company's employees had not been forwarded to the Inland

²⁷¹ Ibid

Revenue, resulting in a winding-up petition being presented in February 2007 by Customs and Excise.

Financial constraints in private and public sector are more of a dilemma than the HRA itself. In the above case one doubts that the HRA would have assisted no one, unless of course a recovery fund had been available, in the form of specific pool of funds being available to rescue a failing business.

One suspect that the answer would be swift from the Government in that they are not in the position to prop up the private sector, as in reality the private sector is not in a position to embrace the HRA.

Of course it has been canvassed throughout that in real terms would any distinction really matter, given the statutory controls; and the lack of investment within the private sector, which would be available to keep open non profit homes, unlike the local authorities who of course have sufficient funding to meet the needs of residents by under pinning state rest homes if the need arose, in order to satisfy the terms of the HRA.

One sad reflection is simply that more local authority homes close due to non investment, and also being unable to meet the ever changing environment of the new standards being applied upon a regular piecemeal basis.

It follows therefore that the dilemma in real times will remain, even if the HRA was amended and section 6(3) was all embracing, as this would long term only protect those residents in well established and trusted establishments.

Time Limits

In the case of proceedings taken against a public authority there is a limitation period of one year from the date of the act complained of²⁷², unless there are shorter time limits that apply to the action - for example three months for judicial review²⁷³ - in which case the shorter time limit will apply. Convention rights can be waived, but only if the waiver is unequivocal and does not conflict with an important public interest.

In short the HRA instils within the UK a new approach that can be best demonstrated in the procedure adopted in both civil and criminal cases²⁷⁴. Tribunals and committees along with other such bodies will be left in no doubt that the rules of natural justice prevails both against procedure and bias²⁷⁵.

²⁷² Applies only to claims which directly allege breach of Convention by a public authority see 7(1) & (3)
²⁷³ Application must be made promptly, within a 3 month , and unlike the old RSC R> 53, time may not be extended see r. 54.5 92)(4)

²⁷⁴ Article 6 HRA for instance

²⁷⁵ *Bryan v UK* 21 EHRR [1995] @ 342, Held that a developer could challenge an enforcement notice as a breach of Article 6. "In the context of planning appeals the very existence of this power available to the executive, whose own policies may be in issue, is enough to deprive the inspector of the requisite appearance of independence, notwithstanding the limited exercise of the power in practice and irrespective of whether its exercise was or could have been in issue in the present case."

The Importance of Enforcement

The purpose thus far has been to provide a flavour of human rights protections as enshrined in the Convention, and a brief outline of the statutory framework of the HRA.

Having set out the basic framework, to make this dissertation more understandable, is to the ensuing arguments in context. It is now pertinent to consider the issue of enforcement.

One of the main reasons why the newly elected government in 1997 pledged to enact a human rights statute was to provide an easier and more readily available method by which aggrieved individuals could bring Convention claims.²⁷⁶

The case of *Brind*²⁷⁷ exposes the frailties of the judicial assumption that Parliament always intends legislation to

²⁷⁶ *Rights Brought Home* [CM 3782].

²⁷⁷ *Brind v Home Secretary* 1991 1 AC 696

respect their Convention obligations. Accordingly, arguments for human rights would be minimal and hypothetical.

Moreover, given high profile embarrassment on the pan-European-level²⁷⁸ meant that many policy makers considered a change was necessary to ensure domestic courts could, metaphorically, nip violations in the bud whilst preventing future regional embarrassment²⁷⁹.

Before moving onto the statutory scheme of the HRA, which makes this possible, it is important to say a note on the importance of enforcement. To use an example, the Universal Declaration of Human Rights, signed in 1948, applicable in international law, makes very lofty guarantees.

In addition to guaranteeing basic civil liberties, it guarantees work, free choice of employment to a decent social and cultural life. Crucially, however, the guarantee is not to enforce these 'universal' rights against all who

²⁷⁸ for example, the Article 3 violation in *Ireland v UK* – (1979-80) 2 EHRR 25

²⁷⁹ See *Towards a Constitutional Bill of Rights for the United Kingdom*, by Robert Blackburn (A Cassell Imprint) BLC ISBN 1 85567 529 3

choose to violate them, but calls for 'teaching and education' by states²⁸⁰.

This goes to the nub of the argument. It is all very well making grand moral statements, but if these statements cannot be effectively enforced these statements become illusory, rhetorical folly.

There must be 'practical bite' of enforceability to transfer these statements into reality.²⁸¹ The idea of enforcement comes in many forms, and so it is necessary here to define the term for the purpose of further discussion.

Enforcement can involve citizens gaining access to the courts, an inherent right in Article 6(1). In Golder v UK (1960)²⁸² it was considered that Convention guarantees would be 'useless' if it was impossible to commence court proceedings in the first place.

Further, there is a right to 'effective remedy', and if a national court fails to provide this where there is a breach, aggrieved citizens may commence proceedings in the ECtHR.

²⁸⁰ Preamble, Universal Declaration on Human Rights 1948

²⁸¹ GEARTY (2004) *'Is the idea of human rights now doing more harm than good?'* Centre for the study of human rights, lecture at London School of Economics and Political Science, 12 October 2004.

²⁸² (1994) 18 EHHR

The ECtHR can, and then issue a declaration as to whether the member state is in conformance with its Convention obligation. However, this declaration is of no binding effect. If a statute is in violation, the ECtHR cannot strike down this piece of legislation.

In the context of this dissertation, this is the parameter of the enforcement debate. To put it in its crudest and characterised form, the enforcement hinges on the extent to which the judiciary can deem a statute 'unconstitutional' or 'unlawful'.

It is clear from the above paragraph that the ECtHR does not possess these powers, but the purpose of the dissertation from here is to consider whether the enforcement provisions of Sections 3 and 4 could warrant this extreme consequence.

These provisions themselves are of great constitutional importance and go to the heart of the debate on the judiciary's boundary of intervention in a constitutional democracy. The scope of this enforcement mechanism affects profoundly the relationship between the

legislature and judiciary, and hence the supremacy of Parliament.

Indeed, the fact these issues are under consideration itself raises issues of fundamental constitutional principle and possible challenges to these orthodoxies.

Before engaging these two central enforcement provisions in the HRA, it is important to point out that by no means is there one settled method of human rights enforcement by the judiciary. National constitutions within the European continent can and do go over and above the guarantees made by the ECtHR for effective remedies. They can, and do, also go further than the Convention in how rights are characterized²⁸³.

This is not to accept that the Convention is a lowest common denominator, but to maturely recognize that national systems can develop their own constitutional approaches and characterize human rights in a way peculiar to their national identity and culture.

²⁸³ For example, this contains in the main civil and political rights, but this does not preclude member states from developing social and economic rights.

Chapter 5

ENFORCEMENT UNDER THE HUMAN RIGHTS ACT

As set out in the previous chapter the most robust enforcement mechanism charges the judiciary with ruling on the legality of a statute and its compatibility with constitutional norms.

In considering this role it is useful to consider approaches taken by the USA, Canada and South Africa²⁸⁴. The judiciary in these cases measure legislation against a constitutional document, with an ultimate power of legislation invalidation.

This formation can handily be described as "entrenched bills of rights" in that the validity of legislation hinges on the judicial determination of its compatibility this constitutional text.

An alternative approach that does not accept the ramifications of increased judicial powers is prevalent in New Zealand, which determines human rights as

²⁸⁴ For an introductory text on the Canadian Charter see Schabas, [1991] International Human Rights Law and the Canadian Charter, Toronto, Carswell.

essentially a shared enterprise between both the judiciary and Parliament.

This approach can aptly be described as an "interpretative bill of rights" insofar as the enforcement mechanism available to the courts is to find human rights compatible with the linguistic or implied intention of legislation.

Enforcement as a political compromise

It is from this pedigree that the HRA emerges as a political compromise between the desirability of Parliamentary sovereignty and international respect for human rights. How this compromise is maintained depends crucially on how the judiciary perceive their constructive obligations under Section 3(1), which provides

"So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights."

The term that draws most attention in the passage "possible", and the vast majority of this dissertation will concern itself with ascertaining its scope and the way that the judiciary have applied the perceived meaning within the body of their judgments.

As stated, the reach of a human rights regime depends crucially on the enforcement mechanisms at the court's disposal, and there are still many open questions about how the judiciary exercises their obligation under these, provisions.

Despite this, cabinet ministers have looked upon Section 3 of the HRA with a good deal of optimism, viewing it as a provision enabling the judiciary to make quiet corrections of most offending legislation. The government expressly opted for the word "possible" over "reasonable" in section 3(1) to create a more onerous duty on the courts to find a Convention compliant interpretation. As the then Secretary of State for the

Home Department, Jack Straw, said: "*We expect that, in almost all cases, the courts will be able to interpret legislation compatibly with the Convention*"²⁸⁵

Arguably, the government has therefore given the courts a green light to carve out an extensive jurisdiction in human rights enforcement, but this comes with conditions.

These conditions are supplied by other provisions in the HRA²⁸⁶. Section 3(2) provides Section 3(1):'*applies to primary legislation and subordinate legislation whenever enacted and does not affect the validity, continuing operation or enforcement of any incompatible primary legislation*!.

This can best be described as the non-invalidation clause, which ensures that whilst the court can adopt an extensive role under Section 3(1), this does not permit invalidating, or making an interpretation that fundamentally departs from the operation of a statute.

²⁸⁵ Hansard HC, 16 February 1998, col 780

²⁸⁶ Gearty (2002) 'Reconciling Parliamentary Democracy and Human Rights' 118 Law Quarterly Review.

Moreover, as Lord Irvine argues:" This ensures that the courts are not empowered to strike down Acts of Parliament which they find to be incompatible with Convention rights'²⁸⁷.

In cases when the judiciary find that a Convention compliant is not possible, they will apply Section 4(2), which provides: *"If the court is satisfied that the provision is incompatible with a Convention right, it may make a declaration of that incompatibility"*²⁸⁸

Again, the rationale for this Section is that it introduces:

"...a new mechanism through which the courts can signal to the Government that a provision of legislation is, in their view, incompatible. It is then for government and Parliament to consider what action should be taken" Also adds, *"I believe that this will prove to be an effective procedure and it*

²⁸⁷ Hansard HL, 3 November 1997, col 1230

²⁸⁸ Ibid

*is also one which accords with our traditions of Parliamentary sovereignty."*²⁸⁹

A major issue is the frequency at which this provision is used. Lord Irvine said that Section 4(2) "provides for the rare cases" where a declaration must be made²⁹⁰. These declarations are serious and are likely to "prompt the government and Parliament to respond",²⁹¹ although the failure to respond has led to criticism by the judiciary²⁹²

It is worth noting and touching upon the procedure of remedies at this juncture whereupon the government can respond to such a declaration by using the fast track procedure²⁹³ to this end such a procedure can be commenced either as above following a declaration of incompatibility however amendments by the executive are limited under remedial orders²⁹⁴ and only where there are compelling reasons to do so, and normally by a positive resolution procedure²⁹⁵

²⁸⁹ Ibid

²⁹⁰ Hansard HL, 3 November 1997, col 1231

²⁹¹ Ibid

²⁹² Goodwin v United Kingdom [2002] 35 EHRR 18. @ 52,53,102-4 & 120

²⁹³ See Sec 10 and Schedule. 2

²⁹⁴ Statutory instruments. 20 (1); which amends, and removes its incompatibility with the Convention.

²⁹⁵ Schedule 2 of the HRA

The effect of the order will allow retrospective effect, although a limitation is applied in that the retrospections cannot create for instance a criminal offence if none existed prior to its implementation.²⁹⁶

The statutory mechanisms by which human rights can be enforced; the interaction between Sections 3 and 4 is an important feature of the HRA²⁹⁷.

Both sections are crucially dependent upon the way, in which the judiciary perceive their scope. It follows that a broad reading of Section 3, permitting the vast majority of cases being read Convention compliant, will inevitably lead to a reduced role for Section 4.

The same is, of course, true if the judiciary deemed Section 3 to carry a weak interpretative obligation coupled with a deferential approach to Parliament. There is a fundamental tension between Sections 3 and 4 with

²⁹⁶ Schedule 2, Para. 1 (3)

²⁹⁷ Klug [2003] 'Judicial Deference Under the Human Rights Act 1998' European Human Rights Law Review

a broad approach to one necessarily reducing the scope of the other²⁹⁸.

Arguably the power to change a law retrospectively is to accommodate a violation once a declaration has been made under Section 4. Parliamentary supremacy is preserved in that the Minister is required to lay before Parliament a document containing a draft of the proposed order together with the required information²⁹⁹

Such information can be summarised as explanation of the incompatibility, which would include findings or order together with the required information and reasons for proceeding, under Sec. 10, and for making an order, in the proposed terms.

Once compliance has been met then there is a period of at least 60 days, which allows for information to be gleaned from the Minister concerned.

²⁹⁸ Irvine [2003], 'the Impact of the Human Rights Act: Parliament, the Courts and the Executive', Public Law 308.

²⁹⁹ See Schedule: 2, Para 3; & 5

The Minister may amend the draft in light of representations. Once amended or approved in draft form, this is again laid before Parliament accompanied by a summary including any representations that have been made. The order does not come into effect until approved by a resolution of each House within 60 days, after it is laid for the second time.

For completeness an order made under the fast track, only remains in force for 120 days, unless approved in the above terms. Following *R (H) v Mental Health Review Tribunal*³⁰⁰ the Sec. of State introduced The Mental Health Act 1983 (Remedial) Order 2001³⁰¹ using the urgent procedure above, this can be explained because of the fundamental rights to personal liberty and if not rectified quickly, would have created confusion as the tribunals considering such matters would have been unsure as to who bore the; 'burden of proof'.

The power given under Sec. 10 to amend legislation applies both to primary and secondary legislation. This is

³⁰⁰ [2001] EWCA Civ @ 415,

³⁰¹ Statutory Instrument. 2001/3712

useful as it allows speedy amendments following an adverse decision by the ECtHR, thus saving potential embarrassment to Parliament.

Problem of constraining 'possible'

Section 3(1), therefore, plays a large part in guiding the extent to which the judiciary may consider any complaint alleging that legislation is Convention incompatible.

As stated, the term 'possible' draws close attention, as it is inevitably the scope of this term that will determine the effectiveness of judicially enforced human rights.

Therefore, it is of the utmost importance to ascertain the scope of the term, and how this can guide the judiciary's constructive obligations.

The problem with Section 3, however, is there is no matter of fact way of restricting what is possible. Whilst semantically the word possible necessarily implies the existence of external constraining factors, this does not help in defining what these constraining factors are. It

will be argued in the next few parts that the HRA occupies a shaky constitutional ground between Parliamentary supremacy and fundamental rights.

How the courts plough this middle ground has been left silent by Parliament, and there is a risk that Section 3 is sanctioning the invalidation of legislation through interpretation.

Before adopting this extreme consequence, it is instructive to examine the following synthesis of judicial statements as to what is deemed a Convention compliant construction within the realms of the 'possible'.

Judicial approaches to Sections 3(1)

To this end a number of judicial statements have been made on both Sections 3 and 4, and the following represents a synthesis of these speeches... *"The interpretative obligation...is a strong one"³⁰², "quite unlike any previous rule of statutory interpretation"³⁰³, and to*

³⁰² *A* [2002] 1 AC 45, 67 per Lord Steyn.

³⁰³ *A* [2002] 1 AC 45, 87 per Lord Hope.

*be applied "even if there is no ambiguity in the language"*³⁰⁴. "Subject to the Section not requiring the court to go beyond that which is possible, it is mandatory in its terms"³⁰⁵ and "*places a duty on the court to strive to find a possible interpretation compatible with Convention rights*"³⁰⁶.

It is therefore legitimate "to adopt an interpretation which linguistically may appear strained"³⁰⁷ as "Compatibility with Convention rights is the sole guiding principle"³⁰⁸.

However "the court's task is to read and give effect to the legislation which it is asked to construe"³⁰⁹. The Section 3 "obligation ...applies to the interpretation of legislation. This function belongs, as it has always done, to the judges.

³⁰⁴ *A* [2002] 1 AC 45, 67 per Lord Steyn.

³⁰⁵ *Poplar* [2001] 4 All ER 604, 624 per Lord Woolf.

³⁰⁶ *A* [2002] 1 AC 45, 67 per Lord Steyn.

³⁰⁷ *A* [2002] 1 AC 45, 68 per Lord Steyn.

³⁰⁸ *A* [2002] 1 AC 45, 87 per Lord Hope.

³⁰⁹ *A* [2002] 1 AC 45, 87 per Lord Hope.

In R v Lambert³¹⁰ Lord Hope stated "the obligation powerful though it is not to be performed without regard to its limitations. The obligation applies to the interpretation of legislation, which is the judge's function. It does not give them power to legislate"

Further Section 3 does not give power to the judges to overrule decisions which the language of the statute has been taken on the very point at issue by the legislator"³¹¹.

In essence once a construction of a particular piece of legislation is found to be incompatible under the terms of the HRA then under section 4 a declaration is made.

There are of course a number of practical problems involved in applying Section 3 "it may be enough simply to say what the effect of the provision is without altering the ordinary meaning of the words used"³¹². In some cases, "...a strained or non-literal construction may be adopted, words may be read in by way of addition to

³¹⁰ R v Lambert [2002] 2 AC, 545, 585 B-D, Para 79

³¹¹ Lambert [2001] 3 All ER 577, 604 per Lord Hope.

³¹² Lambert [2001] 3 All ER 577, 604 per Lord Hope.

those used by the legislator and ...words may be "read down" to give them a narrower construction that their ordinary meaning would bear"³¹³.

In other cases "the words used will require to be expressed in different language in order to explain how they are to be read in a way that is compatible with the HRA. The exercise in these cases is one of translation into compatible language from language that is incompatible"³¹⁴.

In dealing with these problems, it is "necessary to identify precisely:-

(a) The words used by the Legislature which would otherwise be incompatible with the Convention right; and

(b) How these words were to be construed, according to the terms of Sec. 3, in order to make them compatible"³¹⁵. "*So far as possible judges should seek to achieve the same attention to detail in their use of language to express the effect of applying Section 3(1)*

³¹³ *Lambert* [2001] 3 All ER 577, 604 per Lord Hope.

³¹⁴ *Lambert* [2001] 3 All ER 577, 604 per Lord Hope.

³¹⁵ *A* [2002] 1 AC 45, 87 per Lord Hope.

as the Parliamentary draftsman would have done if he had been amending the statute. It ought to be possible for any words that need to be substituted to be fitted in to the statute as if they had been inserted there by amendment".

Therefore, in applying Section 3 "courts must be ever mindful of this outer limit"³¹⁶. In *Lambert*, Lord Hope said "It is therefore clear that the court can only extend a meaning provided it can be done without doing such violence to the statute as to make it unintelligible or unworkable, otherwise the use of this technique will not be possible"³¹⁷.

In *Poplar* Lord Woolf said "the most difficult task which the courts face is distinguishing between legislation and interpretation...if it is necessary in order to obtain compliance to radically alter the effect of the legislation this will be an indication that more than interpretation is involved"³¹⁸

³¹⁶ *See* [2002] 2 AC 291, 313 per Lord Nicholls.

³¹⁷ *Lambert* [2001] 3 All ER 577, 604 per Lord Hope.

³¹⁸ *Poplar* [2001] 4 All ER 604, 624 per Lord Woolf.

However interpretation depends on how far the courts are prepared to read in to the statute a specific meaning, or put in a different way, how they [the courts] are prepared to strain the meaning in order to uphold an alleged wrong doing of the court below.

In, *Condon v The United Kingdom* the Court of Appeal considered cases on appeal, the ECtHR held that Court of Appeal in merely considering the safety of the applicants' conviction was in breach of their fundamental rights within the HRA.³¹⁹

The "Court of Appeal was concerned with the safety of the applicants' conviction, rather than had he received a fair trial.... The question whether or not the rights...guaranteed to an accused under Article 6 of the Convention was secured cannot be assimilated to a finding that his conviction was safe....³²⁰"

That decision was later followed by the Court of Appeal, Lord Woolf C.J..."it would be unfortunate if the approach

³¹⁹ *Condon v. The United Kingdom*. Appli. No. 35718/97. Judgment given at Strasbourg, May 2, 2000

³²⁰ *Condon v. The United Kingdom*. Appli. No. 35718/97 @ Paragraph 65

of the European Court of Human Rights and the approach of the Court of Appeal were to differ. Section 3 of the HRA now required all acts of the UK Parliament to be read in a way that was compatible with Convention rights³²¹

In essence all UK legislation should be given a meaning that adopts and embraces the rights, if that's possible,³²² as above such a meaning is purely dependant upon how far the courts are prepared to go in the exercise of that function.

Lord Woolf in the Privy Council said, "*That issues involving the Bill of Rights should be approached with realism and good sense, and kept in proportion. If this is not done the Bill will become a source of injustice rather than justice and it will be debased in the eyes of the public*³²³."

Granted the Convention is not an entrenched bill of rights but no less important to the society, whose human rights are embodied within the HRA. It should be minded that

³²¹ The Times (London), November 21, [2000]

³²² For example If a court makes a declaration of incompatibility then it is for Parliament to amend (see below)

³²³ Attorney-General of Hong Kong v. Lee Kwong-Kut [1993] AC 951 @ page 975

the "principal aim of society" in England was [and remains] to protect individuals in the enjoyment of the absolute rights of life, liberty, and property³²⁴".

Simor and Emmerson's recent publication, *Human Rights Practice*³²⁵ ... "(a) that the rights should be 'practical and effective' - the effectiveness principle (b) that an autonomous or independent interpretation of certain Convention terms is necessary to ensure uniformity and to prevent the Convention's purpose being frustrated; and (c) that certain of its terms must be interpreted in a dynamic or evaluative way in order to ensure that rights are effectively protected in the light of social and scientific changes".

Judicial approaches to Sections 4(2)

A Convention compatible interpretation will "not be possible if the legislation contains provisions which expressly contradict the meaning which the enactment would have to be given to make it compatible [and] the same result must follow if they do so by necessary

³²⁴ Sir William Blackstone, in his *Commentaries, on the Law of England*, vol. 1, 124.

³²⁵ J Simor and B Emmerson QC, *Human Rights Practice*, (June 2000), Sweet & Maxwell

implication, as this too is a means of identifying the plain intention of Parliament"³²⁶.

Indeed, Lord Bingham in Anderson [2003] noted, "*In these cases using s3 "would not be judicial interpretation but judicial vandalism... [as] it would give the section an effect quite different from that which Parliament intended"*³²⁷. "*But the interpretation of a statute by reading words in to give effect to the presumed intention must always be distinguished carefully from the amendment"*.

The first declaration of incompatibility was issued in March 2001. In this case, the Court of Appeal held that Sections 72 and 73 of the Mental Health Act 1983 were incompatible with Articles 5(1) and 5(4) of the Convention in that they reversed the normal burden of proof in requiring a detained person to show that they should not be so detained, in essence he who asserts must prove³²⁸.

³²⁶ *A* [2002] 1 AC 45, 87 per Lord Hope.

³²⁷ *Anderson* [2003] 1 AC 837, 883 per Lord Bingham.

³²⁸ *R v (1) Mental Health Review Tribunal, North & East London Region (2) Secretary Of State For Health ex p H* (2001)

Subsequently, there have been a further number of cases. In *R v Commissioners of Inland Revenue* Section 262 of the Income and Corporation Taxes Act 1988, held incompatible and repealed. In *R v Mental Health Tribunal North and East London Region* sec 73 of the Mental Health Act 1983 was declared incompatible and amended³²⁹.

In *International Transport Roth GmbH v Secretary of State for the Home Department*, the penalty scheme contained in Part II of the Immigration and Asylum Act 1999 declared incompatible and amended³³⁰.

In *R v McR* Section 62 of the Offences Against the Person Act 1861, Criminal Justice (Northern Ireland) order 2002 (2003 No 1247 (N.I. 13), Article 19 and Schedule 1. Made, 8 May, 2003.

³²⁹ amended by Mental Health Act (Remedial) Order 2001 (made 18/11/01, in force 26/11/01)

³³⁰ Amended by Nationality, Immigration and Asylum Act 2002, section 125, and Schedule 8 (Amendments to the Bill tabled on Report in the House of Commons, 12 June 2002. In force 14 November 2002/ 8 December [2002])

No prosecutions have been brought under section 62 since the declaration of incompatibility³³¹.

In the case of Bellinger v Bellinger³³² the rights of transsexuals came under consideration, by the House of Lords who found itself unable, or at least unwilling, to interpret 11(c) of the Matrimonial Causes Act 1973 in such a way as to allow a male to female transsexual to be treated in law as a female³³³.

The House, whilst sympathetic to the case, admitted it lacked institutional competence as regards deciding issues relating to the rights of transsexuals.

The House did not feel it appropriate to use its powers under Section 3 to reinterpret the statute in terms that to do so would necessitate giving the expressions 'male' and 'female' in the HRA³³⁴ a novel, extended meaning that a person may be born with one sex but later became, or became regarded as, a person of the opposite sex.³³⁵

³³¹ Amended by Nationality, Immigration and Asylum Act 2002, section 125, and Schedule 8(Amendments to the Bill tabled on Report in the House of Commons, 12 June 2002. In force 14 November 2002/ 8 December 2002

³³² Bellinger v Bellinger UKHL 21 (2003)

³³³ 56 per Lord Hope

³³⁴ Sec 11© Matrimonial Causes Act 1973

³³⁵ Per Lord Nicholls @ Para 36.

The House of Lords, without hesitation, issued a declaration of incompatibility under sec 4. The effect of the declaration was that the Matrimonial Causes Act was contrary to Article 8³³⁶ and 12³³⁷ of the Convention.

On the practical side, it seems that Section 4 has been used most often where the courts feel ill equipped to make sweeping changes to a legislative scheme.

In both Bellinger v Bellinger [2003]³³⁸ and Re S; Re W [2002]³³⁹ Lord Nicholls recognised that Parliament is best suited to develop a coherent and comprehensive framework.

In Re S this was because the child care "starring system" had far reaching ramifications for local authorities and could only be redesigned by Parliament once aware of the surrounding circumstances³⁴⁰: "This is especially so where the departure has important practical

³³⁶ Article 8 right to respect for private life.

³³⁷ Right to Marry.

³³⁸ [2003] UKHL 21

³³⁹ [2002] UKHL 10

³⁴⁰ Ibid

repercussions which the court is not equipped to evaluate"³⁴¹

In Bellinger this was in recognition that gender reassignment laws require the drawing of eligibility regulations, and thus ill suited for judicial determination³⁴². As Lord Hope said in Lambert "*amendment is a legislative act. It is an exercise which must be reserved to Parliament*"³⁴³. "*Were ... [judges] to create a fresh scheme purportedly under sec. 3, then... [they would] be failing to show the judicial deference owed to Parliament as legislators*"

In these cases "*It will ...be necessary to leave it to Parliament to amend the statute and to resort instead to the making of a declaration of incompatibility*"³⁴⁴ but courts should remember that "*a declaration of incompatibility is a measure of last resort*"³⁴⁵, as per Lord Steyn in A [2002].

³⁴¹ S&W [2002] 2 AC 291, 313 per Lord Nicholls.

³⁴² Ibid

³⁴³ Lambert [2001] 3 All ER 577, 605 per Lord Hope.

³⁴⁴ Lambert [2001] 3 All ER 577, 604 per Lord Hope.

³⁴⁵ A [2002] 1 AC 45, 68 per Lord Steyn.

Preserving the fundamental feature of a statute there are a number of basic principles that arise out of this synthesized judicial material. They are all contingent, however, on retaining an existing constitutional boundary which was demarcated by Section 3(2) to preserve the supremacy of Parliament and their uninhibited power to make and unmake any law³⁴⁶.

The judiciary have laid great emphasis on the importance of not violating this constitutional norm. This involves finding a ground that does not violate the relevant statute's fundamental feature whilst enabling the court to carry out their interpretative role. After all, and as Lord Millet notes in Mendoza, the courts must find a Convention compliant construction where possible³⁴⁷.

The judiciary cannot 'radically' alter the meaning of the statute, they must preserve the 'fundamental' features of the statute, and failure to do so would amount to 'judicial vandalism', involving 'legislation not interpretation'.

³⁴⁶ Irvine (1999) '*Activism and Restraint: HR and the Interpretative Process*', *European Human Rights Law Review* 350.

³⁴⁷ *Mendoza v Ghant* [2004] UKHL.

The crucial question, therefore, is the method they adopt both to carry out this judicial obligation whilst preserving the fundamental social policy of a statute.

A view mooted and rejected at an early stage was that Section 3(1) would be confined to resolving linguistic ambiguities in statutory language³⁴⁸. Where the words under consideration fairly admit of more than one meaning the Convention-compliant meaning is to prevail.

The statutory language would then be given a meaning that best accords with the Convention. The House of Lords in R v A rejected this restrictive approach, considering that this would create a semantic lottery, not true to the extensive interpretative obligation bestowed upon them by Section 3(1)³⁴⁹. More optimistically, the courts can look behind language; they can read in and read down words all of which can change the meaning of the enacted legislation.

This does not mean that the courts avoid looking to the statutory language, used by which Parliament expresses its intention. The critical question is the degree to which

³⁴⁸ For a history, see Clayton and Tomlinson (2000), 'The Law of Human Rights', Oxford University Press, Oxford.

³⁴⁹ 1 AC 45, 68 per Lord Steyn

it is permissible to change the statute's meaning. They must preserve the fundamental social policy behind the HRA, but aside from this they can do considerable violence to the statute. The following discussion has led to two basic propositions resonant in the case law.

(1) An interpretation is "possible" provided that the intrinsic and fundamental social policy behind a statute is retained. (2) However, if this fundamental aspect of the statute is clearly in contrary to the Convention, then the courts must issue a declaration of incompatibility.

Manipulating the fundamental aspect of a statute – a case study

The question then turns to how the courts determine what a fundamental feature of a statute is and therefore logical restrictions on "possible". The problem is that in many cases this touchstone remains elusive and ill defined. As Butler said of the claim that an interpretation must not be contrary to fundamental Parliamentary intent is "trite...simplistic...and misses the point" because no rule of interpretation seeks to violate Parliamentary

intent, the claim assumes that the intention of Parliament is easy to ascertain³⁵⁰.

In a recent decision the House of Lords³⁵¹ were called upon to consider Schedule 1 of the Rent Act 1977 (hereafter "the Rent Act"), which provides: -

2(1) The surviving spouse (if any) of the original tenant, if residing in the dwelling-house immediately before the death of the original tenant, shall after the death be the statutory tenant if and so long as he or she occupies the dwelling-house as his or her residence.

2(2) for the purposes of this paragraph, a person who was living with the original tenant as his or her wife or husband shall be treated as the spouse of the original tenant.

The issue was whether the appellant Juan Godin-Mendoza (hereafter "Mendoza"), who had lived long term with his

³⁵⁰ Butler (2000) 'The Interface Between the Human Rights Act and Other Enactments: Pointers from New Zealand' *European Human Rights Law Review* 249.

³⁵¹ *Mendoza v Ghant* [2004] UKHL

homosexual partner, was able to succeed as a statutory tenant under the Rent Act following his partner's death.

The Lords responded in the affirmative. Arguably the social policy was to give a spouse security of tenure. The Lords read this to a person of the same sex, despite the wording of Section 2(2) of the Rent Act such security was extended to a homosexual partner. In essence the words "living with the original tenant as his or her wife or husband", was glossed over to include a person of the same gender.

Both the Court of Appeal and House of Lords never gave a rigorous assessment of the statute's fundamental purpose when ruling that Mr. Mendoza had a right to succeed his homosexual partner as his "husband or wife". Neither judgment gives more than a cursory paragraph on the reason why the legislation could be read to include homosexual cohabiters without doing violence to its underlying purpose.

Lord Nicholls merely asserted that the social policy underlying the legislation of security of tenure is equally applicable to 'the survivor of homosexual couples living together in a close and stable relationship'³⁵². Similarly in the Court of Appeal, Buxton LJ, supported by the other members, deliberated that as Parliament allowed non-marriage couples succession, this does not therefore preclude same sex partners.

Whilst this case may be a breakthrough in social equality terms, it is constitutionally problematic. It is submitted that both members of the judiciary were avoiding the main issue, cherry-picking the criteria for succession in order to arrive at 'their' desired outcome.

Whilst homosexual couples may live in close, stable and longevial relationships, they cannot be husband or wife, because the law says that homosexuals cannot marry. Homosexual cohabitation is not 'marriage-like'³⁵³ because it lacks the defining features of a legal marriage, as a relationship between persons of the opposite sex.

³⁵² *Mendoza v Ghant* [2004] UKHL.

³⁵³ A phrase used by Baroness Hale in *Mendoza v Ghant* [2004] UKHL.

Lord Millett³⁵⁴ picked up on these anomalies in his fellow lord's judgments. Particularly, his lordship recognised that the forum for social change of this nature is Parliament, and if Parliament so chooses they can incorporate succession provisions into their civil partnerships legislation³⁵⁵. Enlarging the category of potential beneficiaries to include those almost certainly deliberately excluded must verge on a substantial departure from a fundamental feature of the Rent Act³⁵⁶.

In short, despite the perceived importance of retaining the fundamental feature of a statute, and thus supplying the restriction on what is constructively 'possible', the courts put this aside to ensure an outcome that best accords with ideals of social equality.

This was a departure from an earlier decision considered by the Lords in the case of *Fitzpatrick –v- Sterling*³⁵⁷. In this case the Lords did not accept that Schedule 1 (2) (1) applied relying instead upon Sec. 3(1) of the Rent Act,

³⁵⁴ dissenting upon the ground that it was not possible to read "spouse" in paragraph 2 as including the same sex partners

³⁵⁵ *Ibid*

³⁵⁶ Mead (2003) *'Swallowing the Camel, Straining at the Gnat: Some Implications of Mendoza'* European Human Rights Law Review 501.

³⁵⁷ (1999) 3 WLR @1113

thus treating Mr. Fitzpatrick as a member of his former partner's family. Whilst this case was decided before the HRA, nonetheless this could be seen as a move forward for the same sex partners. However under the terms of Sec 3(1) Mr. Fitzpatrick became an assured tenant unlike a statutory tenant in Mendoza.

Essentially Mr. Fitzpatrick was treated less favourable than in the case of Mendoza, upon the premises that upon the death of a statutory tenant a person who was a member of that original tenant's family and was residing with him or her in the dwelling house at the time of and for the period of two years immediately before the death, becomes entitled to an assured tenancy by succession, by virtue of the provisions of section 2(1)(b) of the Rent Act 1977 and paragraph 3 in part 1 of Schedule 1 to that Act³⁵⁸.

The effect of this is that Mr. Fitzpatrick was not offered the same protection by virtue of the nature of his tenancy. The same protection against rent increases is not afforded to an assured tenant unlike a statutory tenant as the rent payable under an assured tenancy is

³⁵⁸ ³⁵⁸ as amended by section 39 of and schedule 4.2 to the Housing Act 1988

the contractual or market rent, which may be more than the fair rent payable under a statutory tenancy, other differences also apply to possession proceedings that are distinct from a statutory tenancy³⁵⁹

Further whilst the nature of the tenancy as an assured tenant, this precluded to right to buy, which is available to all secured tenants³⁶⁰.

A further example of this is the 'rape-shield' case, *R v A* [2002]. A majority of the House of Lords, led by Lord Steyn, held that an evidentiary statutory restriction on a rape victim's previous sexual conduct with the accused had to be read subject to Article 6 which meant that the evidentiary rule ought not to be automatically inadmissible³⁶¹. Accordingly, the House of Lords held that a possible interpretation could be made without the requirement of issuing a declaration of incompatibility.

Again the case must be put in context, as the purpose of s41 (3) (c) was to protect rape victims, and prevent the

³⁵⁹ see the Housing Act (ibid) and Civil Procedure Rules

³⁶⁰ See Housing Act 1996.

³⁶¹ s41(3)(c), Youth and Criminal Evidence Act 1999

jury forming adverse views of the rape victim's sexual history with the accused. It was considered many of the gendered stereotypes could implicitly have an impact on the jury's verdict. This is the reasoning behind the section, but the main purpose of its enactment was to prevent judicial involvement given the court's traditional common law stance in enabling this history as material evidence³⁶².

The courts once again sidestepped the essential feature of the legislation and did so to reassert traditional common law values. These essential features were of secondary importance to judiciary intent on reasserting these judicial values into evidentiary requirements.

³⁶² Fenwick and Phillipson (2003), *Public Law and Human Rights*, Cavendish, London pgs186

CHAPTER 6

ENFORCEMENT UNCERTAINTY

-AND-

CHANGING CONSTITUTIONAL MORES

Whilst the House of Lords' decisions in Mendoza and Bellinger contradict one another, they do have one thing in common, and in that they indicate much confusion about how the judiciary are to enforce human rights in the UK constitution.

This confusion stems, because the UK constitution is a political settlement. It has no single written constitutional text to indicate the rights of powers of state organs³⁶³. However, it is a constitution in recognising the implicit and delicate relationship between Parliament who makes the law, and the judiciary who apply it. The constitution is marked by a boundary where judicial intervention is

³⁶³ Although the UK does have a partially written constitution, this is to be found in many different places, like historic texts (Magna Carta), and statutes like the European Communities Act 1972, Scotland Act 1998, Wales Act 1998, Representation of the People Acts, and indeed the Human Rights Act.

warranted in circumstances to apply and uphold a statute³⁶⁴.

This constitutional Convention of judicial deference to the legislature is central to how the UK constitution is perceived by the judiciary in upholding Parliamentary sovereignty and its uninhibited power to make or unmake any law³⁶⁵.

Multi-layered constitution

This confusion stems, it is submitted, because of an increasingly multi-layered and fluid UK constitution that invites the judiciary to articulate their, own ideas about what the UK constitution is.

The Convention of judicial deference central to the UK constitution is becoming increasingly ambiguous. The HRA adds a further burden to this constitutional unrest. It is deeply political, fraught with difficulties because of its uncertain constitutional ground between

³⁶⁴ DICEY AV (1959) 'Introduction to the Study of the Law of the Constitution' 10th ed., Macmillan

³⁶⁵ Of course, parliamentary sovereignty, in many ways is illusory.

Parliamentary supremacy and human rights entrenchment.

In many respects, this uncertain ground has been ceased by the judiciary to carve out an increasingly active role. The judiciary have become increasingly vocal on their role within a reinvigorated separation of powers.

Lord Woolf in the context of government's proposals to remove asylum-seekers' appeal rights said that this would be "fundamentally in conflict with the rule of law"³⁶⁶. He also said that if this proposal were to become law "it would be so inconsistent with the spirit of mutual respect between the different arms of government that it could be the catalyst for a campaign for a written constitution".

Indeed, existing members of the judicial hierarchy, Laws LJ and Sedley³⁶⁷ have both written extra judicially about

³⁶⁶ Squire Centary Lecture delivered at Cambridge University, 29th January 2004

³⁶⁷ As he was then know.

the source of the court's power deriving independently from Parliamentary sovereignty³⁶⁸.

In a judicial capacity, Laws LJ has made some telling statements in *Thoburn v Sunderland*³⁶⁹ about the changing nature of constitutional authority. His lordship asserted that there are two types of statutes: (1) constitutional statutes, and (2) ordinary statutes. Unlike ordinary statutes, Laws LJ reasoned that constitutional statutes require a special approach to repeal and a demanding level of scrutiny when engaged.

This approach is tantamount to creating a constitution, effectively entrenching fundamental rights into the common law.

Need for a constitutional foundation

The crux of the matter – is how the court responds to statutes and any limitations thereto; depends crucially on the constitutional foundation of the court's power. The "Common Law" School argues that the courts derive their

³⁶⁸ Laws (1995) *Law and Democracy* Public Law 72

³⁶⁹ [2002] 2 WLR 247

power from the old common law remedies of mandamus and prerogative writs, and therefore they operate independently of Parliament³⁷⁰. Therefore, if the courts fail to apply an Act of Parliament, or more moderately imply rigorously into statutes to alter fundamentally the statute's meaning, there is an argument that this is constitutionally legal³⁷¹.

In many respects, these moves are not extreme or unexpected because of the moral emptiness and inflexibility of Parliamentary sovereignty, the most commonly assumed constitutional orthodoxy. This gains much of its legitimacy from Professor Dicey's seminal 19th century work, *The Law of the English Constitution*³⁷².

It is not so much his substantive points that are at issue here but rather the theoretical pedigree that informs his work.

Dicey was a classical positivist, believing that all law can be scientifically and empirically established from their

³⁷⁰ For a good exposition of this view see, Craig (2003), 'Administrative Law', Sweet and Maxwell, London, see Chapter 1 'The nature and purpose of administrative law'.

³⁷¹ For a detailed discussion on the ambit of judicial intervention in public law, see Craig [1998] *Ultra Vires and the Foundations of Judicial Review* Constitutional Law Journal 63.

³⁷² Dicey [1959] *Introduction to the Study of the Law of the Constitution* 10th ed, MacMillan, London

passing by an authorised legal source. In his work, of course, Parliament was this body. However to some legal positivism is morally impoverished, a crude and descriptively flawed way of understanding the nature of law and the constitution³⁷³.

It omits constitutional values that do just as much to define constitutional boundaries and the relationship between the judiciary and Parliament, as does those who pass the laws³⁷⁴.

Whilst as a matter of form the UK may operate under Parliamentary democracy, it must be considered whether as a matter of substance this is, to use one of Professor Anthony Giddens' phrases, a 'shell institution', failing to adapt to monumental social, and in this case, constitutional change.

³⁷³ For an excellent critique, see Dworkin [1991] 'Laws Empire', Fontana, USA.

³⁷⁴ Dicey, did, however, recognise the importance of values in the political operation of the constitution by way of Conventions. Nevertheless, this applies to the way in which political actors perceive their role, and ignores the values that may guide judicial principles.

It was Lord Bingham who said that institutions must change with a world movement towards judicialisation of fundamental rights and the emergence of continental/international tiers of government³⁷⁵.

The dangers of entrenchment through interpretation

Indeed, there has been monumental constitutional change in past decades that Dicey's Parliamentary supremacy model has failed to adapt to. Legislative power has moved both up (to the EU) and down (to Wales, Scotland, Northern Ireland, London etc). Accession to the European Community in 1972, direct effect and supremacy of EC law have considerably strained Parliamentary sovereignty.

It was with considerable embarrassment; the way in which the courts sought to make the striking down of a statute in contravention with EC law also compatible with the supremacy of Parliament in *Factortame*³⁷⁶.

³⁷⁵ Bingham, [2002], 'A new supreme court for the United Kingdom', The Constitution Unit, University College London

³⁷⁶ R v Secretary of State for Transport, ex parte Factortame [1991] 1-3905

Similarly, the growth of judicial review has been relentless. Public law has become increasingly 'constitutionalised', that is restricted the operation of government by means of judicial values. The growth of executive discretion due to wide legislative drafting has seen the development of judicial values that inform greatly the way statutes operate³⁷⁷.

This development has, admittedly, been belated, but the key 1960s decisions indicated a judiciary more willing to intervene in matters previously the reserve of government³⁷⁸. Indeed, the previously high standard of *Wednesbury*³⁷⁹, which allowed the substance of governmental decisions to be challenged where wholly unreasonable, has been relaxed in a number of categories, in human rights cases where the standard of review is now proportionality³⁸⁰.

Even before the enactment of the HRA, the courts were developing common law fundamental rights that

³⁷⁷ Craig (2003), 'Administrative Law', Sweet and Maxwell, London, see Part 2

³⁷⁸ Examples of increased judicial activism include *Ridge v Baldwin* [1964], *Padfield v Minister of Agriculture* [1968], *Anisminic v Foreign Compensation Commission* [1969], *Conway v Rimer* [1968].

³⁷⁹ *Associated Provincial Picture House Ltd v Wednesbury Corp* [1949] 1 KB @ 223

³⁸⁰ *R v Secretary of State for the Home Department, ex parte Daly* [2001] 2 WLR 1622, per Lord Steyn

demanded a more intensive level of scrutiny ("anxious scrutiny") than that of *Wednesbury*³⁸¹.

The constitution on this reading, then, is not fixed and constant, but fluid and evolving, changing as society changes. Judicial values have grown and with this an entirely new perspective to approach Acts of Parliament.

As the constitution has the capacity to change according to societal need, this has led many commentators to suggest that the UK constitution is a normative settlement, seeking renewal with the best possible reasons for reform.

To illustrate, and to draw upon a pre-eminent advocate of human rights, Laws LJ said extra-judicially that the constitution is: "a dynamic settlement, acceptable to the people, between the different arms of government...dynamic because it can change...without

³⁸¹ For example, fundamental rights were being carved out for: access to courts *R v Lord Chancellor, ex parte Witham* [1998] QB 575, free speech *R v Secretary of State for the Home Department, ex parte Simms* [1999] 2 AC 115, basic subsistence *R v Secretary of State for Social Security, ex parte Joint Council of Welfare of Immigrants* [1996] 4 All ER 385.

revolution. In the end, it is not a matter of what is, but of what ought to be"³⁸².

It is not surprising; therefore, that judicial politics has taken centre-stage when considering the complex, multi-faceted constitution that embraces many contradictory ideals at its core.

As Bamforth and Leyland argue, there is power now to the courts to articulate these constitutional complexities, and for him this turns upon whether the individual judge is a minimalist (favouring judicial restraint) or a maximalist (more hard edged review)³⁸³.

Formal structures, therefore, are of secondary importance. What really matters is how judges make sense of the constitutional issues around them. It is, after all, the judiciary who has to articulate a theory of democracy when deciding whether a restriction on the Convention rights is proportionate and 'necessary in a

³⁸² Laws (1995) *Law and Democracy* Public Law 72. This argument is intertwined with Wade's assertion that the constitutional principle of the supremacy of parliament over the judiciary *cannot* be established by an Act of Parliament, and is in reality a question of political fact determined by the judiciary.

³⁸³ Bamforth and Leyland (2003), 'Public Law in a Multi-Layered Constitution', pgs. 1-25, in Bamforth and Leyland, (2003) *Public Law in a Multi-Layered Constitution*, Hart Publishing, Oxford

democratic society³⁸⁴. To do this, they must consider what a democratic society actually is, and the extent to which they play a part in shaping this³⁸⁵.

It is at this point that the argument of Parliamentary sovereignty as a 'shell' institution becomes more apparent. The judiciary are not engaged in some literal and mechanical process, applying statutes and simply following the will of Parliament, but are engaged in a real normative political debate about the nature and freedom of democracy.

Where does this leave the practical dimension of the judicial practice? Quite simply, any consideration of legal practice is impoverished without a fully consideration of the underlying values presupposing those views. It is only by practitioners appreciating the deeply normative issues involved in both judicial enforcement and human rights jurisprudence that a comprehensive claim can be made.

³⁸⁴ As is a legitimate restriction in Convention jurisprudence.

³⁸⁵ Ewing and Gearty, (1991) *'Democracy or a Bill of Rights'*, Society of Labour Lawyers, London

This point can be illustrated by examining the National Health Service. The NHS has been consistently part of national political debate in the post-war period. Issues of resources have played centre stage in the major political parties manifesto pledges. Nevertheless, given the political importance of adequate NHS resourcing, the courts have considered many cases before being invited to rule in favor of applicants seeking treatment.

In *R v Cambridgeshire Health Authority, ex parte B*³⁸⁶, a ten-year-old girl with an acute form of leukemia, had been treated by chemotherapy and had a bone marrow transplant. However, doctors considered that further chemotherapy and a second bone marrow transplant was not in the patient's best interest. The girl's father, having sought further medical advice, was advised the chance of success with further treatment was 10-20%.

The problem, however, was that the treatment in total would cost £75,000. The father judicial reviewed the health authority's decision.

³⁸⁶ [1995] 1WLR 898

At first instance, Laws J³⁸⁷ held that the health authority acted unlawfully in withholding treatment because, amongst other reasons, they did not take into account the wishes of B or her father. The interesting point is that Laws J stated B as having a 'fundamental right' to life, and that this 'inalienable' right can place legitimate restrictions on the way funds are allocated.

On appeal, Lord Bingham recognised that, despite the quite agonising facts surrounding this case, this reasoning is riddled with problems. Human rights whilst too many optimists are viewed as a public good, on this reading, are a very dubious public good.

They can have a real destabilising and debilitating effect on society, and how democratic institutions allocate its resources. His lordship overturning the High Court's decision said...

"Our society is one in which a very high value is placed on human life. No decision affecting human life is one that can be regarded with other than the greatest seriousness.... [However]...the courts are not...arbiters as

³⁸⁷ As he was then.

to the merits of this kind...We have one function only, which is to rule upon the lawfulness of the decisions'

Maximalism – v – Minimalism

It is therefore submitted that judges have different normative commitments, which influence their view of what the law is, and indeed what they want the law to be. Laws J believes in fundamental rights as a basis of civilised society, whereas Lord Bingham's views closely approximate to those of Benthamite utilitarianism³⁸⁸. In this case, his lordship recognised the need to maximise the health service's resources, and judicial intervention could considerably frustrate this.

The issue, then, is how the judiciary comprehends their role under Section 3(1). This will, above all else, determine the practical dimensions of judicial enforcement of Sections 3 and 4. The synthesis of judicial practical statements above provided a glimpse of the present law, but

³⁸⁸ see Bentham, 'Utilitarianism'

These statements are given meaning and effect only once the practitioner is aware of the normative foundations of these views. Theories of the constitution are silent prologues behind all the practical statements enumerated. It may even be said, verging on the extreme, that these practical statements are mere rhetorical devices employed when necessary to support a pre-judged normative conclusion.

In essence, the British constitution is multi-faceted, and at times contradictory, and arguably the judiciary can cherry pick to support their preferred judicial philosophy, whilst knowing that the expansion of judicial values mandates novel constitutional approaches³⁸⁹.

The point to be taken from this chapter, in addition to the initial descriptions of human rights instruments, is that the HRA is no ordinary statute set for mechanical application by the judiciary. It invites, and demands, something more. It invites the judiciary to articulate theories of democracy. It invites the judiciary to engage

³⁸⁹ For a brilliant exposition of judicial ideology influencing caselaw, see Griffith (1997), *The politics of the judiciary*, 5th edition, Fontana, London.

in open-ended inquiries into the scope of privacy rights, or expression or torture.

To do these things involves no ordinary practical application of legal precedent. It involves some delving into ideas of constitutional theory in order to enrich practical understanding about how cases like *Mendoza*, *R v A*, and *Bellinger* are really decided and what is really going on when the Judiciary makes such enforcements. In *Mendoza* weight was given to social equality, in *Bellinger* Parliamentary sovereignty, in *R v A* common law values.

Human right law and enforcement, then, far from being set prescriptions, involves a good deal of introspection and moral deliberation. The next Chapter will deal directly with this central issue. It is only by ascertaining the most normatively justifiable enforcement model can a justifiable approach be laid out for the interpretative obligation under Section 3(1).

CHAPTER 7

HUMAN RIGHTS UNCERTAINTY

The scope of human rights law

In addition to the judicial enforcement being uncertain, a further problem is presented by the difficulties in properly ascertaining the scope of human rights law. Put simply, it must be asked what the practical ramifications are for open-ended human right texts on how the judiciary perceive and perform their role.

For example, Article 2 of the Convention, protects the 'right to life', and lists a number of guarantees³⁹⁰. Article 2 can easily be regarded as one of 'the most fundamental provisions in the Convention'³⁹¹.

It prevents the state from intention killing. It places a duty on the state to investigate suspicious deaths, and in certain circumstances, it places a positive obligation to take steps to prevent the avoidable loss of life.

³⁹⁰ Article 2 is used here because of its perceived importance as a fundamental provision. However, the ensuing discussion can easily be extended to any of the purported guarantees under the Convention.

³⁹¹ *McCann and Others v United Kingdom* (1995)

However, there has been, and continues to be, strong disagreement about how the right is to be characterised. The first question involves asking how a 'life' is to be characterised so as to enter Article 2. Is a foetus a life?³⁹² This is far from controversial.

Indeed the US Supreme Court decision in *Roe v Wade*³⁹³ shows the perils of deliberating on questions of this nature, where the nation split on this issue. How about quality of life? Does the right to life necessarily imply the choice to end life?

The case of Diane Pretty

The House of Lords decision in *Pretty v United Kingdom*³⁹⁴ exposed the inherent tension in the Article 2 right³⁹⁵. In this case, the applicant suffered from a degenerative and incurable illness affecting the muscles, and sought to commit suicide; due to her illness she was unable to do this without assistance. As it is a crime to

³⁹² *Bruggerman and Scheuten v Federal Republic of Germany* (1978)

³⁹³ *ROE v. WADE*, 410 U.S. 113 (1973)

³⁹⁴ *Pretty v United Kingdom* [2001] UKHL 61: [2002] 35 EHRR 1

³⁹⁵ Other rights were considered, but for the purpose of this discussion Article 2 will only be considered.

assist another to commit suicide³⁹⁶, the applicant argued that the refusal of the Director of Public Prosecutions to grant immunity to her husband to assist her amounted to a violation under Article 2.

Relying upon Article 2, the applicant argued that the right to life at its essence is a right to self-determination over life - a right whether to live or not. The right to life included its natural corollary, the right to die, and the state had an obligation to protect both.

The House of Lords ultimately decided that Article 2 could not be interpreted as conferring the diametrically opposite right. Nor could it create a right to self-determination in the sense of conferring on an individual the entitlement to choose death rather than life.

This case is indicative of the uncertainty surrounding the precise content of human rights. The open textured and normative dimension of human rights prescriptions invites increasing introspection and moral judicial deliberation.

³⁹⁶ Section 1, Suicide Act 1961

Human rights increasingly involve hard questions about the nature of liberal society itself, and it is highly dubious to suggest that the judiciary are best placed to articulate answers to these hard questions. Of course, the House of Lords in *Pretty* managed to avoid adopting the extreme interpretation of Article 2 that the applicant argued for.

However, perhaps at some future date this extreme interpretation of Article 2 will not be so unreasonable. The Convention is, after all, a 'living instrument'. It is this prospective and chameleon-like characteristic of the Convention that perhaps brings human rights as controversial political issues to the fore.

Prohibition on torture and inhuman and degrading treatment

This is no more so than on Article 3 prohibition on torture and inhuman and degrading treatment. The scope of Article 3 was first tested in cases involving the government mistreating terrorists/criminals by way of beatings and devices³⁹⁷. As intentional extreme acts, the court was asked to consider whether political prisoners

³⁹⁷ The varying intensity of this mistreatment determining whether the violation was torture or inhumane and degrading treatment

subsequently raped, amounted to an Article 3 violation³⁹⁸. The Courts replied in an affirmative that such action was a violation.

These can perhaps be considered paradigm cases on the scope of Article 3 as protecting political prisoners given events surrounding World War II. However, in invoking the chameleon 'living instrument' doctrine, Article 3 has expanded and reformulated itself to a whole host of problematic areas.

Does the sexual abuse of a criminal prisoner amount to torture on this basis? On the basis of *Aydin v Turkey*, an incremental development could be made so as to include sexual abuse to prisoners.

In *Selmouni v France*³⁹⁹ the ECtHR were invited to find that sexual assault on someone in custody fell within the scope of Article 3. Interestingly, the Court found this to be torture; once again asserting the Convention is a "living instrument".

³⁹⁸ *Aydin v Turkey* [1998] 25 European Human Rights Review

³⁹⁹ (2000) 29 European Human Rights Review

The problem is that torture in this sense is a far cry to the very narrow categories envisaged in the 1940s. As the idea of torture expands to include an increasing number of categories, as an idea and a constraining force becomes subsequently diminished.

The ECtHR has been asked to consider, for example, whether birching⁴⁰⁰, parental chastisement⁴⁰¹, or even prison conditions⁴⁰² amount to torture. Indeed, in *Price v UK*⁴⁰³ the issue was whether a disabled woman with recurring kidney problems, who was committed to prison for contempt of court, was subject to inhuman and degrading treatment as the facilities were not adopted to accommodate someone with such a disability and the staff not trained for the needs of a disabled person.

The ECtHR held that the UK government was in breach of Article 3. So, now that unintentional acts are considered within the scope of Article 3, does this mean substandard prison conditions amount to torture or degrading treatment?

⁴⁰⁰ *Tyrer v UK* [1978] 2 European Human Rights Review

⁴⁰¹ *Costello-Roberts v UK* [1993] 19 European Human Rights Review

⁴⁰² *Price v UK* [2002] App.33394/96

⁴⁰³ 2002 96 European Human Rights Review

Does the failure of social service to protect children from abuse amount also to a breach?⁴⁰⁴ The relentless pace of Article 3 in expanding into more and more governmental affairs itself begins to raise important issues of democracy and how it chooses to distribute scarce public resources.

Uncertain enforcement role and uncertain human rights

The problem is that Articles 2 and 3, and human rights generally, suffer incurable epistemological defects⁴⁰⁵. Whilst people may agree at the level of abstraction what human rights contain, this consensus disappears at the level of specificity, where real life, value conflicting scenarios invokes pluralistic and divergent understandings of what is required.

Nobody, for example, save an extreme minority, would disagree that Article 3 emboldens a commitment to a civilized society.

⁴⁰⁴ Z v United Kingdom (2002) 34 European Human Rights Review

⁴⁰⁵ Campbell, 'Incorporation by interpretation' in Campbell, Ewing and Tompkins (eds) (2001) *'Sceptical Essays on Human Rights'*, Oxford University Press.

However, there would be strong disagreement as to whether Article 3 should apply to, for instance, substandard prison conditions and thus diverting scarce public resources from perhaps worthier initiatives.

The question of distributing scarce public resources, as Lord Bingham opined above in *ex parte B*, is a democratic function involving Parliament and or government.

Both an uncertain enforcement role and uncertain human rights must be understood as a coupling when determining the proper ambit of the judiciary's role under Section 3(1) and 4(2). It is necessary now to consider these two factors together in designing a practical model by which the judiciary can discharge their statutory enforcement obligations.

Traditional interpretation

The first way to resolve the problems inherent in Section 3(1) is to retain the traditional interpretative approach of the courts in making the presumption that Parliament legislated in conformance with its international law

obligations. Accordingly, legislation, no matter how out of sync with established human rights case law, is read so as to be compatible⁴⁰⁶.

Indeed, this traditional rule of construction is a restriction on Section 3 in that it prevents the courts from challenging the intention of Parliament's interpretation of how it is to act compatible to its international treaty obligations. There is some academic support with this approach.

Butler argues that Section 3 is a similarly drafted statute to that of the perceived weaker enforcement mechanism in Section 6 of the New Zealand Bill of Rights⁴⁰⁷.

By way of background, the New Zealand Bill of Rights allows a reasonable interpretation of the Bill of Rights, but where this is not possible, the legislation still stands. The New Zealand approach is considered much weaker than that in the UK, as the court is not necessarily always searching for a possible compatible meaning, but is rather using Parliamentary intention to find a consistent

⁴⁰⁶R v Secretary of State, ex parte Brind [1991] 1 AC 696

⁴⁰⁷ Butler (2000) 'The Interface Between the Human Rights Act and Other Enactments: Pointers from New Zealand' European Human Rights Law Review 249.

reading. Nevertheless, Butler argues that New Zealand and the UK are textually identical:

Wherever an enactment can be given a meaning that's consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning".

This is to be compared with, (to refresh): "s3(1), so far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights".

The crux of Butler's argument is that both sections create a duty ("shall"/"must") to adopt a "consistent"/"compatible" interpretation where this "can be" done/"is possible"⁴⁰⁸.

However different approaches to reverse burdens of proof have emerged from these two jurisdictions⁴⁰⁹. This difference is best stated as New Zealand using Parliamentary intention as the limiting factor. In the UK context, by contrast, both politicians and the judiciary have expressed their view on Section 3 as one allowing strained

⁴⁰⁸ See p.251, Butler (2000) 'The Interface between the Human Rights Act and Other Enactments: Pointers from New Zealand' *European Human Rights Law Review* 249.

⁴⁰⁹ Compare *R v Phillips* [1991] 3 NZLR 175 with *R v Lambert* [2001] 3 All ER 577.

interpretations and to do what is possible, short of legislating, in order to prevent a declaration of incompatibility⁴¹⁰.

There is also an express reference in the government's white paper that the Section 3 interpretative obligation marks a break from previous rules of construction⁴¹¹.

More generally, the whole purpose of a strained interpretation is to alter significantly what Parliament intended⁴¹². It is therefore paradoxical to argue that Section 3 permits a strained interpretation whilst proclaiming that the limits of this are supplied by Parliamentary intention⁴¹³.

In essence, the problem with this conservative approach is that it seems to make out as if the HRA never happened, or if it did, that Parliamentary intention is fixed to the point of conforming with all treaty obligations, which is an odd and self-serving presumption.

Moreover, the HRA gives effect to a continental treaty of open textured language, drafted in broad and general terms.

⁴¹⁰ See chapter 1

⁴¹¹ *Rights Brought Home* Cm 3782, 1997, Para 2.7. Jack Straw, Hansard HC, 3 June 1998, col. 423.

⁴¹² Marshall (2003) 'The Lynchpin of Parliamentary Intention: Lost, Stolen or Strained' *PL* 236.

⁴¹³ *Ibid*

Therefore, traditional rules of construction are inadequate when interpreting the Convention.

Despite the epistemological inadequacies for human rights jurisprudence, the value of the HRA is the important place of dialogue where different branches of the state are engaged in a substantive discourse. Utilisation of the traditional interpretative method would shrink Section 4(2) to vanishing point.

Modified interpretation

A more hopeful line on ascertaining the restriction of what is 'possible' is a novel approach to Parliamentary intention that looks to see whether Parliament, all things considered, clearly intended to breach human rights.

This would involve an expanded utilisation of the 'Pepper v Hart'⁴¹⁴ method of examining Hansard to determine Parliament's intention. Given the purpose of legislation is to codify a political judgment in a public and authoritative form, it is arguable therefore that the judiciary's role is to build interpretative theories about what Parliament intended to communicate.

⁴¹⁴ Pepper v Hart [1993] AC 593

Admittedly, any interpretative theory by the judiciary would involve a good deal of speculation and second-guessing, but this is an evolutionary legal method to ascertain what Parliament intended. The judiciary would have to consider, for example the following questions.

First, if Parliament unknowingly breached human rights would their knowledge of the breach lead to the legislation being redrafted? Second, if Parliament enacted a piece of legislation now would they intend to breach human rights? Third, is a consequence of a breach down to the ends or the means used?

Dealing with the first question, there is some evidence from the case law that this "informed intention" approach has some bearing on judicial reasoning.

As Lord Steyn said "...it is realistic to proceed on the basis that the Legislature would not, if alerted to the problem, have wished to deny the right..."⁴¹⁵

Section 19(1) of the HRA adds further support to this "informed intention" proposition, as this statute obliges the minister in charge of a relevant bill to make a statement

⁴¹⁵ R v A [2002] 1 AC 45, 68.

indicating that the bill is Convention compatible. It is a reasonable to impute to Parliament an intention to be Convention compatible in these scenarios.

Therefore, the absence of such a declaration will suggest that any breach was intended, rendering a section 3 interpretation impossible; whilst where a s19 statement was made use of Section 3 will be legitimate⁴¹⁶.

This informed intention approach appears reasonable in that it introduces a tidying up doctrine similar to implied repeal. It also challenges the legal fiction that all legislation derives its authority from a single Parliamentary body that stands the test of time⁴¹⁷.

Parliament, which enacted the Offences Against the Persons Act in 1861, is very different both socially and politically from the one that enacted the Criminal Justice Act in 2003.

The above approach is a robust exercise in constructing Parliament as a more socially relevant body than the artificial legal construct that defines the validity of law. However, it

⁴¹⁶ Differentiating Parliament's intention to breach human rights in passing an Act, and its opinion on whether an Act does in fact breach human rights, is vital: for the former Section 19 is relevant, but for the latter, as Lord Hope states (A [2002] 1 AC 45, 75), Section 19 is irrelevant. As it is only Parliament and not the Executive that is sovereign, it seems reasonable to reserve the benefits of Parliamentary sovereignty to those enactments which have received fully informed Parliamentary consent for the proposed breach of human rights.

⁴¹⁷ An issue recognised by Hart, *Postscript*, 1994, Oxford University Press 58-66.

could be seen as an open invitation for the judiciary to rule on the validity of statutes, to view old law with the benefit of hindsight.

It would be more appropriate for Parliament itself to update statutes, and bringing to bear a host of relevant social and political issues, rather than narrow legalistic doctrine. This approach indirectly introduces an analogous doctrine to implied repeal, and Section 3(2), which states that the continuing validity and operation remain in effect, would be challenged.

On the third point, is whether the judiciary can distinguish between ends and means, there is evidence to suggest that this approach influences judicial decision-making.

The issue of whether the true intention of Parliament can be derived from the means, or the ends, it enacts was central in Anderson, S&W, and International Transport Roth v Secretary of State for the Home Department⁴¹⁸. In this case, Jonathon Parker LJ declined to use Section 3 stating:

“The exclusive role of the Secretary of State in determining liability...and the correspondingly subordinate role of the

⁴¹⁸ [2003] QB 728

courts... [are] central and essential features of the scheme. To reverse those roles would involve much more than linguistic changes to the statutory provisions: to my mind, it would produce a fundamental change in the nature and character of the scheme, such that the rewritten scheme would not be recognisable as the scheme which Parliament intended⁴¹⁹.

This distinction between means and ends may also explain the divergent rulings in *R v Secretary of State for the Home Department, ex parte Anderson*⁴²⁰ and *R v A*⁴²¹.

In *R v A* Section 41 of the statutory provisions did not exclude the judiciary's evidential requirements. By stating that the underlying purpose of the statute was for a fair trial, the judiciary sidestepped the evidentiary restrictions that were a means to this end. The means could be legitimately altered provided that the ends are not undermined.

Similarly, in *Anderson* s29 of the Crime (Sentences) Act 1997 was constructed as a device to enable the Home Secretary on his discretion to adopt or reject judicial

⁴¹⁹ [2003] QB 728, 785. Similar comments made by Lord Nicholls in *Sevillano* [2002] 2 AC 291, 314.

⁴²⁰ [2003] 1 AC 837

⁴²¹ [2002] 1 AC 45, 68.

advice on sentencing, not as a mere means, but an end in itself⁴²². Therefore, the judiciary could not legitimately interfere with.

The problem with this distinction is that it invites disingenuous and artificial constructions of the statute's ends. Also, this practice masks the fact that the means to arrive at this end can be highly controversial.

If the end in A was to ensure a fair trial it does not make it any less controversial that the judiciary say that admitting evidence of the accused's previous sexual conduct with the victim is a means to this end.

The means may actually undermine the end. And why cannot this evidentiary restriction be an end in itself? Indeed, the end to be achieved is subject to variant interpretation, and the most elaborate and artificial rationalisations can be stated for why a certain means can achieve the statute's desired objective.

Nevertheless, this modified approach has some qualitative aspects in that it focuses on what Parliament intended to restrict as a possible interpretation.

⁴²² *Anderson* [2003] 1 AC 837, 894 per Lord Steyn.

Furthermore, this approach would advance the “dialogue model” of the HRA. It goes further than the traditional approach, in that it has a place for Section 4, where Parliament’s intention to breach human rights is made sufficiently clear. The broader problem, however, is that this approach does not solve the problems inherent in the current judicial approach that enables a strained interpretation restricted by fundamental statutory intention.

This approach, then, goes too far in that it leaves many question unanswered. It goes too far in inviting a good deal of judicial speculation on what Parliament, socially enlightened in the twenty-first century, would make of a statute from Queen Victoria’s reign. It goes too far in sanctioning the judicial creation of artificial distinctions between means and ends. It goes too far, then, in intruding on many controversial issues ordinarily the reserve of Parliament.

Constitutional legitimacy

Undeterred, there are some would argue that the modified intention approach does not go far enough. On

this viewpoint, law is essentially an interpretative exercise by the judiciary, who are charged to make interpretations so as to fit in with the underlying political morality of a state and in a way that best justifies state coercion on citizens⁴²³.

The "constitutional legitimacy" model approaches Section 3(1) as but one more means for the judiciary to interpret in accordance with the underlying political morality. This involves considering what is constitutionally legitimate, the best interpretation of the HRA in question, and the most appropriate interpretation that fits and advances the constitutional tradition.

To do this, the judiciary examine the constitutional history in order to determine what is deemed 'possible'. This approach involves consideration of the normative justifications for Parliamentary sovereignty in notions of representative democracy, the rule of law, the culture of human rights, and the extent to which the judiciary consider special protection essential to uphold this constitutional tradition.

⁴²³ Dworkin (1991), *Laws Empire* (Fontana), pgs176-276

The broad approach, therefore, favours the interpretation of constitutional values of Parliamentary sovereignty against those of competing principles of human rights to keep best in with the constitutional tradition.

Therefore, it is arguable in the current state of affairs when the executive dominate both Houses of Parliament, where effective scrutiny is increasingly ineffective, where broader and vaguer laws challenge the classic libertarian approach propagated by Dicey, which the judiciary needs to return to this culture of liberty, this constitutional tradition, by way of a broad interpretative approach⁴²⁴.

The implicit assumption here is that the judiciary perceive their role includes a duty to protect human rights, and doing this by way of ensuring citizens are not subject to undue erosions of liberty by the executive. Indeed, as stated in previous chapters, the judge's perception of their role has changed considerably over the past four decades, with inflated roles in administrative law, common law fundamental rights and EC law.

⁴²⁴ Dworkin (1990) *'A Bill of Rights for Britain'*, Chatto and Windus, London

The door is open, then, for the judiciary to use the interpretative obligation under Section 3 broadly, to uphold shared constitutional traditions and values as an evolving normative exercise of which they are the guardians. Practically, this will mean that if Parliament does not expressly exclude the judiciary's interpretation, then the courts can find a Convention compliant interpretation⁴²⁵.

This approach, on a practical level, is similar in effect to the attempt in *R v A* by Lord Steyn to entrench human rights where Parliament has not expressly prohibited their application⁴²⁶. If Parliament states that human rights are excluded from consideration, then the courts will not consider them. However, if Parliament is silent, then the courts are free to come to any interpretation they wish.

It would also be comparable to the Canadian Charter style "notwithstanding clause". Indeed, Professor Gearty recognised that this radical interpretation of Section 3(1)

⁴²⁵ Reminiscent of that in the Canadian Charter, and the approach taken by the Judiciary when applying EU law.

⁴²⁶ [2002] 1 AC 45 at 68

is "theoretically possible"⁴²⁷. Further, under the constitutional legitimacy approach, the role of Section 4 is to be used where Parliament has expressly intended to breach the intended human right.

The benefit of this approach for the mechanics of the HRA is that it avoids inherent difficulties with ascertaining Parliamentary intention, especially when this intention is continuous, and does away with the semantic debate over legislating and interpreting.

Whilst it may not fit in with the statutory language, it is nevertheless accepted that Section 3(1) and the word "possible" invites a normative exercise as to how far Parliament should be held to account for their treatment of human rights issues.

Whilst this approach, to some commentators, does considerable damage to the HRA, on another reading it fits well with the statutory provisions in that it upholds Parliament's will that the vast majority of cases can be Convention compatible. This approach, therefore,

⁴²⁷ Gearty (2002) 'Reconciling Parliamentary Democracy and Human Rights' 118 LQR pg256.

enables the Judiciary to prevent the greatest number of potential statutory incompatibilities⁴²⁸.

There is a whole host of problems with this approach, which draw upon the discussion in the previous Chapters. For the sake of completeness, it is worth repeating these arguments here. First, human rights suffer incurable defects of conceptual uncertainty.

There is no apparent way to transfer broad agreement at the level of abstraction to the level of specificity, to the level of judicial application⁴²⁹. A broad interpretative approach under Section 3(1) invites the courts to make determinations on the content of human rights.

However, the problem is that these rights are not uncontroversial – they are at the heart of how civilised society operates, how the government distributes its scarce resources, how society values lifestyle choices.

These are not uncontroversial, and so the constitutional legitimacy approach is an oxymoron: there is nothing legitimate about a democratically illegitimate body

⁴²⁸ Phillipson (2003) 'Mis (reading) Section 3 of the Human Rights Act' 119 LQR 183 @ page 187.

⁴²⁹ The epistemology argument above.

deciding deeply moral issues usually the reserve of legislative chambers.

There are also problems with accommodating this approach into the statutory scheme designed. Sections 3(2) states that the judiciary's obligation, does not, "affect the validity, continuing operation or enforcement".

The purpose of this addition to the HRA, as stated above, was to protect statutes from being repealed or otherwise being radically altered by the judiciary. In this context, a radical interpretation of a statute may do considerable violence to the statute, so as to alter the statute's operation fundamentally.

The statute's original voice and mode of operation may be fundamentally changed to amount to invalidation. This may over dramatise the point, but the purpose for the addition of Section 3(2) was to put the blockers on a robust interpretative approach, as this would approve.

Further, judicial activism is also profoundly undemocratic as they are not representative, accountable or open to general participation. They are also restricted in their

reasoning capacities due to their limited knowledge and capacity on governmental issues.

A further problem that Section 4, which requires a declaration of incompatibility where a Convention compliant construction is not possible, would be redundant because it is highly unlikely that Parliament would pass a statute expressly ousting human rights deliberation.

This is likely to be so because of political embarrassment, or because there is a good deal of moral force in using human rights to attack human rights. Even the draconian Anti-Terrorism, Crime and Security Act 2001 was stated as Convention compatible by the Home Secretary⁴³⁰.

Even assuming that Parliament did express that the measures are contrary to human rights, it would be a superfluous constitutional exercise on the part of the court to inform Parliament of a breach they expressly endorsed. The very point of Section 4 and Act in general, was to create a dialogue between the judiciary and Parliament.

⁴³⁰ Under the Section 19 procedure

Greater use of Section 4(2): a true dialogue model

This spirit of dialogue seems to be missing in the way the judiciary perceives their changing constitutional role. The implication of the judiciary's current approach is tantamount to reducing the Section 4 scope to cases involving, in the main, the need for detailed statutory schemes that is beyond the capability of the courts.

In both *Bellinger v Bellinger* [2003]⁴³¹ and *Re S; Re W* [2002]⁴³² Lord Nicholls recognised that Parliament is best suited to develop a coherent and comprehensive framework. In *Re S* this was because the childcare "starring system" had far reaching ramifications for local authorities, and could only be redesigned by Parliament once aware of the surrounding circumstances⁴³³. In *Bellinger* this was in recognition that gender reassignment laws require the drawing of eligibility regulations, and thus ill suited for judicial determination⁴³⁴.

Whilst these cases represent a correct application of Section 4, they are nonetheless indicative of an unduly restrictive

⁴³¹ [2003] UKHL 21

⁴³² [2002] UKHL 10

⁴³³ *Ibid*

⁴³⁴ *Ibid*

approach undermining a dialogue [model] the HRA exists to promote. It will be submitted that, if applied properly, Section 4 has the potential to resolve the many issues of

Political power, human rights uncertainty; and judicial legitimacy that have emerged since the enactment of the HRA⁴³⁵.

The marvel of the ensuing approach is that it does not require the judiciary to show restraint. On the contrary, the approach demands that the judiciary be robust and seek to articulate their own judicial vision on the nature and application of moral values in liberal society.

Unfortunately, a great many judges avoid using Section 4 and its underlying philosophy of promoting dialogue, and prefer to adopt a narrow interpretation of rights at the breach stage, through the concept of "legislative deference"⁴³⁶, to avoid entering the mechanism of the HRA.

Currently, the judiciary apply a "legislative deference" test to establish whether there was a breach of a human right⁴³⁷.

⁴³⁵ Gearty, 'The Human Rights Act and representative democracy' (2002).

⁴³⁶ Craig (2001) 'The Courts, The Human Rights Act and Judicial Review' Law Quarterly Review cites *Brown v Scott* [2001] 2 WLR 817 and *R (Alconbury Developments Ltd) v Secretary of State for the Environment Transport and the Regions* [2001] 2 WLR 1389 as examples.

⁴³⁷ Laws J outlined four general principles in *International Transport Roth GmbH v Secretary of State for the Home Department* [2002] 3 WLR at 376-78.

What may be a material consideration, for example, is the special expertise of the court over that of the executive, and vice versa. Classically, the judiciary feel more competent in cases involving natural justice and civil liberties, by contrast to the executive whose expertise is in national economic policy and issues of political importance.

For example, in Brown v Stott (2003) the House of Lords had to consider whether a statutory requirement to provide a breath specimen, with an adverse inference made for non-compliance was compatible with the principle against self-incrimination as enshrined in Article 6(2).

The House of Lords held that the principle against self-incrimination was not absolute, and could be subject to a balancing act between the needs of the offender and those of road safety. Accordingly the court found the statutory requirement in compliance with Article 6(2).

The problem with the above decision is that Article 6 is absolute, inviting no qualifications, and so the court read down this particular human right,⁴³⁸ instead of issuing a declaration of incompatibility, which seemed, quite a natural

⁴³⁸ Fenwick and Phillipson (2003) *Public Law and Human Rights*, Cavendish, London

conclusion. The House of Lords chose to distinguish established Convention case law,⁴³⁹ whilst diminishing the impact of Article 6 by narrowing its scope. Accordingly the desire to avoid the HRA mechanism narrows human rights.

The reason for this unduly restrictive approach is that many members of the judiciary seemingly equate the Section 4 declaration of incompatibility with judicial dis-application of the offending legislation⁴⁴⁰.

This is because of the widely held view that Parliament cannot ignore a declaration because of the politically adverse impact both to Parliament and to the ECtHR⁴⁴¹.

Indeed, the executive themselves have done little to dispel the uncertainty between Section 3 and 4. The government has been eager to down Section 4 declarations as of rare applicability⁴⁴², and that it is not the judiciary's role to dis-apply primary legislation. It would be better if Section 4 declarations were considered more custom and unproblematic than is currently the case.

⁴³⁹ *Sauders v UK* [1997] 23 European Human Rights Review

⁴⁴⁰ Klug (2003) *'Judicial Deference Under the Human Rights Act 1998'* European Human Rights Law Review 125.

⁴⁴¹ Nichol (2002), Public Law 441-2 However, this view ignores the potential for settling challenges in the ECtHR to avoid a binding precedent, or more importantly the possibility that the Judiciary might develop a more stringent conception of the Convention Rights than the ECtHR.

⁴⁴² Jack Straw, Hansard HC, 16 February 1998, col. 771, and Lord Chancellor, Hansard HL, 5 February 1998, col. 840.

The judiciary should be more willing to utilise Section 4. The issue is how more frequent should they be used, and what defines its applicability.

It is submitted that a broad approach to Section 4(2) should be utilized, and with this a corresponding narrow use of Section 3(1). This is on the basis that human rights are conceptually uncertain ideas inviting too much introspective and moral deliberation by the judiciary.

This draws upon both the arguments made above on human rights uncertainty and also those in chapter 3 on enforcement uncertainty.

Rather, the answer to appreciating the relationship between Sections 3(1) and 4(2) as enforcement mechanisms is the centrality of 'dialogue' to the HRA.

As Klugg states, this is crucial aspect of the rationale for the statute in preserving constitutional orthodoxies⁴⁴³. Dialogue comes in many forms, but in this context the principle of audi alteram partem⁴⁴⁴ seems central to ensure that a problem can be subject to a host of different perspectives

⁴⁴³ Klugg (2003) 'Judicial Deference Under the Human Rights Act 1998' European Human Rights Law Review 125.
⁴⁴⁴ "to hear the other side"

and viewpoints. Different viewpoints are essential to the construction of legal rules as this ensures that the law is socially relevant and coloured by those whose behaviour it is supposed to guide.

By exposing the same moral issue to variant interpretation and different perspectives ensures an intelligent and wholesome resolution.

The law, then, becomes attuned to different perspectives and finds its meaning from the connections, the contrasts and the compromises inherent in a participatory procedure. This is the basis of a dialogue model – people come with their own self-interested views but seek to construct an argument that the other party find compelling⁴⁴⁵.

This idea of dialogue, one fostering an inclusive agenda, could well answer many of the inherent problems the judiciary have encountered since the HRA came into force. The statutory scheme of the HRA can be interoperated to support dialogue by locating the resolution of human rights uncertainty by different branches of the state. Rather than viewing human rights as the exclusive province of the judicial

⁴⁴⁵ Habermas (1996) *'Between Facts and Norms'*, Oxford, Polity Press

branch, it must be appreciated that to ensure effective resolution of human rights uncertainty, and to ensure effective executive compliance thereto, requires all branches of the state to engage in the difficult questions posed by human rights law.

Therefore, the HRA should be viewed as a mechanism to debate the controversial moral and political issues inherent in human rights jurisprudence.

This will fit best if the judiciary use Section 3(1) to make a provisional interpretation that is to rule on the Convention compatibility of a statute, but to leave the final resolution of this matter with Parliament by issuing a Section 4(2) declaration of incompatibility⁴⁴⁶.

Therefore, the courts would simultaneously use their power under Section 3(1) and Section 4(2) to express their view on the best interpretation and to issue of declaration of incompatibility, deferring the final view to Parliament.

This approach paradoxically relies on the "legislative deference" approach that has dogged the successful

⁴⁴⁶ Campbell, Ewing and Tompkins (eds) (2001) 'Incorporation through interpretation' in *Sceptical Essays on Human Rights*, Oxford University Press.

application of human rights. However, in this case the doctrine is used to define the judiciary's enforcement options in human rights cases, rather than whether human rights are engaged or breached.

In fact, the courts are invited to remove the Gordian knot of deference in human rights cases and adopt a robust approach, constructing a view favouring judicial values and compel Parliament to agree. Therefore, in a case such as *Brown v Stott*⁴⁴⁷, the courts can be audacious as they like, expressing the fundamental importance of fair trial rights and the right to silence, whilst reserving the final decision to the outcome of Parliamentary debate.

Criticisms of this dialogue approach

The major objection to this approach would be on its ability to fit in with the statutory scheme of the HRA. It could be said that this approach defies the will of Parliament and the statutory scheme because the judiciary would not be carrying out their obligation. The terms used in Section 3(1) appear mandatory: the court

⁴⁴⁷ *Brown v Stott (Procurator Fiscal)* [2001] RTR 121 @ 65

must read and give effect to legislation in a way Convention compatible. The "given effect" term is not mere superfluous the court must give this remedy if they can make a possible interpretation.

Again, the term "possible" must come under scrutiny and all those comments made in Chapter I about the judiciary understanding and comprehending their role in the UK constitution as a normative exercise. The constructively "possible" is heavily determined by the normative approach adopted.

The argument here is that the most normatively sound theory favours the judiciary to exercise "legislative deference" in its obligation to what is "possible" under Section 3(1). Put simply, a binding Convention compliant construction is not "possible" because of the need to defer to Parliament's final decision.

There are an embarrassing number of reasons why the judiciary should defer in this manner. Human rights are conceptually uncertain, as their precise content cannot be determined without recourse to controversial moral judgement. Given this controversy, it is more appropriate

for these issues to be the subject of deliberation in a legislative body that fosters participation of different perspectives.

The judiciary both lack this participatory element, and also a democratic basis as deliberators of moral controversy. Also there is the benefit of the outcome of this moral disagreement being presented in codified rules that guide and co-ordinate behaviour⁴⁴⁸.

Whilst the judiciary are institutionally and democratically ill suited to determine human rights issues, this does not diminish their role as a key participant in the dialogue model central to the HRA. No judicial decision is morally infallible, but this is not to undermine the unique "judicial voice" that speaks of many important constitutional and social values, like free speech, habeas corpus and civil liberties.

The echo of human rights discourse is a value reaffirmation in a consensual liberal society. As such, recognising the importance of these broad values to

⁴⁴⁸ Raz (1995) *Authority and the Law*, Oxford

society's constitutive identity, the judiciary can make a unique contribution to the political dialogue of the UK.

A prime example of this was where Lord Wolf publicly denounced the government's plans to oust appeal in asylum cases, a measure that was subsequently dropped⁴⁴⁹. By bringing the judicial perspective to the forum in human rights cases, in a way that is accessible to all to debate, the public dialogue can only be improved.

There are many cases ripe for public deliberation, and the judiciary can have a unique input to this. A good example of this is the House of Lords recent decision in *A and others v. Secretary of State for the Home Department* [2004] concerning the legality of the executive's power to intern indefinitely without trial immigrants on terrorist suspicion⁴⁵⁰.

Their lordships held that these measures were incompatible and disproportionate to the legitimate aims as enshrined in the Convention. Accordingly, a declaration of incompatibility was issued and now it is

⁴⁴⁹ Woolf, Squire Centary Lecture delivered at Cambridge University, 29th January 2004

⁴⁵⁰ Section 21, Anti-Terrorism, Crime and Security Act 2001

imperative that Parliament duly considers some of the judicial statements made about the fundamental nature of freedom and habeas corpus.

A related objection is the fantasy of the court sending all human rights cases to Parliament for debate. There have been hundreds of human rights cases since the enactment of the HRA and so it seems extravagant and fanciful for the courts to send all cases for legislative deliberation.

This is surely disproportionate overkill, consuming Parliament's time with incremental human rights issues at the cost of more substantive legislation. This fact is recognised in the Order that government ministers can fast track amendments without the requirement of Parliamentary debate.

However, it is not suggested that all human rights matters go forth for debate in the legislative chamber. There may be some issues that are considered of fundamental importance that they require discourse between the widest possible interests. This may involve

both the House of Lords and Commons joining in the debate about the proper scope of human rights.

A case in point is *A and others v. Secretary of State for the Home Department* [2004]⁴⁵¹ where given the importance of the terrorist issue, how governmental measures can balance the value of Article 5 and 6 rights and national security should be exposed to the widest possible interests, and this means the utmost attention by Parliamentarians.

There are other routine matters, however, which could be dealt with by a specially constituted human rights committee. Further, to ensure the success of the dialogue model as suggested, the remedial order provision should be used sparingly, or possibly amended to recognise a multi-track means to amend statutes, which may on the one side permit a minister to fast-track an amendment, whilst matters that require more anxious scrutiny would require Parliamentary debate⁴⁵². These matters will be discussed in the final chapter.

⁴⁵¹ *A and others v. Secretary of State for the Home Department* [2004] EWCA Civ@104

⁴⁵² Section 10 of the HRA empowers a Minister of the Crown to take remedial action as deemed necessary to remove the incompatibility.

This would then recognise a commitment to stronger and more engaging debates about the content of human rights. Overall then, the response of the legislature is a matter of degree depending on the gravity of the interests at stake.

In any event, increased use of Section 4 as stated here will encourage the judiciary to think more rigorously about when human rights are engaged. The essentials of any successful dialogue are for different parties to put across compelling arguments that persuade the other to change their viewpoint wholly or partially.

The judiciary would bear this in mind when deciding whether a human right is engaged and so how they seek to persuade Parliament to amend existing legislation.

The importance of human rights standards then, rather than being diminished by way of wide and spurious applications, by calling the Convention a 'living instrument' inviting wider and wider use under the guise of social change, will instead be focused on matters of real importance in a liberal society.

A further problem envisaged is how this approach impacts on the UK's relationship with the Convention.

Wintermute argues generally that Section 4 declarations do not provide an effective remedy to applicants in accordance with Article 13⁴⁵³. This is because whilst the courts recognise a breach of the Convention, they do not provide a remedy to the parties as required. Section 4, then, has been called the "booby prize", in that the parties to the action expend a good deal of effort to ultimately end up with nothing.

Despite this argument, it is a necessary consequence of locating the resolution of these matters with Parliament and not with the courts. Parliament does of course have the power to apply legislation and amendments retrospectively and in some cases this may be deemed appropriate.

Moreover, the Convention does recognise that different member states have different constitutional arrangements for the protection of human rights, and their rule promulgation by a legislative body should not be seen as the opposite of this.

⁴⁵³ Wintermute (2003) "Same Sex Partners, *"Living as Husband and Wife"* and Section 3 Human Rights Act" Public Law 621.

Chapter 8

Anti-Terrorism Policies and the Open Society

In the previous chapter we considered the controversy that surrounded Article 3 of the HRA. It may take some years to fully evaluate the effects of the terrorist attacks since [become known as] 9/11. In the wake of each attack, previous proposals were re-introduced, in an effort to police the new form of aggression which has a Global impact upon society, and therefore new policies with similar objectives were drafted to extend police surveillance authority.

Years on the political landscape have shifted significantly in many, if not most, countries⁴⁵⁴. The UK has on occasions compromised its position in attempting to introduce new policies, whilst almost showing a scant disregard for the rules of natural justice endemic within a democratic society. Such disregard is upon the premises that not to do so; would lead to further attacks upon those that the HRA were meant to protect.

⁴⁵⁴ Privacy International

Policy changes were not limited to the United States⁴⁵⁵, as a large number of countries responded to the threat of terrorism. Terrorist atrocities around the world, including London; Madrid, Bali, Russia, Morocco, and Saudi Arabia, were at the forefront, the new regime on acquiring body counts, were exercising 'terror' and bringing it to a new dimension. The days of casually waiting in a relatively small queues at most events is now long past. In essence as a civilized society we all, to some extent, have to endorse the new security measures now being deployed world wide, and all in the name of anti terrorism.

The question arises as to what extent are we prepared to sacrifice our fundamental freedoms to secure our safety. Governments have seized upon these issues and events as opportunities to create and enhance their powers. Such shifts have been global, each country launched it own war against terrorism.

Privacy International, wrote;⁴⁵⁶ the changes in anti-terrorism laws are not the only policy transformations in response to terrorism. The mere threat of terrorism has changed political discourse. In some cases, the war on terrorism has given new

⁴⁵⁵ For instance with the introduction of the Patriot Act.

⁴⁵⁶ About Anti-Terrorism Policies and the Open Society by Privacy International

life to previously failed proposals such as ID cards in the United Kingdom; in 2003 the UK government returned to the rhetoric of terrorism to shore up support for the cards in place of the usual rhetoric that followed such a notion the preceding years.⁴⁵⁷

The reality is simply that very few people are prepared to sacrifice their safety in the name of 'police state' or what other rhetoric comes to mind. We all strive to live our lives unhindered by trauma, and yet the threat remains in our daily lives whether we travel by public transport or take to the airways, whatever the congestion one will hear very few people complain of the delays whilst checks are made to secure our safety.

Moreover the question arises as to what sacrifices are we prepared to make, and how far are we prepared to tolerate the erosion of our 'civil liberties'. Of course those in power and responsible for our safety are called in to question on the methods adopted to protect society from the ever increasing acts of terrorism, although less so when acts of atrocities and when considering the nature of terrorism face today with groups such as AQ who is very different from many other

⁴⁵⁷ while previously fraud and asylum seekers were use

terrorist groups, in that it appears to be a loose connection of associated associates albeit with shared purposes, rather than a paramilitary structure.

This difference makes it more difficult to pin down exactly what AQ is likely to at any given time⁴⁵⁸, and who is or may be involved in it or under its penumbra⁴⁵⁹

Of course above we touched upon ID cards however despite more recent statements by the Home Office Minister, quietly admitting that ID cards will have no effect on combating terrorism, the policy is seen as inseparable in the minds of the people, despite mounting evidence stating otherwise.

In some cases, policies have been copied from or harmonized with other countries with little consideration to the variances in political dynamics. Hong Kong for instance attempted to harmonize its laws on sedition with Mainland China, requiring a standardization of criminalised groups.

Malaysia decided against repealing its Internal Security Act 1960 involving detention in the wake of the new Global threat

⁴⁵⁸ Plot to cause maximum damage at Frankfurt airport and the American base in Germany (Ramstein) were uncovered where it was apparent that plans to cause mass destruction on the eve of 9/11 in 2007; with a cocktail of Hydrogen Peroxide and other substances.

⁴⁵⁹ Draft volume of written evidence HC 323-II: House of Commons Constitutional Affairs Committee [The operation]

and yet with such a threat there is very little resistance for change which may lessen the security of others.

South Africa and Jamaica's; draft anti-terrorism laws mirror those of Canada's proposed definition of 'terrorist activity', even though Canada later changed its definition due to concerns of confusing protesters and terrorists.

Increased State power is immediately associated with the war on terrorism; whether requiring the removal of veils for drivers license photos, secret seizure of packages from the media, clamping down on train-spotters and -photographers, chasing down opposition parties, and the equation of terrorism to separatism and its implications, or suppressing dissent, amongst others.

Again such measures find very little resistance of those seeking security as they go about their daily business. The question of course is simply to what measures will we allow those Governments legislate these policy dynamics which touch against our freedom, in the premises of offering comfort, as if we are at risk without such sanctions, when we live in an Open Society.

It follows that while the legal landscape is shifting and affecting many components of human rights, and not only privacy, in many cases these policies are founded upon its curtailment.

These policy dynamics; challenge the defense of civil liberties and the promotion of the Open Society as we shall see has diminished since the Prevention of Terrorism Acts of the 1970s terrorism laws have done little to ensure that we are safe from terrorist attack, but much to infringe the human rights and civil liberties of those living in the UK.

It is how the Government applies the opposing interests⁴⁶⁰ that calls into question whether we have to sacrifice say our free movement in the name of fighting oppression of others, whose task is to curtail the sense of well-being whilst exercising that task.

For example following 9/11 the Government introduced indefinite detention without charge of foreign nationals. Of course this has opposing views. The Populace would almost agree with such measures; with very few dissenting, however

⁴⁶⁰ Safe movement balanced along side the need to protect society in such a task.

academics and by in large those involved in human rights⁴⁶¹ may well take a different stand, as the larger picture is the erosion of the rights that we as a Society hold so dearly.

For instance the former frailties with the legislation was replaced by the control order regime, which allows government ministers to impose sweeping restrictions on individual freedoms upon the basis of secret intelligence and suspicion.⁴⁶²

Pre-charge detention has been increased from 14 days to 28 days, with further extensions threatened. Broad new speech offences impact on free speech rights and non-violent groups have been outlawed.⁴⁶³ Our right to protest has been seriously curtailed, including by the possibility of, misuse of police powers.

In response to the Home Secretary's announcement that he will seek to extend pre-charge detention for terror suspects beyond 28 days, Liberty Director Shami Chakrabarti⁴⁶⁴ said... "Holding suspects for months without charge is an attack on British justice and could be catastrophic for British security as well.

⁴⁶¹ As we may see; the bigger picture, of the curtailment of the HRA.

⁴⁶² See below the new SIAC, whose procedures have been called in to question on diverse occasions.

⁴⁶³ Liberty

⁴⁶⁴ 01 Feb 2007

If young people see friends and family interned without trial, they are far less likely to help the police, let alone join up. We've had years of rough and ready anti-terror laws and we are not any safer".... "It's time for a major re-think in Government; for additional resources, intercept evidence and a look at the interviewing process. These measures won't attract sexy headlines but this is about saving lives, not political careers."

Liberty suggests that police and prosecutors be given additional powers to enable them to bring successful prosecutions rather than extend detention periods.

These powers include allowing phone tap evidence in criminal court and criminalizing an individual's failure to turn over passwords and encryption codes for seized computers.

We should be minded that following the Second World War, it was felt necessary to build safeguards into the rights and responsibilities to protect the citizen against the state. The exceptions to this were in times of conflict, although certain absolute rights existed.⁴⁶⁵ As above we have touched upon the philosophy and yet this chapter calls for greater scrutiny of the

⁴⁶⁵ See now Article 3 of the Convention on Human Rights

measures now adopted within the UK, in the name of Anti-Terrorism curtailment.

The main issues surround the detention of certain classes of society, and the way that the UK have compromised the HRA, which will be examined in contrast to our allies America.

As we shall see with the passage of time a number of blows have been struck against the government in its plight to detain suspected terrorists and in so doing have breached the HRA and the Convention.

In order to carry fully analysis the impact upon the HRA, and thus the freedoms that it [the Act] was to embrace, including the fundamental freedoms,⁴⁶⁶ it will be necessary to visit the recent workings of the new Tribunal set up following a decision of ECtHR, canvassed below. It is upon this background that the erosion of civil liberties be seen to have eroded in the name of terrorism. The question arises as to how far a civilized society is prepared to condone the action of those whose task is to protect society from the atrocities outlined within the body of this dissertation.

⁴⁶⁶ Although limitation on wordage will only allow a summary of the areas of concern.

The Swinging Pendulum and the Dilemma

It will be recalled that Article 3 of the HRA places an absolute bar on subjecting someone to torture or inhuman or degrading treatment. In the case of Soering v United Kingdom (1989)⁴⁶⁷ the ECtHR; held: "Article 3 would be infringed if a person was extradited to a country where there are substantial grounds for believing that he/she will suffer such treatment".

In that case, however, the Court stressed that inherent within the Convention was the search for a 'fair balance between the demands of the general interest of the community and the requirements of the protection of an individual's fundamental rights'.

The United Kingdom has always contended that this balance was not observed in the sequel to Soering, namely the case of Chahal v United Kingdom⁴⁶⁸.

In the above case the UK sought to deport to India a Mr. Chahal,⁴⁶⁹ who had been refused asylum, upon the ground that his presence was not conducive to the public good for reasons of national security.

⁴⁶⁷ 11 EHRR 439

⁴⁶⁸ (1996) 23 EHRR 413 Chahal v United Kingdom Case No. 70\1999\576\662 European Court of Human

Rights

⁴⁶⁹ a Sikh separatist

Mr. Chahal resisted deportation upon the ground that he feared that he would be tortured if he were returned to India.

The United Kingdom Government argued before the Strasbourg that the Secretary of State was entitled to balance Chahal's interest as a refugee against the risk he posed to national security if he was not deported.

Conversely this argument was, rejected by the Court;⁴⁷⁰ which held... *"that 'whenever substantial grounds have been shown for believing that an individual would face a real risk of being subjected to treatment contrary to Article 3 if removed to another State' it was unlawful to remove him. The activities of that individual, however undesirable or dangerous, could not be a material consideration."*

It follows that the above decision has far-reaching implications; in that Article 5 of the Convention provides that no one shall be deprived of his liberty, save in certain specified circumstances, the most material being lawful detention after conviction by a competent court.

Another is lawful detention of a person against whom action is being taken with a view to extradition or deportation.

⁴⁷⁰ Strasbourg Court of Human Rights

The government's dilemma arises, simply in what you do with a person of whom you do not wish to stay in your country; however deportation is not possible because of the impact of Article 3, as there is no right to detain a terrorist suspect without trial.

Conversely as there is no right to detain by reason of the above then it follows that Executive detention is not an option.

The Court in *Chahal*⁴⁷¹ struck a further blow to the UK's ability to take executive action in the interests of national security, in that the Secretary of State had ordered that Mr. Chahal should be deported on the ground that his continued presence in the United Kingdom was not conducive to the public good for reasons of national security.

Mr. Chahal challenged that order⁴⁷², and the Court held "that issues of national security were for the Security of State and could not be the subjected to review by the court".

Of course this view was not shared by Strasbourg, in which it was held "Article 5(4) provides that anyone deprived of his

⁴⁷¹ Ibid *Chahal v United Kingdom* (1996) Case No. 70\1999\576\662 European Court of Human Rights

⁴⁷² by judicial review

liberty is entitled to challenge the lawfulness of his detention before a court".

Moreover Mr. Chahal had not been able to make an effective challenge because he was not aware of the *reasons* why the Secretary of State had concluded that he posed a risk to national security and therefore Article 5(4) had been infringed.

It should be remembered that at the time of the decision in Chahal the HRA did not form part of our domestic law. The Chahal case raised two problems, which can be summarized as follows: -

What could the UK do with aliens who were a security risk but who could not be deported because they risked being subjected to torture or to inhuman or degrading treatment in their own countries⁴⁷³; and

When the government wanted to deport an alien on grounds of national security it would often not be willing to disclose to the alien the information that gave rise to the security risk. How could it cater for the alien's right under Article 5(4) to challenge his detention according to a fair procedure?

⁴⁷³ Within the terms of Article 3 HRA.

The government's response was to adopt a procedure that Strasbourg had itself commended in *Chahal*⁴⁷⁴; which was a procedure that the Court believed, perhaps not wholly accurately, existed in Canada; in 1997 when it passed a Statute creating a Special Immigration Appeals Commission, (hereafter "SIAC").

This was established pursuant to the Special Immigration Appeals Commission Act 1997. At this juncture it may be useful to visit the procedures adopted by SIAC, which will lend itself to the criticism that has been applied by the shortcomings of the procedures adopted. Such criticism, have been aimed at the 'special advocates' and 'closed evidence' procedures adopted in the prosecution of cases, which will be discussed in great detail below.

Special Immigration Appeals Commission

The remit of SIAC is to hear appeals against immigration and asylum decisions where, because of national security or other 'public interest considerations', some or all of the evidence on which the decision is based cannot or could not be disclosed to the appellant.

⁴⁷⁴ Ibid *Chahal v United Kingdom* (1996) Case No. 70\1999\576\662 European Court of Human Rights

In such cases, the decision will often rely heavily on assessments prepared by the security and intelligence services. In these instances, arguably there is a substantial risk that if the person concerned becomes aware of the detail of the evidence against him, the source of the evidence will be compromised.

However the unfairness of not knowing the case to answer by reason of non-disclosure,⁴⁷⁵ and [as we shall see], such a procedure arguably falls foul of the HRA, and has been subject to much criticism both by the advocates⁴⁷⁶ long with other professionals⁴⁷⁷ and human rights organisations such as Amnesty International,⁴⁷⁸ regarding the non-disclosure of evidence to the appellant.

Balanced against this criticism is that disclosure on the other hand could mean that surveillance techniques are revealed and lives potentially put at risk!

The Government believed it must be able to take account of such evidence in the interests of *safeguarding* national security.

⁴⁷⁵ Which is a main pre-requisite in criminal trials?

⁴⁷⁶ Two having resigned due to the inability to act in their client's best interest.

⁴⁷⁷ The Law Society, who made representations of their concerns to House of Commons Constitutional Affairs Committee [HC-323-II]

⁴⁷⁸ Who made representations to the House of Commons Constitutional Affairs Committee [HC 323-II]

At the same time, it recognised that deportation from the United Kingdom may have significant consequences for the individual concerned and in the interests of fairness; he or she should be allowed to challenge that decision.

The procedures under SIAC are designed to provide the person concerned with an avenue of appeal and the reasons for that decision to be scrutinised judicially whilst also avoiding the risk of the source being compromised.

A right of appeal to SIAC against an immigration or asylum decision arises where the Secretary of State for the Home Department has certified under section 97,⁴⁷⁹ that the decision has been taken in the interests of national security, in the interests of the relationship between the United Kingdom and another country, or otherwise in the public interest.

Since the 1997 Act, SIAC's; jurisdiction has subsequently been extended by the Anti-Terrorism Crime and Security Act 2001⁴⁸⁰

⁴⁷⁹ Of the 2002 Act

⁴⁸⁰ (The 2001 Act)

and further by the Nationality, Immigration and Asylum Act 2002⁴⁸¹

By reason of Section 21 [2001 Act] the Home Secretary may certify a person as a suspected international terrorist, if he reasonably believes that the person's presence in the United Kingdom is a threat to national security and suspects that the person is a terrorist.

This allows the individual to be detained, even when there is no imminent prospect of his being removed from the United Kingdom. There is a right of appeal to SIAC against the certificate under section 25 of the 2001 Act.

SIAC also has responsibility under section 26 of the 2001 Act for reviewing on a regular basis each certificate that is in force.

It follows therefore that Section 30 of the 2001 Act also designates SIAC as the appropriate tribunal for any legal proceedings to question a derogation by the United Kingdom from Article 5(1) of the Convention, which relates to the detention of a person where there is an intention to remove or

⁴⁸¹ (The 2002 Act).

deport him from the United Kingdom. Proceedings challenging the Derogation Order brought into force other changes.⁴⁸² The following cases illustrate the dynamics of a decision from the SIAC, which involved the possible torture of detainees family member, whereupon the Court consider whether the family as a whole could rely upon Article, as the likely attempt to persecute a family member.

In the case of (A (FC) and others (FC) v. Secretary of State for the Home Department⁴⁸³) which was heard first instance by SIAC under section. 8; [2002 Act] which further extended the jurisdiction of SIAC to include appeals against a decision of the Secretary of State to make an order depriving a person of a British citizenship status, where the Secretary of State for the Home Department certified that the decision to deprive was based wholly or partly in reliance on information which he believes should not be made public.

⁴⁸² Force on 13 November 2001

⁴⁸³ [2006] UKHL 46 on appeal from [2004] EWCA Civ 986 and [2004] EWCA Civ 680

Further section 40 of the British Nationality Act 1981⁴⁸⁴ as amended by the 2002 Act, provides that "a person may be deprived of his citizenship status if he has done anything seriously prejudicial to the vital interests of the United Kingdom or a British overseas territory".

The gist of the case⁴⁸⁵ was set out by Lord Bingham⁴⁸⁶... *"The question in each of these appeals, arising on very different facts, is whether the appellant falls within the familiar definition of "refugee" in article 1A(2) of the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol. It is common ground in each case that the appellant has a well-founded fear of being persecuted if she were to be returned to her home country, Iran (in the first case) and Sierra Leone (in the second).*

In each case the appellant is outside the country of her nationality and is unable or, owing to her fear of persecution unwilling, to avail herself of the protection of that country. The only issue in each case is whether the appellant's well-founded

⁴⁸⁴ the 1981 Act

⁴⁸⁵ Secretary of State for the Home Department (Respondent) v. K (FC) (Appellant) Fornah (FC) (Appellant) v. Secretary of State for the Home Department (Respondent) [2006] UKHL 46

⁴⁸⁶ Para 1.

fear is of being persecuted "for reasons of ... membership of a particular social group". The practical importance of this issue to the appellants is somewhat mitigated by the Secretary of State's acceptance that article 3 of the European Convention on Human Rights precludes the return of the appellants to their home countries, because of the treatment they would be liable to suffer if returned. But the Secretary of State contends, and the Court of Appeal has in each case held, that such treatment, although persecutory, would not be "for reasons of ... membership of a particular social group" and therefore the appellants fall outside the definition of refugee.

The correct understanding of this expression is a question of theoretical but also practical importance since the appellants enjoy stronger protection if recognised as refugees".

The Lordships in allowing the Appeal noted: I accept⁴⁸⁷, of course, that usually persecution is carried out by those who are not members of the persecuted group. But that is not always so. For various reasons - compulsion or a desire to curry favour with the persecuting group, or an attempt to conceal

⁴⁸⁷ Lord Bingham, (at Para. 81.) Of which the other Lord Lords agreed.

membership of the persecuted group - members of the persecuted group may be involved in carrying out the persecution.

Here, for whatever misguided reasons, women inflict the mutilation on other women. The persecution is just as real and the need for protection in this country is just as compelling, irrespective of the sex of the person carrying out the mutilation.

For these reasons I am satisfied that Ms Fornah is to be regarded as a refugee in terms of the Geneva Convention. I would accordingly allow the appeal in her case also.

As the above case illustrates, the issues are or can be extremely complex, and therefore the need to take detailed instructions is at the forefront (or should be) to any adherence under the terms of the Convention. In essence any misuse of powers or procedural unfairness does not serve justice within the Convention or so it is argued, especially when the powers of the SIAC are immense, for instance, SIAC additionally has powers to hear applications for bail by persons detained under the Immigration Acts, including those detained under those Acts by

virtue of the 2001 Act, in those cases where the appeal lies to SIAC.

Where SIAC makes a final determination of an appeal, any party to the appeal may bring a further appeal on any question of law material to that determination. An appeal may be brought only with the permission of SIAC or, if such leave is refused, with the permission of the appropriate appellate court as the above case illustrates.

Procedures and funding

This further right of appeal; with leave was extended to bail decisions by SIAC in respect of persons certified as suspected international terrorists under the 2001 Act,⁴⁸⁸ under the provisions of the Asylum and Immigration (Treatment of Claimants, Etc.) Act 2004.

Proceedings before SIAC are within the normal scope of the civil funding scheme, the Community Legal Service.

Cases will therefore be supported if they satisfy the appropriate means and merits criteria for funding. The merits criteria for

⁴⁸⁸ With effect from 22 September 2004

civil funding are set out in the Funding Code, which is made under the Access to Justice Act 1999 and approved by Parliament.

The Code covers matters such as minimum prospects of success and cost benefit of the case⁴⁸⁹. Proceedings before SIAC were brought within the scope of the by the Lord Chancellor's Direction⁴⁹⁰. The Direction was superseded by the Community Legal Service Scheme by Para's. 2(1) (ha) to Schedule 2 to the Access to Justice Act 1999.⁴⁹¹

Before SIAC came into scope such cases could only be funded through the exceptional funding procedure under section 6(8) (b) of the Access to Justice Act 1999.

Proceedings before SIAC

Proceedings before SIAC; are heard by a panel of three members; the composition of the SIAC panel is specified in the 1997 Act.⁴⁹²

⁴⁸⁹ Hardly a test given the ramifications of the consequences.

⁴⁹⁰ Direction dated 10 December 2002

⁴⁹¹ Inserted by the Immigration and Asylum Act 2002) with effect from April 2003

⁴⁹² as amended by the NIA Act 2002:

One member must hold or have held *high judicial office* and one must be, or have been, the *Chief Adjudicator* or a *legally qualified member* of the IAT⁴⁹³, subsequently altered to require one member to be or have been a legally qualified member of the AIT. The Lord Chancellor has the power to appoint one of the members of SIAC to be its Chairman⁴⁹⁴.

The procedures to be followed in proceedings before SIAC are prescribed by the Special Immigration Appeals Commission.⁴⁹⁵

Those procedures as far as possible mirror those followed in ordinary immigration and asylum appeals, but with special provisions to allow the Secretary of State to rely on evidence without disclosing it to the appellant or his representative, where to do so would be contrary to the public interest⁴⁹⁶.

In order to protect sensitive intelligence information, the members of SIAC have been subject of developed security vetting (DV), as has the person acting on behalf of the Secretary of State for the Home Department.

⁴⁹³ Later requirement that the second requirement will, from 4th April, be amended to require that one member must be or have been a legally qualified member of the AIT

⁴⁹⁴ Membership of SIAC currently comprises 22 judicial members, 13 legal members and 13 lay members.

⁴⁹⁵ (Procedure) Rules 2003

⁴⁹⁶ This has been a bone of contention between many Special Advocates

A general duty is placed under Rule 4 of the 2003 Rules on SIAC, when exercising its functions, to secure that information is not disclosed contrary to the interests of national security, the international relations of the United Kingdom, the detection and prevention of crime, or in any other circumstances where disclosure is likely to harm the public interest. The Commission is also required⁴⁹⁷ to exclude the appellant and his representative from a hearing or party of a hearing if it considers it necessary in order to ensure that information is not disclosed contrary to the public interest.

Special Advocates

Under section 6 of the 1997 Act the relevant law officer⁴⁹⁸ may appoint a special advocate to represent the interests of the appellant in any proceedings from which he and his legal representative are excluded. The law officer has discretion rather than a duty to appoint a special advocate, but the Secretary of State may not rely on "closed material" (i.e. evidence which has not been disclosed to the appellant or his representative) unless a special advocate has been appointed.

⁴⁹⁷ (By rule 44)

⁴⁹⁸ (The Attorney-General, the Advocate General or the Attorney-General for Northern Ireland)

The appointment of 'special advocates involve a two-stage process; selection and appointment. The Attorney General maintains three civil panels of junior counsel to the crown that are approved to undertake Government work, according to their experience and seniority. Competition to become junior counsel to the crown is strong and appointment to the panel is by way of an open, fair and transparent process.

From these panels, Treasury Solicitor's Department recommends to the Attorney General a potential list of lawyers with appropriate experience. Following approval by the Attorney General, lawyers are subject to full-developed security vetting (DV), before they are selected to join the 'pool' of DV counsel.

Lawyers in the 'pool' may be appointed to act for either, the Secretary of State, or as Special Advocates, in any given case, subject to there being no conflict of interest between cases.

Within the terms of the Special Immigration Appeals Commission Act 1997⁴⁹⁹ the Attorney General "may appoint a person, to represent the interests, of an appellant in any proceedings before the Special Immigration Appeals

⁴⁹⁹ S6 (1)

Commission from which the appellant and any legal representative of his are excluded”.

Further under the Special Immigration Appeals Commission (Procedure) Rules 2003 which provides that the Attorney General shall be notified by the Secretary of State of a pending appeal if the Secretary of State intends to oppose the appeal and intends to object to the disclosure of material to the appellant. Provisions⁵⁰⁰ provisions provide that the “relevant law officer may appoint a Special Advocate to represent the interests of the appellant in proceedings before the Commission.”

The fact that detainees’ special advocates are appointed by the Attorney General, who himself has personally represented the Secretary of State before SIAC has naturally generated concerns about the appearance of fairness of the process by which the detainee’s interests are represented in closed hearings. In order to address these concerns; the Law Officers have agreed that the Solicitor General appoints the Special Advocate⁵⁰¹.

⁵⁰⁰ Rule 34(3)

⁵⁰¹ (Acting pursuant to section 1 of the Law Officers Act 1997)

The procedure is that upon receiving notification from the Home Secretary, the Solicitor General considers whether or not to appoint a Special Advocate.

From the 'pool' of DV lawyers, recommendations are put forward by Treasury Solicitor's Department on the basis of an assessment of the level of experience that is necessary for a particular case and availability of counsel.

The Solicitor General then considers the recommendations and decides whether to appoint a Special Advocate to a case.⁵⁰²

The appellant⁵⁰³ is notified of the proposed appointment and is given the opportunity to make representations as to whether no special advocate should be appointed or there is any good reason why the named advocate should not act⁵⁰⁴

The limitations under which the Special Advocates perform their function and the ways in which they could be enabled to do so more effectively⁵⁰⁵ and other salient features of the appeal

⁵⁰² Those appointed to be Special Advocates understand the nature of their role before they are appointed].

⁵⁰³ (Or his representative)

⁵⁰⁴ (For e.g. a conflict of interest).

⁵⁰⁵ (section C)

regime under Part 4 of ATCSA which may fall to be reconsidered in debate on the new proposals.⁵⁰⁶

Special Advocates are appointed by the Law Officers under section. 6 of the SIAC Act 1997; which provides that Special Advocates may "represent the interests of the appellant; in any proceedings before [SIAC] from which the appellant and any representative of his are excluded".

Their functions are further defined by r. 35 of the SIAC⁵⁰⁷ as "to represent the interests of the appellant by "(a) making submissions to the Commission at any hearing from which the appellant and any representative of his are excluded; (b) cross-examining witnesses at any such hearings; and (c) making written representations to the Commission".

The Court of Appeal considered the function of the Special Advocates in M v Secretary of State for the Home Department⁵⁰⁸, the first and only case in which SIAC allowed an appeal against certification. Lord Woolf⁵⁰⁹CJ said... "*The involvement of a special advocate is intended to reduce (it*

⁵⁰⁶ (section D)

⁵⁰⁷ (Procedure) Rules 2003

⁵⁰⁸ [2004] EWCA Civ. 324, [2004] 2 All ER 863

⁵⁰⁹ of Barnes

cannot wholly eliminate) the unfairness which follows from the fact that an appellant will be unaware at least as to part of the case against him".⁵¹⁰

After giving its reasons for dismissing the Home Secretary's application for permission to appeal against SIAC's decision, the court said... *"We feel the case has additional importance because it does clearly demonstrate that, while the procedures which SIAC have to adopt are not ideal, it is possible by using special advocates to ensure that those detained can achieve justice and it is wrong therefore to undervalue the SIAC appeal process"*⁵¹¹

Of course one criticism is the inability to take instructions on the closed case, which is undoubtedly the most serious limitation on what Special Advocates can do. This limitation has not been universally understood. For example, in his evidence to the Select Committee on Home Affairs⁵¹², Lord Carlile of Berriew QC⁵¹³ was under the misapprehension that Special Advocates are free to talk to the Defendant's lawyers:

⁵¹⁰ At [13]

⁵¹¹ At [34]

⁵¹² On 8 March 2004

⁵¹³ Appointed under s. 28 of ATCSA to review the operation of the detention provisions

Lord Carlile of Berriew: *"They [Special Advocates] do not communicate with their clients very much at all. Indeed, I am not aware of any significant level of communication with the "client". Certainly, there are communications with the private lawyers for the detainee, the detainees always have their own lawyers, their own solicitors, their own barristers; of course, their own barristers do not see the closed material. So there is plenty of room for an iterative process between the Special Advocate and the Conventional lawyers, but I would like to see the Special Advocate able to bypass the Conventional lawyers in certain circumstances."*⁵¹⁴

The Dilemma of the Special Advocates

There is in fact no contact between the Special Advocates and the appellant's chosen representatives in relation to the closed case and, therefore, no "iterative process" of the kind described. Under the SIAC (Procedure) Rules 2003, Special Advocates are permitted to communicate with the appellant and his representatives only before they are shown the closed material.

⁵¹⁴ Rule 4 of the 2003 Rules places a general duty on SIAC, when exercising its functions, to secure that Information is not disclosed contrary to the interests of national security, the international relations of the United Kingdom, the detection and prevention of crime, or in any other circumstances where disclosure is Likely to harm the public interest.

In practice, the appellants have not generally chosen to take advantage of this opportunity⁵¹⁵. Such communication is in any event, unlikely to be of much use to the Special Advocates, since they do not at this stage know the extent of the case to answer or the evidence thereto⁵¹⁶.

There are also circumstances in which individual Special Advocates have taken the view that, on the facts of a particular case, it would not be in the appellant's interests to participate in a particular hearing. This course was deprecated in strong terms by one tribunal⁵¹⁷ but regarded as entirely appropriate by another.⁵¹⁸

There may be situations in which it is not in the interests of the appellant for his Special Advocates to participate in a particular hearing.

The question whether Special Advocates should participate or not is one which they must answer in the exercise of their own

⁵¹⁵ Perhaps, in part a reflection of the lack of confidence in the *unilaterally* appointed security cleared lawyer.
⁵¹⁶ The procedures to be followed in proceedings before SIAC are prescribed in the Special Immigration Appeals Commission (Procedure) Rules 2003. Those procedures as far as possible mirror those followed in Ordinary immigration and asylum appeals, but with special provisions to allow the Secretary of State to rely on evidence without disclosing it to the appellant or his representative, where to do so would be contrary to the public interest.

⁵¹⁷ (Collins J in *Abu Qatada*)

⁵¹⁸ (Sullivan J in *S*).

independent judgment, taking into account all the circumstances of the case. Special Advocates have to consider the extent to which, given the limitations inherent in their role, they can advance the appellant's interests in any closed hearing nature of the closed case the appellant has to meet.

Once the Special Advocates have seen the closed material, they are precluded by r. 36(2)⁵¹⁹ from discussing the case with any other person. Although SIAC itself has power under r. 36(4) to give directions authorising communication in a particular case, this power is in practice almost never used, not least because any request for a direction authorising communication must be notified to the *Secretary of State*. So, the Special Advocate can communicate with the appellant's lawyers only if his opponent in the proceedings has approved the precise form of the communication.

Such a requirement precludes communication even on matters of pure legal strategy. Special Advocates can identify;⁵²⁰ any aspects in which the allegations made by the Home Secretary

⁵¹⁹ *Ibid*: Rule 4 of the 2003 Rules places a general duty on SIAC, when exercising its functions, to secure that Information is not disclosed contrary to the interests of national security, the international relations of the United Kingdom, the detection and prevention of crime, or in any other circumstances where disclosure is Likely to harm the public interest

⁵²⁰ (By way of cross-examination and submissions)

are unsupported by the evidence relied upon; and check the Home Secretary's evidence for inconsistencies.

However Special Advocates have no means of knowing whether the appellant has an answer to any particular closed allegation, except insofar as the appellant has been given the gist of the allegation and has chosen to answer it. Yet the system does not require the Secretary of State necessarily to provide even a gist of the important parts of the case against the appellants in the open case, which is provided to the appellants.

In the above situations, the Special Advocates have no means of pursuing or deploying evidence in reply. If they put forward a positive case in response to the closed allegations, that positive case is inevitably based on conjecture. They have no way of knowing whether it is the case that the appellant himself would wish to advance. The inability to take instructions on the closed material fundamentally limits the extent to which the Special Advocates can play a meaningful part in any appeal⁵²¹.

⁵²¹ Amnesty International continues to express concern that proceedings under the ATCSA fall far short of international fair trial standards, including the right to the presumption of innocence, the right to present a full defence and the right to counsel.; See evidence given The Department for Constitutional Affairs *February 2005*

Counsel generally acts on instructions from a solicitor, whose firm is involved in the preparation of the case. A Law Officer through an instructing lawyer employed by the Treasury instructs special Advocates.

As above SIAC consists of three judges⁵²² and in cases of the refusal of applicants for admission to the UK permission to enter or ordered to be deported on the grounds that this is conducive to the public good and in particular, in the interests of 'national security', a right of appeal is granted to SIAC.

Pursuant to the HRA, procedural rules have been made designed to ensure that proceedings before SIAC do not lead to disclosure of material where this would be damaging to the national interest.

For completeness closed hearings take place in the absence of the applicant at which SIAC considers closed material⁵²³. A special advocate represents the applicant but, once he/she has seen the closed material, he/she is no longer permitted to communicate with the applicant. Of course this raises the issues of 'Natural Justice' in the sense that⁵²⁴ the cogency of the

⁵²² Of whom the President is a member of the High Court

⁵²³ Undisclosed to the Applicant

⁵²⁴ Ibid.

evidence may well go unchallenged, and of course the further issue of the presumption of proof, may be heeded.

The applicant has no way of being placed in a position to challenge the cogency of that evidence, in the sense that he /she may be able to rebut the possible damning evidence which is often the case when such evidence may be equally compelling in say criminal trials, but less so when challenged with the assistance of the defendant, as to the cogency of the evidence being relied upon. It is upon this basis that it would remain unclear as to how much weight would or is be placed upon that evidence placed before the SIAC.

Upon this point the chair of any given SIAC hearing as outlined above is a member of the judiciary, either from the High Court or Court of Appeal. The other members are either security driven or from the Diplomatic service and therefore the proceedings are arguable entrenched in legal process. Of course all of the material being dealt with is referred to as closed material and as above such material is not for disclosure to the Applicant.

For completeness many transcripts are either open or closed as are the judgments.

The Procedures

The SIAC (Procedure) Rules 2003 set out the time limits for appeals to SIAC exercising its powers under the 1997 Act. These include immigration decisions taken under the 1981 Act, the 2001 Act or the 2002 Act. An appellant in detention: not later than 5 days after the date on which he is served with the decision. An appellant in the UK: not later than 10 days after the date on which he is served with the decision.

An appellant outside the UK: not later than 28 days after either the date on which he is served with the decision, or, where he is in the UK at the time of the decision, and may not appeal while in the UK, not later than 28 days after the date of which he left the UK.

The Commission may extend the time limits if satisfied that there are justifiable special circumstances. The 2001 Act sets out the time limit for appeals to SIAC against certification as a suspected international terrorist by the Secretary of State for Home Department.

An appeal against certification must be given within a period of 3 months beginning with the date on which the certificate is issued or with the leave of SIAC after the end of this period but before commencement of the first review by SIAC.

Under the 2001 Act, SIAC must hold a first review of each certificate issued by the Secretary of State for Home Department as soon as is reasonably practical after the expiry of 6 months beginning with the date on which the certificate was issued. Parties may also make an application for permission to appeal on a question of law to the Court of Appeal, the Court of Session or the Court of Appeal in Northern Ireland, from a final determination by the Commission of an appeal or a review.

The prescribed time limits stipulate that an application for leave must be filed with the Commission not later than 5 days after the applicant has been served with a copy of the determination where the applicant is in detention; otherwise, the application must be filed not later than 10 days after service of the relevant determination.

Challenging decisions while ensuring that sensitive information is protected from disclosure, and that the composition of SIAC provides it with the expertise necessary both to assess intelligence material, and to consider and decide appeals within its jurisdiction.

Immigration and nationality matters do not fall under the head of civil rights and obligations, and the provisions of Article 6 of the Convention therefore do not apply.

The above was stated as a correct position of law in that it was held that SIAC's present procedures⁵²⁵ fully meet the requirements of that Article as they relate to civil procedures as endorsed by the Court of Appeal in a the case of *Secretary of State for the Home Department and M*⁵²⁶

An appeal to the Commission is made by sending a completed form⁵²⁷ to the Special Immigration Appeals Commission by hand, post or fax. A notice of appeal with the Commission a copy of the notice and any documents must be served at the same time on the Secretary of State for the Home Department.

⁵²⁵ The Annex sets out a process guide for hearings before SIAC.

⁵²⁶ C2/2004/0516).

⁵²⁷ SIAC 1

For completeness upon receiving the notice of appeal; the Commission will issue an appeal number and acknowledge receipt to the parties.

If the Secretary of State for Home Department intends to respond to the appeal he must provide the Commission with a summary of the facts relating to the decision being appealed and the reasons for the decision, the grounds on which he opposes the appeal and the evidence which he relies upon in support of those grounds.

If the Secretary of State objects to any of this material being disclosed to the appellant then he must inform the Commission of the reasons for his objection. The Secretary of State at this stage will contact the Attorney General's office so that a Special Advocate may be appointed. Once appointed; the Special Advocate will contact the appellant and his representatives. The Secretary of State must make available to the Special Advocate any material that he provides to the Commission and to the appellant any material that is not contrary to the public interest.

Surprisingly there is no time limit within the rules for the Secretary of State to oppose the appeal so the Commission may call a directions hearing to specify a time for the Secretary of State to oppose the appeal and to serve the closed material on the Special Advocate.

The Commission may call a directions hearing at any stage in order to issue directions for the conduct of proceedings. All parties are usually involved. A single member of the Commission can chair a directions hearing. Once the Special Advocate has had sight of the closed material he or she may no longer communicate directly or indirectly with the appellant or his representative.

Upon seeing the closed material the Special Advocate may make submissions as to why the material should be disclosed to the appellant.

The Secretary of State has the opportunity to respond. The Special Advocate and Secretary of State may meet to try to resolve issues of disclosure.

If there remain any issues, which the Secretary of State and the Special Advocate are unable to resolve, then these will be decided by the Commission at a hearing. This requires a panel of 3 members of the Commission. Neither the appellant nor his representative is permitted to attend the hearing. The Commission will make a ruling on all remaining issues of disclosure. The Commission may call a directions hearing to provide a timetable for the submission of skeleton arguments, evidence and witness statements prior to the hearing of the appeal.

The Commission notifies all parties of the date, time and place of the hearing in writing. The UK representative of the UNHCR is also notified of the hearing. The hearing will be presided over by a panel of 3 members of the Commission. The proceedings will be open except where the Commission has to consider closed evidence in which case only the Special Advocate and the Secretary of State will be present.

At the conclusion of the hearing the Commission will reserve judgment and will probably set a date for delivery of its determination. The Commission must record its decision in

writing and may produce an open and closed version of its determination. An application to the Commission for leave to appeal to the appropriate court⁵²⁸ must be made not later than 10 days after the party seeking leave to appeal has received written notice of the determination. There is no prescribed form.

The Commission can entertain an application for bail from an individual who is detained. An application must be made in writing to the Commission. The Commission must then serve a copy of the bail application on the Secretary of State and arrange a hearing. A single member of the Commission can hear a bail application.

The Commission must hold a first mandatory review of a certificate issued under s21 of the 2001 Act 6 months after the date of issue of the certificate or 6 months after determination of an appeal against the issue of the certificate. If the certificate is maintained; a further review will take place every 3 months thereafter⁵²⁹.

⁵²⁸ (Either the Court of Appeal, the Court of Session or the Court of Appeal in Northern Ireland)

⁵²⁹ The Department for Constitutional Affairs *February 2005*

Under Part 4 of the Anti-Terrorism, Crime and Security Act 2001 (ATCSA) introduced a procedure by which foreign nationals suspected of involvement in terrorism can be detained without trial on the certificate of the Home Secretary. The Detainees may appeal to the Special Immigration Appeals Commission (SIAC), who can hear open evidence⁵³⁰ and closed evidence.⁵³¹ Where the Home Secretary relies on closed evidence⁵³² Special Advocates are appointed to represent the interests of the appellant in the closed hearings.

The introduction of a power to detain a suspect on the basis of closed evidence marks a departure from previous practice in this country.

Those who promoted Part 4 of ATCSA claimed that this departure was justified by the threat posed by various terrorist groups.

They also claimed that the unfairness inherent in relying on evidence not shown to the detainee was mitigated by the

⁵³⁰ (Which the detainees and their representatives are shown)

⁵³¹ (Which they are not).

⁵³² (every case so far)

provision of Special Advocates and by the existence of the SIAC procedure.

Derogation of Obligation

Of course following 9/11 the Government hastened to address this problem further. Article 15 of Act entitles a signatory to derogate from some of its obligations 'to the extent strictly required by the exigencies of the situation...in time of war or other public emergency threatening the life of the nation'.

On 11th November 2001 an Order was made⁵³³ derogating from Article 5(1) of the Convention in respect of, 'foreign nationals present in the UK who were suspected of being concerned in the commission, preparation or instigation of acts of international terrorism, or of being members of organisations or groups which were concerned or of having links with members of such organisations or groups as above, and who were a threat to the national security of the UK'.

The Home Secretary⁵³⁴ announced that the Government was committed to the principles enshrined in the Convention and so

⁵³³ The Anti-terrorism, Crime and Security Bill 2001

⁵³⁴ Mr. David Blunket (As he was then)

rather than running the risk of deporting suspects to a country where they could face torture or inhumane or degrading treatment, it has had to try and balance the civil liberties of the individual on one hand against the need to protect society against terrorism on the other.

Relying upon this derogation, Parliament then passed the Anti-Terrorism, Crime and Security Act 2001. Part 4⁵³⁵, which permitted the Home Secretary to issue a certificate in respect of an alien if he reasonably believed that this person's presence in the United Kingdom was a risk to national security and suspected that this person was a terrorist⁵³⁶.

The issue of such a certificate rendered the alien in question subject to detention and deportation.

If it was not possible to deport him because of the risk of torture or inhuman or degrading treatment in his own country, then he could be detained indefinitely in the UK without trial, pending ultimate deportation. The HRA [2001] gave an alien detained the right to appeal to SIAC⁵³⁷ against the derogation and against certification by the Secretary of State. Such appeal

⁵³⁵ of that Act was particularly controversial

⁵³⁶ Under section 23 of the HRA

⁵³⁷ Ibid.

was subject to the SIAC procedure of closed material and special advocates⁵³⁸.

The Secretary of State issued certificates in relation to a number of aliens that he was unable to deport and these men were detained in Belmarsh prison. They exercised their right to appeal to SIAC. They alleged that the derogation was unlawful in that there was no 'public emergency threatening the life of the nation'. They further alleged that the measure was discriminatory and thus contrary to Article 14 of the Convention in that it only applied to foreign suspected terrorists and not to British nationals.

SIAC upheld the appeal on the ground that the order was discriminatory and contrary to Article 14. The Secretary of State appealed to the Court of Appeal, which allowed the appeal, holding that the discrimination was justified because the detainees had no right to be in this country and, furthermore, were free to leave if they wished to.

In A v Secretary of State for the Home Department;⁵³⁹ the first issue was whether there was indeed a 'public emergency threatening the life of the nation' that justified the making of

⁵³⁸ Ibid

⁵³⁹ [2004] UKHL

the derogation Order. Eight out of the nine Law Lords reached the conclusion that there was.

They attached weight to the fact that the Secretary of State and Parliament had so concluded and that SIAC, which had considered closed material, had confirmed this view.

Particularly important was the nature of the test to be applied. In the leading speech Lord Bingham cited a decision of the Strasbourg Court;⁵⁴⁰ where the issue was whether low-level IRA terrorist activity in Ireland justified derogation from Article 5.

The Strasbourg Court gave this definition of 'public emergency affecting the life of the nation'... *"An exceptional situation of crisis or emergency which affects; the whole population and constitutes a threat to the organised life of the community of which the State is composed.*

Lord Hoffmann⁵⁴¹ applied a more fundamental test, which gave the words a more literal meaning when he held *"Terrorist violence, serious as it is, does not threaten our institutions of government or our existence as a civil community."*

⁵⁴⁰ (Lawless v Ireland (No 3) (1961) 1 EHRR 15

⁵⁴¹ dissenting

"The real threat to the life of the nation, in the sense of a people living in accordance with its traditional laws and political values, comes not from terrorism but from laws such as these. That is the true measure of what terrorism may achieve"

The second issue was whether the terms of the Derogation Order and of section 23 of the HRA [2001] satisfied the requirement that they should infringe Convention rights to no greater extent than was 'strictly required by the exigencies of the situation'.

Seven members of the House concluded that they did not.

Three factors weighed particularly in their reasoning:-

Was the importance that the United Kingdom has attached, since at least Magna Carta, to the liberty of the subject;

That the measures attached only to foreign nationals⁵⁴²;

⁵⁴² This with respect does not stack up when contrasted with domestic terrorist, and of course terrorist traveling from Yorkshire to inflict damage on London

The measures permitted those detained to opt to leave the country⁵⁴³.

The House of Lords quashed the derogation order and declared that section 23⁵⁴⁴ was incompatible with the Convention.⁵⁴⁵

It repealed the offending legislation and passed a new Act the Prevention of Terrorism Act 2005; which empowers the Secretary of State, in specified circumstances, to place restrictions on terrorist suspects by making them subject to control orders.

These orders can impose a wide variety of obligations such as curfew, electronic tagging, and restrictions on association and on electronic communication, duty to report to the police station and so on. The HRA makes provision for two types of control order.

The first imposes obligations, which fall short of depriving the suspect of his liberty. These are likely to interfere with other human rights, such as the right to privacy and to respect for

⁵⁴³ If they were so dangerous, this did not seem logical, for they would be free to continue their terrorist activities overseas, as per The Rt. Hon. The Lord Phillips, Lord Chief Justice of England and Wales delivering a lecture at the University of Hertfordshire Law Lecture on Terrorism & Human Rights

⁵⁴⁴ of the 2001 Act

⁵⁴⁵ The Government could, in theory, have disregarded the decision of the House of Lords and left section 23 of the HRA in force, but it has always respected judicial decisions on incompatibility. It did so on this occasion

family life, but these are rights with which the Convention permits interference where specified circumstances, such as national security, justify this. Such control orders are known as 'non-derogating' control orders, because they do not derogate from Convention rights.

Further the Secretary of State can impose such an order where he reasonably suspects someone of having been involved in terrorism-related activity and considers it necessary to impose the order in order to prevent him from continuing to be so involved.

The other type of control order is a 'derogating control order'. This is one that imposes restrictions that do amount to deprivation of liberty. Before such a control order can be made, the Government has to make a derogation order. Having done so, it then has to apply to the court to make the control order.

However more than suspicion is required and, one should be minded that the court has to be satisfied that the individual against whom the order is made has been involved in terrorism and that the order is necessary by way of response.

The 2005 Act makes detailed provision for access to a court in order to challenge the making of a control order. Appeal is to a single judge, with a further right of appeal to the Court of Appeal.

The regime of closed material and the special advocate is also adopted. The HRA provides that the principles of judicial review are to apply and that any human rights challenge is to be made in accordance with these statutory provisions.

The European Commissioner for Human Rights visited London,⁵⁴⁶ and questioned whether the new legislation was compatible with Convention obligations. The Commissioner suggested that the restrictions that could be imposed by non-derogating control orders might well amount to deprivation of liberty contrary to Article 5.

The Commissioner also questioned whether the provisions for review by the court satisfied the requirements of a fair trial under Article 6. Further the Commissioner noted“The proceedings fall some way short of guaranteeing the equality of arms, in so far as they include in camera hearings⁵⁴⁷, the use of secret evidence and special advocates unable subsequently to

⁵⁴⁶ In June 2005

⁵⁴⁷ Closed to the Public, as was the case in dealing with the IRA on sensitive issues, of which the author was involved in one such case.

discuss proceedings with the suspect". Of course this flies in the face of natural justice as well as the provisions to be found within the HRA [HRA]⁵⁴⁸

An American Tale –v- The Patriot Act

At this juncture it is worthy of visiting America to ascertain the response to the atrocities committed against America in the 9/11 attacks which had fuelled almost instantaneous response to the threaten security of the State, whereupon measures put in place in the shortness of time have been heavily criticised.

Within days of the attacks, Congress passed a joint resolution authorising the President to 'use all necessary and appropriate force' against those responsible for 9/11 'in order to prevent any future acts of international terrorism against the United States by such persons'.

Within weeks the Patriot Act was passed which significantly reduced the safeguards on the use by the intelligence services of covert surveillance, the President in the exercise of executive authority took the steps.

⁵⁴⁸ Article 6.

The administration promulgated *a Military Order* which claimed authority to detain without time limit any non-citizen whom the President had 'reason to believe' was a member of Al Qaeda, involved in international terrorism or was involved in harbouring terrorists.

The same Order authorised trials of non-citizens by military commissions. Several hundred persons were removed the place of capture; Afghanistan, and taken to detention at the United States Naval Base at Guantanamo Bay in Cuba.

The apparent attraction of this location is, it was believed⁵⁴⁹ to be outside the jurisdiction of the United States courts so that an application for habeas corpus by a non-national would not lie.

When challenged; the District Court of Columbia ruled *that it had no jurisdiction over aliens detained at Guantanamo*. These aliens included a number of British subjects, one of whom was a Mr. Abbasi.

Relatives on his behalf commenced judicial review proceedings in the High Court in the UK; and sought a mandatory order that the Foreign Secretary should intervene on his behalf of Mr. Abbasi.

⁵⁴⁹ At that time.

The Foreign Secretary objected that the case was not justifiable as it called for a review of his conduct of foreign affairs and this therefore fell outside the jurisdiction of the court. Mr. Abbasi further contended that the High Court⁵⁵⁰ would not investigate the legitimacy of the actions of a foreign sovereign state.

On a renewed application to the Court of Appeal⁵⁵¹ against the refusal at first instance it was held... *"That, where human rights were engaged, the English court could investigate the actions of a foreign sovereign state"*. It [necessarily] has to do so in asylum cases.

The Court of Appeal considered a case in which the District Court of Columbia had ruled that the United States courts had no jurisdiction over aliens detained at Guantanamo.

After reviewing both English and United States authority, the Court of Appeal⁵⁵² held*"we do not find it possible to approach this claim for judicial review other than on the basis that, in apparent contravention of fundamental principles, recognised by both jurisdictions and by international law, Mr.*

⁵⁵⁰ In England

⁵⁵¹ ([2002] EWCA Civ 1598

⁵⁵² at paragraph 64

Abbasi is at present arbitrarily detained in a 'legal black hole'...What appears to us to be objectionable is that Mr. Abbasi should be subject to indefinite detention in territory over which the United States has exclusive control with no opportunity to challenge the legitimacy of his detention before any court or tribunal"...."It is important to record that the position may change when the appellate courts in the United States consider the matter" ...

"The question for us is what attitude should the courts of England take pending review by the appellate courts of the United States to the detention of a British citizen the legality of which rests (so the decisions of the United States courts so far suggest) solely on the dictate of the United States Government and, unlike that of United States citizens, is said to be immune from judicial review"

In the case of Rasul v Bush [2004]⁵⁵³ the Supreme Court held⁵⁵⁴ that *foreign nationals* held at Guantanamo Bay could use the US court system to *challenge* their detention. In case of Hamdi v Rumsfeld⁵⁵⁵ (2004) was a further challenge to the Supreme Court, which involved a US citizen, Mr. Hamdi, who had been

⁵⁵³ 542 US 466

⁵⁵⁴ By a majority of six to three

⁵⁵⁵ 542 US 507

declared an 'illegal enemy combatant' by the United States Government and detained without trial, initially at Guantanamo and subsequently at military prisons on the United States mainland.

Following a petition for a habeas corpus the Supreme Court held ⁵⁵⁶ that Mr. Hamdi could not be held indefinitely at a US military prison without the assistance of a lawyer and without an opportunity to contest the allegations against him before a neutral arbiter.

The Pentagon announced that it was establishing a Combatant Status Review Tribunal where detainees could challenge their enemy combatant status. They would, however, only have the assistance of a personal representative assigned by the Government⁵⁵⁷, and they would have to overcome a 'rebuttal' presumption in favour of the Government's evidence.

It is interesting to note at this juncture that The Patriot Act and some other USA statutory provisions, and some permitted

⁵⁵⁶ by an 8-1 majority

⁵⁵⁷ not a lawyer

executive acts, was thought to go far beyond anything that would be tolerated as acceptable⁵⁵⁸ in the UK.

Any comparisons between ATCSA [2001] and Guantanamo Bay were thought to be totally unhelpful and included gross exaggeration⁵⁵⁹.

In the case of *Hamdan v Rumsfeld*, Mr. Hamdan⁵⁶⁰, a Yemeni national detained at Guantanamo, challenged the jurisdiction of the military commission before whom he was due to be tried for conspiracy "to commit... offences triable by military commission". The Supreme Court upheld this challenge, holding that there was no basis for ousting the jurisdiction of the Federal Courts.

Time to Account Joint: The Committee on Human Rights

The issue in so far as the UK is concerned has been questioned as to whether the HRA or Convention; extends outside the UK, in cases where detainees are being incarcerated in such places as Afghanistan and Iraq.

⁵⁵⁸ legally or politically

⁵⁵⁹ Draft volume of written evidence HC 323-House of Commons Constitutional Affairs Committee
Headed: The operation of the Special Immigration Appeals Commission (SIAC) Written evidence

⁵⁶⁰ June 29 2006

Oral Evidence taken before the Joint Committee on Human Rights⁵⁶¹ posed a number of issues following allegations, that the treatment of prisoners; which it is alleged violated the HRA [HRA]; and the Convention; such treatment included allegations of placing hoods over the heads of the detainees, hooding was being used even during interrogation, that there were stress positions, deprivation of sleep and so on.

Amnesty International⁵⁶² stated that it believed that Part 4 of the ATCSA is inconsistent with international human rights law and standards, including treaty provisions by which the UK are bound by those provisions.

Amnesty International opposed detention under Part 4 of the ATCSA; as It is detention ordered by the executive, without charge or trial, for an unspecified and potentially unlimited period of time, principally on the basis of secret evidence which the people concerned have never heard or seen, and which they were therefore unable to effectively challenge.

It has been noted throughout that Protection of Human Rights and Fundamental Freedoms, enshrines; the prohibition of

⁵⁶¹ Tuesday 26 June 2007

⁵⁶² Representations made to the House of Commons Special Select Committee HC-323-11

torture or other ill treatment. Amnesty International expressed concern at the "likely reliance by the UK executive on 'evidence' that was procured under torture of a third party (i.e. not the appellants), in the UK executive's presentation of such "evidence" in ATCSA proceedings before the SIAC.

This "evidence" is said to have been obtained at Guantanamo Bay, Bagram and possibly in other undisclosed locations where people are held in US custody purportedly in the so-called "war on terror"⁵⁶³.

Amnesty International also expressed concern that the UK authorities had taken advantage of the legal limbo and the coercive detention conditions in which UK nationals, and possibly others, were and have been held at Guantanamo Bay to interrogate them and extract information for use in ATCSA proceedings before SIAC here in the UK.

Amnesty International also has reminded the UK authorities, including the judiciary, of the fundamental prohibition on accepting evidence in any judicial proceedings if obtained as a result of torture, enshrined, inter alia, in Article 15 of the

⁵⁶³ Ibid

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to which the UK is a State Party. Article 4 of the same instrument states that state parties must criminalize all acts of torture, as well as any acts, which constitute complicity or participation in torture.

Amnesty International considered that the use of evidence obtained under torture⁵⁶⁴ undermines the rule of law and makes a mockery of justice. Torture not only debases humanity and is contrary to any notion of human rights, but it can also lead to decisions based on totally unreliable evidence.

The willingness of the UK authorities to rely on evidence extracted under torture fundamentally undermines any claim to legitimacy and the rule of law and contravenes international human rights law and standards.

It was further averred by Amnesty International that it continued to express concerns that in showing such a willingness to rely on evidence extracted under torture the UK

⁵⁶⁴ A point always taken under PACE for lesser of an action, but which could lead to unreliable evidence

government and the SIAC have given a green light to torturers worldwide.⁵⁶⁵

Lord Lester of Herne Hill expressed his concerns in putting questions to the Attorney General⁵⁶⁶ : In the context of...
"Should say that I was with Sam Silkin, the Attorney General, in giving undertakings at the Strasbourg Court in the Irish state case that we would never again use the five techniques, as I am sure is known. On the eve of the invasion of Iraq⁵⁶⁷ in a speech in the Lords, I said that it was "essential for members of the Armed Forces and civil servants to have clear guidance about the legal obligations imposed on them as we face imminent war against Iraq."

The response... *"As you have fairly accepted, Mr. Attorney, something seriously has gone wrong emerging from the Payne Court Martial, that hooding was used not only during transit but as part of conditioning for interrogation, that, in the case of 'high value intelligence' detainees, hooding was being used even during interrogation, that there were stress positions, deprivation of sleep and so on. All of those conditioning*

⁵⁶⁵ Amnesty International 7 February 2005

⁵⁶⁶ Q213 Taken before the Joint Committee on Human Rights on Tuesday 26 June 2007

⁵⁶⁷ on 17 March 2003

techniques, according to the evidence, appear to have had the approval of the legal adviser at Brigade Headquarters, from the evidence we have read.

How would you explain such a spectacular failure; to ensure compliance with what you of course accept is fundamental norms of humanitarian human rights law? How do you explain that?

It is upon this background that the Rt Hon Lord Goldsmith QC⁵⁶⁸ [Attorney General] was further examined regarding the position of the UK Government⁵⁶⁹ surrounding the advice given to the Government by the Attorney General. This followed a number of criticisms alleging that the Attorney General was of the view that the HRA and Convention did 'not' apply to places outside the EU.

Lord Goldsmith replied⁵⁷⁰ *"it has always been my view that Articles 2 and 3 apply overseas to the actions of British soldiers who are holding civilians in UK-run detention facilities"*.

⁵⁶⁸ a Member of the House of Lords

⁵⁶⁹ In an attempt to establish what advice had been given, and any 'policy' that may exist within the Army in interrogating detainees.

⁵⁷⁰ Q192 in response

When questioned further for the reason/s why the Government did not share that view; Lord Goldsmith responded... *"There have been two perfectly respectable arguments. There has been an argument that the ECHR, as such, does not apply outside the European space, and that derives from one of the paragraphs in the Bancovic case"*.

"The Bancovic case was the first case in which the European Court was asked to consider whether the ECHR applied in some way to military operations and it was held that it did not. That was the alleged bombing of the Belgrade television station. So there has been an argument that ECHR does not apply".

His Lordship continued.... *"I, personally, because of another case called Osalan, did not think that was right and it did apply outside the European space. That was then conceded, rightly I think, in the course of this hearing. Then there is the question of whether the Human Rights Act applies. That is again a separate question. But I do want to come back to this because it is also very important to recognize that the obligations which*

nobody; has been in any doubt applies;⁵⁷¹ so did domestic criminal law'...

"That is why any soldier who mistreated, treated inhumanely, let alone tortured, a detainee in the course of a UK detention would have been liable to Court Martial, and, indeed, that is precisely what happened. I do not believe, so far as the substantive standards of treatment are concerned, there is any difference between what the Geneva Convention, the Convention Against Torture require in relation to detention and the ECHR. I do not think there is any difference at all, so I do not think it matters, and I am not aware that anyone ever thought there was something that was permitted under the Geneva Conventions that is not permitted under the ECHR."

The military commission, both in structure and procedure, violated the provisions of both the Uniform Code of Military Justice and Article

His Lordship continued to explain *"that a month after the Commissioner's visit, we experienced in London a synchronised series of explosions on public transport, inflicting heavy loss of life and personal injuries. The suicide bombers responsible were*

⁵⁷¹ The obligations under the Geneva Convention, the obligations under the Convention Against Torture

all British subjects". This, I suspect, persuaded most people in the United Kingdom that special measures to deal with terrorists were a necessity. Challenges of the new regime of control orders were, however, not slow in coming'.

A non-derogating control order was made against a man referred to as MB. This was on the grounds that the Secretary of State reasonably suspected him of having been involved in terrorism-related activities and that the control order was necessary to prevent him from traveling from England to Iraq to fight with the insurgents there.

Because of this limited objective, the obligations that it imposed were relatively modest, including the surrender by MB of his passport and an embargo on foreign travel. He sought a declaration that the 2005 Act was incompatible with the Convention because it did not provide for a procedure for challenging the imposition of the order that was fair. One complaint was of the use of closed material and a special advocate.

The case against MB depended very largely on *closed material*, as we have seen such material may have been obtained under oppression, e.g. torture. His appeal came before Mr. Justice

Sullivan, who accepted the argument that the HRA did not provide for a fair trial and declared it 'incompatible' with the Convention for this reason.

The Secretary of State appealed, as obviously this was of immense importance. Sitting to hear the case amongst others was two most senior judges, the Master of the Rolls and the President of the Queen's Bench Division, whereupon the appeal was allowed.

It was held that the judge had wrongly concluded that the court's only role was the limited role of considering whether the Secretary of State's original decision had been flawed. It was held that the court could and should consider whether the control order was justified on the basis of the evidence at the date of the hearing.

It has been expressed throughout this chapter that of concern was the use of closed material, which meant that MB was not informed of the nature of the case against him. The court decided however, that where precautions against terrorism are concerned, the Secretary of State must be permitted, where the needs of security so demand, to avoid disclosing secret material.

The Strasbourg Court had itself indicated approval of the use of closed material coupled with a special advocate in *Chahal*⁵⁷². The safeguards put in place by the 2005 Act⁵⁷³ were the best conceivable in the circumstances.

In *A & Others v Secretary of State for Home Department*⁵⁷⁴ the Court considered the use of torture evidence in SIAC proceedings, the Home Secretary stated "it would be irresponsible for the Government not to take appropriate account of any information which could help protect national security and public safety".

Of course the international obligation to prohibit and prevent torture is undermined if torture evidence is 'knowingly admitted' for any other purpose other than the prosecution of alleged torture offences. In the long term, it is highly unlikely that the use of torture and oppressive techniques adopted to extract information helps to protect the public⁵⁷⁵.

⁵⁷² *Chahal v United Kingdom* (1996) Case No. 70\1999\576\662 European Court of Human Rights

⁵⁷³ Terrorism Act 2005

⁵⁷⁴ *A & Others v Secretary of State for Home Department* [2004] EWCA 1123

⁵⁷⁵ Preamble and Article 2 of UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

Commons Constitutional Affairs Committee and SIAC

The workings of SIAC have been focused upon by a recent House of Commons Constitutional Affairs Committee⁵⁷⁶ who expressed concerns regarding the make up of the SIAC about the range of other members of SIAC.

It was felt that whilst the Committee were sure that SIAC have always acted with total integrity, however for the 'credibility' and 'transparency' of the system it was suggested that the Committee would be happier if; whilst one of the members should have experience of security or at least diplomatic work at a high level, the other should be truly a lay person without such experience⁵⁷⁷.

Of concern was that; upon jurisdiction involved a *lower standard of proof* than in Conventional civil and criminal courts. Whether such a revelation (assuming it is), is compatible to a fair trial is somewhat surprising in that the normal proposition is that he who asserts must prove; e.g. on the 'balance of probability'⁵⁷⁸, 'or' beyond reasonable doubt⁵⁷⁹ or even in the

⁵⁷⁶ Ibid

⁵⁷⁷ The Committee could not see any real difficulty in finding a small group of such people, who could be security cleared

⁵⁷⁸ Civil standard

⁵⁷⁹ Criminal burden.

former example 'on the balance of probability';⁵⁸⁰ would be higher; than that imposed in the SIAC hearings.

Then there is of course even now [*or so it would appear*]; a lower standard normally not to be found within our Jurisprudence until now.

The Committee stated that it is inevitable that problems arise in any tribunal where the subject of the case, [here] the detainee, does not see or hear the whole of the evidence and proceedings.

The fact that the detainee is left in that position understandably is bound to cause anxiety to all of us more used to the general disclosure procedures of the courts of this country. It is regrettable and should be avoided so far as possible. Understandable too is the frustration of the detainees' private lawyers, who can only see what their clients see.

In justification of the above the Committee confirmed that they had seen extensive material, of which they were left in no doubt

⁵⁸⁰ Civil burden of proof

that national security could be at risk if certain types of evidence were revealed to the detainees.

At risk too would be some individuals' lives. The kind of evidence the Committee looked at includes that provided by ⁵⁸¹human resources including those who might be described as a term of art as 'informants', disclosure of locations used for observation, details of technical facilities available for listening to and/or reading communications, descriptions and identities of police officers and others, and methods of risk assessment used by the control authorities.

The special advocate system was introduced in the hope that security cleared, skilled lawyers with complete disclosure of closed as well as open material would sufficiently protect the interests of the detainees to ensure total fairness of the proceedings.⁵⁸² Of course such a procedure did not lend itself to some advocates and the Committee identified two advocates who had openly resigned due to the procedure adopted.⁵⁸³

⁵⁸¹ (in this context precious) Ibid @ Para 2.

⁵⁸² Ibid Para 2.

⁵⁸³ The reasons for the resignations recently of two of the special advocates, Ian McDonald and Rick Scannell, plainly dent any confidence that the special advocates have fulfilled their purpose

The Committee noted that the views that they had heard and received have not been unanimous with theirs, but it probably represents the conclusion of the majority of the appointed special advocates.

If the special advocate system has value, the comments that follow are equally applicable to their involvement in any new legislation and procedures as may be announced shortly by the Secretary of State⁵⁸⁴.

The Committee further noted that ...the special advocates have been partly effective and have demonstrated by some of their cross examinations, which resulted in the release of one detainee following the decision of SIAC.

The release of another detainee by the Secretary of State may have been affected in part by scrutiny of the evidence by the special advocate, as part of the ongoing Home Office consideration of each case.

It is interesting to note despite the mention of a number of successes the reality is that out of 30 plus appeals only a

⁵⁸⁴ Ibid @ Para. 2

handful were successful,⁵⁸⁵ many of the detainees had been in detention for over twelve months, a few granted bail, and therefore one can glean, the speed in which appeals are dealt with outlined in the following chapter.

Frailties within the advocacy service were noted and the Committee observed that there had been no, or almost no, such contact in the past in the detention cases.

This means that the special advocate had been unable to question the detainee or his lawyers on potentially important matters such as where the detainee was on a particular day, who were his associates, why he was seen to perform certain actions. Given adequate protection of the security of the state on an instance-by-instance basis, the Committee could see no significant harm in developing the system⁵⁸⁶.

United Nations High Commission for Refugees⁵⁸⁷ urged the Committee⁵⁸⁸ to consider whether SIAC guarantees a fair and effective procedure for determining status and protection needs.

⁵⁸⁵ Evidence from the website of SIAC [cases dealt with]

⁵⁸⁶ @ Para 3 Ibid

⁵⁸⁷ Evidence submitted by the United Nations High Commissioner for Refugees

⁵⁸⁸ Ibid

The Committee reiterated its concerns in relation to SIAC, particularly in relation to the limited amount of time available for appeals by detainees, the restriction on the entitlement to an oral hearing, the time limits for the Secretary of State to contest an application for bail, and the summoning of witnesses⁵⁸⁹.

A Standard of Proof?

Above the author discussed the standard of proof, which equated to less than the 'civil standard'. Likewise the Law Society responded in like terms, whereupon representations made to the Committee concluded⁵⁹⁰.... "It should be made clear that the Secretary of State's assessments should only be upheld if it can be shown at least on the standard of proof applicable in *civil proceedings* that his assessment is justified"

In a civilised society who aims are to uphold the spirit of the Convention and the HRA, nothing less will do. Of course there is a need to protect society from the atrocities that we have experienced, however if our constitution is to withstand the rigours of any onslaught we must always adhere to the basic

⁵⁸⁹ UNHCR hoped that this inquiry would consider the fundamental principles in the context of the inquiry. Para. 3 *Ibid.* 2 February 2005 1 Executive Committee No 82, "Conclusion on Safeguarding Asylum 1998", Para d(ii)

⁵⁹⁰ At Para 4. *Ibid*

principles of natural justice in reaching any deliberation. Such an approach is not only cohesive within our society, but marks the very freedoms and liberties that those wishing to deprive us of must equally envy, as this is the benchmark to the freedom that we all enjoy.

That is not to say compromise the well being of the populace, but merely to in build the safeguards less favourable in a 'none' civilised society, who have waged war against those who hold such a passion for freedom.

On this point dealing with disclosure even under the civil model great pains are taken to ensure full and frank disclosure.⁵⁹¹

Of course when dealing with the safety of others⁵⁹² care must be taken to protect the Law Society stated⁵⁹³ "We believe that SIAC should take a robust approach with regard to disclosure of material on the part of the Government and security services.

The Society considered it essential that as much information as possible should be made available to the appellant and his or

⁵⁹¹ See for example the Civil Procedure Rules.

⁵⁹² For instance the Security Services

⁵⁹³ Ibid

her representative. As they had stated on diverse occasions information should only be withheld from the client where it can be clearly demonstrated that disclosure would result in a *serious* or *credible risk* to national security.

It follows therefore that not only is disclosure essential to protect the human rights of the appellant, it is also crucial that SIAC has the best possible evidence before it when determining matters of national security. That in turn requires evidence from one party to be subject to challenges by the other⁵⁹⁴.

Amnesty International considered that the scheme established under Part 4 of ATCSA was and is incompatible with the Appellants' internationally recognized fair trial rights, in particular under Article 6 of the Convention⁵⁹⁵ and Article 14 of the United Nations International Covenant on Civil and Political Rights⁵⁹⁶ and/or under Article 5(4) of the Convention.

It is also incompatible with Article 3 of the Convention, Article 7 of the ICCPR and Article 15 of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading

⁵⁹⁴ Memorandum of evidence from the Law Society to the Committee of Privy Counsellors, December 2002
⁵⁹⁵ European Convention on Human Rights

⁵⁹⁶ (ICCPR)

Treatment or Punishment; ⁵⁹⁷because, according to a Court of Appeal's judgment,⁵⁹⁸ the scheme requires the admission of evidence obtained by torture or other ill-treatment where the torture or other ill-treatment was neither committed nor connived in by UK officials.

Amnesty International considered that the certification and detention process established under Part 4 of ATCSA, in substance and effect, amounts to the determination of a criminal charge. This is so even though it is plainly not categorised as such under domestic law.

Under international human rights law a state ¹⁰ For more information about the ATCSA and Amnesty International's concerns⁵⁹⁹ in relation to serious human rights violations that have taken place as a consequence of its enactment, see, inter alia, Amnesty International's written submissions to the House of Lords in the case of A & Others v Secretary of State for the Home Department⁶⁰⁰

⁵⁹⁷ (CAT)

⁵⁹⁸ delivered on 11 August 2004

⁵⁹⁹ Memorandum to the UK Government on Part 4 of the Anti-terrorism, Crime and Security Act 2001" and "UNITED KINGDOM - Rights Denied: the UK's Response to 11 September 2001", both published on 5 September 2002 and available at

⁶⁰⁰ published on 4 October 2004; "United Kingdom - Justice perverted under the Anti-terrorism, Crime and Security Act 2001

Returning to the basic right to a determination of case by an Independent forum, Amnesty International; noted⁶⁰¹... *"It is a fundamental aspect of a fair trial that the accused's guilt is established by an independent and impartial tribunal and not by the executive. Amnesty International considered that the scheme contained in Part 4 of ATCSA failed to meet the most basic of fair trial guarantees, namely that the determination of the charge be by an independent tribunal. Inherent in the notion of an independent tribunal as guaranteed by Article 6(1) of the Convention, is that a tribunal has the power to make binding determinations. SIAC's jurisdiction does not have the necessary decision making power required to meet the condition of independence"*.

The above is so for two reasons. Firstly, and generally, because the Secretary of State is empowered to issue a fresh certificate and so to override any successful appeal against certification, even absent any change in circumstance. Whether he exercises this power or not, the fact that he is possessed of it in law is sufficient to offend the right to an independent determination.

⁶⁰¹ Representations made before the Committee Ibid

Secondly, SIAC, disconcertingly, ruled that under ATCSA the standard of proof that the Home Secretary has to meet to justify internment is not the criminal standard of "beyond reasonable doubt" but, instead, is even lower than that in a civil case.

This means that anyone involved in a civil claim to recover damages⁶⁰² must prove their case to a standard higher than that required of the Home Secretary under ATCSA in order to have his decision to intern people – potentially indefinitely -- confirmed by SIAC.

SIAC ruled, in its "generic" judgment,⁶⁰³ that it does not have full jurisdiction under section 25 of ATCSA because it may not substitute its own finding for that of the Secretary of State.

Thus; it is a possibility that the Commission could conclude that there were reasonable grounds for the suspicion or belief without itself holding the requisite suspicion or belief. But its task under section 25 is to consider the reasonableness of the grounds rather than to cancel a certificate if, notwithstanding

⁶⁰² (for example as a result of a car accident)

⁶⁰³ 29 October 2003

the reasonableness of the grounds, it were unable subjectively to entertain the suspicion or hold the belief to which the statute refers.⁶⁰⁴

In short the fact that SIAC; has neither the power to make a finally determinative ruling the lawfulness of detention, nor to substitute its own assessment of the facts for that of the primary decision maker means that it fails to meet the requirements of Article 6(1). In addition, SIAC comprises only a very small number of members.

It is clear from the generic judgment of the Commission that much of the evidence adduced by the Secretary of State will be applicable to more than one appeal, it is therefore inconceivable that there will not be occasions on which the same individuals are required to determine disclosure issues and then; also to consider the substantive appeal.

This situation is further exacerbated by the fact that even if the Commission rules certain material to be disclosable, the Secretary of State may nonetheless decide to withdraw it, rather than disclose it.

⁶⁰⁴ Para 40.

This results in a real risk of unfairness in that the Commission, in determining the appeal, may have been influenced by such material.

Amnesty International concluded "*the removal of the presumption of innocence and the attendant lowering of the standard of "proof" to one of reasonable belief and suspicion a standard lower even than the civil standard of proof*".

It was and will be further argued that evidence obtained is not only unlawful⁶⁰⁵ but is a violation under the Convention. However it has been canvassed on diver's occasions that evidence had been obtained by third parties, whilst under 'torture' outside the UK.

It should be borne in mind that such evidence is inherently unreliable and it is one of the reasons for holding such evidence as unreliable and therefore inadmissible there are other compelling reasons also. In a judgment delivered by Lord

⁶⁰⁵ was, accordingly, to abolish the Court of Star Chamber, where torture evidence had been received, and in that year the last torture warrant in our history was issued.

Griffiths,⁶⁰⁶ in the case of Lam Chi-Ming v The Queen summarised the rationale of the exclusionary rule: "*Their Lordships are of the view that the more recent English cases established that the rejection of an improperly obtained confession is not dependent only upon possible unreliability but also upon the principle that a man cannot be compelled to incriminate himself and upon the importance that attaches in a civilised society to proper behaviour by the police towards those in their custody.*"⁶⁰⁷ Very often it is evidence of others, often obtained under oppression outside the UK that the closed evidence may be based upon.

It follows that the presumption of innocence contains a number of vital safeguards for the avoidance of miscarriages of justice. Implicit is the duty on the state to prove its case so that any doubt is resolved in the accused's favour. The presumption of innocence, enshrined in Article 6(2) of the Convention and 14(2) of the ICCPR is a peremptory norm, which states cannot lawfully violate by invoking Article 15 of the Convention or Article 4 of the ICCPR.

⁶⁰⁶ In the Privy Council
⁶⁰⁷ [1991] 2 AC 212, 220

Conversely Section 21 of ATCSA permits the Secretary of State to certify not on the basis of proof, but merely of suspicion and belief, albeit held on reasonable grounds. As SIAC noted this "is not a demanding standard for the Secretary of State to meet". The absence of sufficient information; and particularised allegations, such as to enable detainee, to know the case against them and to mount a defence. It should be remembered that open "evidence" consists only of the main of assertions, not the substantive evidence in support thereof.

Therefore the bulk of the "evidence" supporting those assertions is withheld from the detainees and their counsel of choice and admitted in "closed evidence proceedings".

Under the "closed evidence proceedings", detainees and their counsel of choice are denied disclosure of the most important "evidence" against them.

This it is submitted is contrary to Article 6(3) (a)-(c) of the Convention and Article 14(3) (a), (b) and (d) of the ICCPR. Under the scheme established under Part 4 of the 2001 Act, the first opportunity for the detainees to mount any form of

challenge to the process is after the charge has been determined by certification, at the appeal stage, however even then the decision on the appeal is largely made on the basis of secret evidence heard in his absence in the "closed evidence proceedings" when the state puts forward and the court considers most, if not all, of the specific evidence which forms its case against the accused.

This secret process, from which the detainee is excluded, replaces wholesale the ordinary trial process together with the accompanying guarantees of the presumption of innocence, equality of arms, as outlined above, but including disclosure and the right to mount a defence.

The procedure established under Part 4 is the antithesis of the protections that Article 6 requires. The incursion into the right to be represented by counsel of *one's choosing*, contrary to Article 6(3)(c) of the Convention and Article 14(3)(d) ICCPR.

Under the Part 4 scheme, the special advocate's ability to "represent the interests" of the detainee is hopelessly circumscribed by the restrictions under which he is required to

operate. He/she is unable to challenge the evidence or cross-examine witnesses effectively because the advocate lacks the material on which to do so, namely informed instructions from the accused.

Despite the statutory function with which the advocate is charged, the advocate is in truth, able to do little if anything to safeguard the interests of the accused.

Even if the safeguard of the special advocate is the least restrictive measure that can be applied, in substance, it does little to repair the total eradication, under Part 4 of the ATCSA, of the right to defend oneself that is an essential element of a fair proceeding⁶⁰⁸.

The ability of the special advocate procedure to meet the requirements of a fair trial is yet further undermined by the fact that counsel who perform this function are assigned by the Attorney-General; not only a member of the Government seeking to defend the certification under appeal, but the very

⁶⁰⁸ Enshrined in Article 6 HRA.

individual who, in some cases, will be appearing in court to argue against the detainee. This, in and of itself, undermines at least in appearance, the right of the detainee; to independent counsel, thus the right to defence.

In short, the Special Advocates appointed to "represent the interests" of ATCSA detainees are no substitute for legal counsel of one's choice. They are restricted in what they can and cannot do and are unable to discuss secret "evidence" with the individuals concerned, undermining the detainees' ability to challenge "evidence" and the Special Advocate's ability to represent his or her interests.

The right to a review suffers from precisely the same deficiencies in securing fair trial guarantees as the original appeal to SIAC (section 25). In essence it is a right in form but not substance. Once an individual is certified it is difficult to conceive of circumstances in which he, rather than the Secretary of State, can bring an end to his certification.

There is nothing he can usefully put forward in the review hearing that he has not already advanced in the appeal before

the Commission because he remains just as ignorant of the evidence against him as he was at that time.

In addition, Amnesty International considered that the consideration by the Secretary of State and SIAC of evidence obtained as the result of torture or other ill-treatment constitutes a further violation of Article 6 and Article 14 ICCPR. It is also a violation of the prohibition on the admissibility in any proceedings⁶⁰⁹ of evidence obtained by torture⁶¹⁰ is an essential component of the absolute prohibition on torture and inhuman or degrading treatment contained in Article 3 of the Convention and Article 7 of the ICCPR.

And yet there are no checks and balances to ensure fair play under such diversity. In Saifi) v Governor of Brixton Prison⁶¹⁰

The applicant issued a Writ of habeas corpus and resisted extradition to India on the ground, among others, that the prosecution relied on a statement obtained by 'torture', which had since retracted

⁶⁰⁹ (save those against the alleged torturer)

⁶¹⁰ [2001] 1 WLR 1134

It follows that the thread behind the SIAC hearings is the right to a fair trial, which has been the corner stone in any civilised society. In contrast the right to a fair trial is not directly applicable to the original jurisdiction of SIAC;⁶¹¹ it is applicable to control orders, which are domestic civil proceedings.

Therefore many of the features; of the special advocate process used in SIAC, which are also likely to be used in relation to control orders, could raise issues under Article 6.

The Government has stressed that these are civil proceedings, which would not attract the Article 6 protections particular to criminal process. However Convention jurisprudence has established that the Convention will not be tied by the vocabulary of National Legislation⁶¹².

Control Orders and The Special Advocate

Professor Andrew Ashworth⁶¹³ maintains that the lead case of Benham v UK requires the ECtHR to consider whether the proceedings are brought by a public authority, have punitive

⁶¹¹ Although principles of procedural fairness and natural justice mean they may be indirectly relevant

⁶¹² Benham v UK (1996) 22 EHRR 293

⁶¹³ addressing the fairness of Article 6

elements and have potentially serious consequences⁶¹⁴. Potentially indefinite house arrest (and even lesser restrictions such as tagging) will clearly satisfy this test.

Given the strength of the argument that control orders will be considered to be criminal process for the purposes of Article 6 the following elements of the Article do not sit comfortably with the use of special advocates, by reason that 6 (3) (a) of the HRA provides that a person should be informed promptly...in detail, of the nature of the accusation against him; and 6 (3) (c) to defend himself in person or through legal assistance of his own choosing; and by sec 6 (3) (d) to examine or have examined witnesses against him.⁶

Thus in both civil and criminal proceedings Article 6 requires that there be equality of arms - a fair balance between the parties.

The fact that the appellant will not be present throughout control order appeal proceedings and will not have access to much of the material makes it clear that there will not a fair balance between the parties.

⁶¹⁴ Professor Andrew Ashworth, Article 6 and the fairness of trials (1999) Crim LR 261

Moreover further prerequisite of criminal proceedings under Article 6 is the presumption of innocence, the concept that goes to the heart of fair trial and extends back to the Magna Carta⁶¹⁵. Concerns as to how control orders will undermine the presumption of innocence have already been expressed widely, and therefore the use of special advocates compound those concerns.

Liberty in making representations to the Committee⁶¹⁶ expressed its concerns "There is a fundamental problem with the use of special advocates which makes them inappropriate for proceedings where the state is seeking recourse against an individual based on allegations of actions or behaviour by him. As there is, no possibility of taking instructions; the special advocate cannot properly test the evidence against him.

As any criminal law practitioner is aware, testing the case against their client and putting their client's case to prosecution witnesses is the heart of an effective defence. If, for example, the prosecution is alleging that the defendant was somewhere

⁶¹⁵ Home Office discussion paper paragraph 36

⁶¹⁶ Ibid HL 353

at a particular place and time, how is it possible to challenge the assertion without instructions? It would be difficult enough to effectively defend a criminal trial on this basis. In civil or SIAC proceedings, where the burden of proof for the state is substantially lower, it is virtually impossible".

This central concern was summarised by the JCHR in its report on anti terrorism powers which said; *"we consider it a significant problem that the special advocate for the detainee is appointed by the Attorney General, who not only represents a party to the proceedings before SIAC, but is the only legal representative present during the closed hearings, in the absence of the detainee or their legal representative."*⁶¹⁷

Concerns over the uses made of special advocates have often come from advocates themselves. Scathing comments made by special advocates who have resigned, such as Ian MacDonald QC who referred to Part 4 ATCSA as an 'odious blot on our legal landscape'.

⁶¹⁷ JCHR 'Review of Counter-terrorism Powers', 18th report of session 2003-2004, 4 August 2004 (HL 158, HC 713)

In February 2004⁶¹⁸ six special advocates⁶¹⁹ wrote an open letter to the Home Secretary expressing concerns at plans then circulating to use them in criminal trials saying, "*We are convinced that both basic principles of fair trial in the criminal context and our experience of the system to date make such a course untenable. It would contradict three of the cardinal principles of criminal justice: a public trial by an impartial judge and jury of one's peers, proof of guilt beyond reasonable doubt, and a right to know, comment on and respond to the case made against the accused. The special advocate system is utterly incapable of replacing these essential fundamentals of a fair trial.*"

As outlined above this disquiet arose from concern that they would be used in criminal trials. However the criminal process contains greater protection for the defendant than civil law, therefore these views would be expressed in even stronger terms in relation to control orders.

Immigration is an Anathema

⁶¹⁸ Information provided by Liberty to the Commission Ibid.

⁶¹⁹ Nicholas Blake QC, Andrew Nicol QC, Manjit Singh Gill QC, Ian Macdonald QC, Rick Scannell and Tom de la Mare, letter to *The Times*, 7 February 2004

A former member Of the immigration Appeals Tribunal⁶²⁰ remarked⁶²¹ "Traditionally the UK has always been a large exporter of its population to many parts of the world, including to some refugee producing countries⁶²² as economic emigrants, possibly tax avoidance, colonialism or many other reasons.

Therefore to have become a relatively miniscule importer of people through Immigration is an anathema. Hence, the enacting of race based legislation by HMG, obviously for the sole purpose to discriminate against foreigners, disguised under the hypocrisy of political correctness to appease or patronise critics from the minority communities and the New Commonwealth. Some would say that the current targeted detentions are simply a crusade against Islam and as basic as "them and us".

Anver Jeevanjee⁶²³ commented further *"I have carefully considered the unique SIAC form of justice in the light of my over 21 year's experience of serving within the system of our Immigration and Asylum Appeals and several other appeal tribunals. I have also scrutinised the impact of SIAC on our*

⁶²⁰ Anver Jeevanjee

⁶²¹ In evidence before the Committee Ibid Para 29.

⁶²² (191000 persons left the UK in 2003)

⁶²³ Ibid

Community and Cultural Diversity in which my family and I have been actively involved for many more years across the world....

My observation of similar jurisdictions under the so called threat of terrorism in some other countries such as India, Sri Lanka, Apartheid South Africa, Burma, China etc., is equally depressing. I have regularly made submissions to the CAC on similar matters. I attach my last one in respect of my concern for Justice at the Immigration Appeals Tribunal and the rapidly declining independence of members of Judiciary as a whole in the United Kingdom.

Finally, I am of the opinion that SIAC ought to be abolished and its work, if it is at all considered necessary, be transferred within a single Immigration Appellate system, together with all other aliens bunched together. This expensive system has always been in shambles anyway; so a few more onto the pile would not make much difference. We already have powers to consider deportation of foreigners who have been convicted of serious crimes and have served their term of imprisonment. British citizens must only face the Criminal Courts'.

Mr. Anver Jeevanjee continued *"I also believe that if members of a broader cross section of diversity and genuine cultural awareness were appointed at the Immigration Courts, than at present, it would determine cases with a greater degree of transparency under the Convention, speed, cost effectiveness and fairness. There is also a case for reviewing the questionable legislation under which SIAC operates. In my view it is not only unlawful but also incompatible with the Convention and racially motivated against foreigners, their wives, children or close families"*.

Upon the insight of the workings of SIAC, Mr Anver Jeevanjee, remarked; *"Those in power also never list some chairpersons and a past President of the IAT was clearly excluded, as he was perceived to be too liberal minded. However, SIAC sits within Field House⁶²⁴, in the legal quarter of London. It is in the same building where I also sat at the Immigration Appeals Tribunal. Seemingly security is very tight, particularly so, when SIAC is in session. In my experience it is a total farce for the determined attacker"*.

⁶²⁴ off Chancery lane

"SIAC members work from offices within the same floor of the building and my colleagues and I share their courtroom when it is free. Although it was all highly secretive I know many who sat on it. I often met them in what I refer to as the 'corridors of dictatorial power'. Whenever, my cases were adjourned due to our endemic administrative problems and I had time on my hands, I went downstairs to observe the SIAC proceedings as a member of the public.

It was interesting to watch the body language and conduct of the court. SIAC carried much greater prejudices against foreigners than does the IAT. Both systems are as institutionally racist⁶²⁵, as are the police, prisons etc. The only difference being that the former still remains in denial and blatantly rejects any such suggestion, while the later accepts the problem and has gone a long way to do something about it. Islamaphobia is rampant, as most of its suspects or detainees appear to belong to the Islamic faith".

"The only unique check against SIAC is the overview and wisdom of the Court of Appeal as well as the Law Lords. I recognise the infallibility of sectors of the Judiciary but it

⁶²⁵ under the Stephen Lawrence inquiry principles

appears there is none such immediate remedy for the executive's errors.

Furthermore, as many would say, government mistakes are subject to political manipulation, covered up by more untruths and flimsy public enquiries. The USA / UK or their allies were unable to obtain any evidence against such suspects despite their torturous detention in the modern day concentration camps of Guantanamo or Belmarsh. In Auschwitz and elsewhere in Europe, there was indiscriminate persecution of Jews and of course anti-Semitism still flourishes today".

"However, it now seems, to have spilled over to victimise all Muslims. The US government might have realised the folly and hopelessness of their allegations. I hope the UK will follow suit and stop putting anyone it fancies under its discriminatory stop and search or house arrest program. I am very shocked but not at all surprised with the manner in which such a 'kangaroo' court operates in the UK. I had experienced such biased courts under the British colonial apartheid system in Kenya during my service there.

Much as one might pretend otherwise, SIAC is not substantially different, perhaps worse. At the very least former terrorists or freedom fighters like Gandhi or Nelson Mandela or even other minor players were made fully aware of charges against them, even under the apartheid laws, which gave them an opportunity to plead either way. SIAC, as far as I understand it, does not offer any such choice. SIAC hearings can only be described as bizarre.

The suspect is not told nor has the right to enquire, what the now highly discredited 'post Iraq intelligence service' was suspecting her or him for. Therefore the defence remains totally blind folded. Periodically, the court goes into a closed session and the suspect led away into his cells by his security escorts".

"The suspects must feel bewildered but than who cares? In one case I heard the only issue seemed to be focused on the suspect having prayed at a certain mosque where the notorious Abu Hamza; ⁶²⁶is said to have preached terrorism or anti-western sentiments. There was another case where the suspect was questioned about transferring funds collected in a London mosque to Afghanistan. The suspect was trying to prove with

⁶²⁶ (Now also in detention) at the time of the statement.

an album full of photographic evidence that he had been involved in building schools in that country. I am not sure if he was believed or the standard of proof required by SIAC".

"The show goes on. During my observation of SIAC, the only person for whom I had the greatest respect and high regard for fairness and competency was Mr. Justice Andrew Collins. I believe he is one of our most exceptional Judge's and I feel greatly honoured to have worked with him at the IAT....

I have little doubt that he must feel quite uncomfortable with the manner in which the proceedings were conducted. Nevertheless, I observed him handle the Court with the highest standard of professionalism, courtesy and justice as far as was possible under the adverse circumstances in which he, as a High Court Judge then, was placed. It must have been personally painful for him to see Justice for foreigners being so grossly mutilated and discriminatory". Mr. Anver Jeevanjee concluded; "courts like SIAC and the legislation under which it operates, should have no place in any credible justice system of any democracy".

Indefinite Detention

In response to the Committee⁶²⁷, and by a written statement⁶²⁸ Justice highlighted various concerns; regarding SIAC's use of civil proceedings to determine indefinite detention under Part 4 of ATCSA 2001; evidence contrary to Article 15 of the Convention Against Torture; and special advocates in closed proceedings under Part 4 of ATCSA.

The central defect of the operation of SIAC since November 2001⁶²⁹ has been the use of civil proceedings to determine issues relating to indefinite detention. This defect flows, however, not from SIAC's own procedures but from the government's decision to adapt SIAC from a specialist immigration tribunal to a de facto counter-terrorism court under Part 4 of ATCSA.

This 'choice of an immigration measure to address a security problem' has meant that persons detained indefinitely under Part 4 have lacked the essential guarantees of due process

⁶²⁷ Ibid

⁶²⁸ At Para 4.

⁶²⁹ At Para 5.

provided by the criminal law i.e. the presumption of innocence⁶³⁰, standard of proof beyond a reasonable doubt⁶³¹, to be present at an adversarial hearing⁶³², the assistance of counsel of their own choosing⁶³³, and so forth.

Justice considered that Whilst the guarantees offered by SIAC's procedures were appropriate to its original civil function⁶³⁴ the use of the same tribunal to judicially review the Home Secretary's decision to indefinitely detain suspected terrorists has been inadequate to the task of protecting those detainees' rights to liberty; as Lord Nicholls of Birkenhead noted in House of Lords decision in A and others v Secretary of State for the Home Department⁶³⁵: "*Nor is the vice of indefinite detention cured by the provision made for independent review by [SIAC]. The commission is well placed to check that the Secretary of State's powers are exercised properly. But what is in question ... is the existence and width of the statutory powers, not the way they are being exercised.*

⁶³⁰ See Article 6(2) of the European Convention on Human Rights: 'Everyone charged with a criminal offence shall be presumed

⁶³¹ See e.g. *Woolmington v Director of Public Prosecutions* [1935] AC 462 at 481-482 per Viscount Sankey LC

⁶³² See Article 14(3) (d) of the International Covenant on Civil and Political Rights; Article 6(1) CONVENTION. See also *Brandstetter v Austria*

⁶³³ Article 14(3) (e) ICCPR; Article 6(1) and 6(3) (c) CONVENTION. See also *Pakelli v United Kingdom* (1983) 6 EHRR 1; *Goddi v Italy* (1982) 6 EHRR 457

⁶³⁴ (reviewing deportation decisions on national security grounds),

⁶³⁵ See above, Para 82

Specifically, SIAC's function under Part 4 has not been to determine whether those detained are guilty of any criminal offence but only to determine on a standard of proof below even that of the ordinary civil standard whether the Home Secretary had reasonable grounds for suspecting that a detainee has been involved in terrorism and, hence, posed a risk to the national security of the UK.⁶³⁶ 53 As SIAC itself noted⁶³⁷, 'it is not a demanding standard for the Secretary of State to meet'⁶³⁸

The use of evidence contrary to Article 15 of the Convention against Torture 47 A and others v Secretary of State for the Home Department⁶³⁹ was considered by the Court of Appeal. Lord Bingham of Cornhill;⁶⁴⁰ *"It would be a serious error, in my opinion, to regard this case as about the right to control immigration. This is because the issue, which the Derogation Order was designed to address, was not at its heart an immigration issue at all. It was an issue about the aliens' right*

⁶³⁶ See *Ajonaou and others v Secretary of State for the Home Department* (SIAC, 29 October 2003), Para 48: 'The test is ... whether reasonable grounds for suspicion and belief exist. The standard of proof is below a balance of probabilities because of the nature of the risk facing the United Kingdom, and the nature of the evidence which inevitably would be used to detain these Appellants'

⁶³⁷ in October 2003

⁶³⁸ *Ibid*, Para 71. In *A and others v Secretary of State for the Home Department* [2004] EWCA Civ 1123, the Court of Appeal

⁶³⁹ [2004]

⁶⁴⁰ At Para 43.

'Sections 3 and 4 of the Human Rights Act: ascertaining the boundary of legitimate judicial intervention'

*to liberty'*⁴⁸ See Article 6(2) of the European Convention on Human Rights: *'Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law'*

Evidence obtained by Torture v Admissibility

It will be recalled that concern was expressed whether there was a 'policy' held by the armed forces to obtain statements, thus evidence by force or degrading treatment⁶⁴¹ Article 15 of the UN Convention Against Torture provides that;⁶⁴² *'any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings'.*

However, in October 2003, the Chairman of SIAC rejected an argument by the detainees that SIAC should refuse to consider evidence that may have been obtained by way of torture in a third country....⁶⁴³ *"We cannot be required to exclude from our consideration material which [the Home Secretary] can properly take into account, but we can, if satisfied that the information was obtained by means of torture, give it no or reduced weight.*

⁶⁴¹ Ibid

⁶⁴² *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984, signed by the UK on 15 March 1985 and ratified on 8 December 1988*

⁶⁴³ *Ajouaou*, n12 above, Para 81

We are, after all, concerned in these proceedings not with proof but with reasonable grounds for suspicion".

This above was subsequently upheld by the Court of Appeal⁶⁴⁴, which held that SIAC was not obliged to exclude evidence that had been obtained under torture in another country by non-UK officials⁶⁴⁵.

It is interesting to note that Coke in the earlier part of his career admitted the existence of this extraordinary power. He therefore saw no objection to the use of torture thus authorized. But we shall see that his views as to the existence of this extraordinary power changed, when the constitutional controversies of the seventeenth century had made it clear that the existence of any extraordinary power in the crown was incompatible with the liberty of the subject. It is not surprising therefore, that, in his later works, he states broadly that all torture is illegal.

The House in R v Mushtaq⁶⁴⁶ noted "*It is of course true, as counsel for the Secretary of State points out, that in cases such*

⁶⁴⁴ in August 2004

⁶⁴⁵ *The appeal court held that Article 15 CAT was not enforceable, as it had not been incorporated into domestic law. It also ruled that Torture evidence obtained abroad was not excluded by either common law principles or the provisions of the European Convention on Human Rights. See A and others, n13 above at Para 133 per Pill LJ*

⁶⁴⁶ [2005] UKHL 25, [2005] 1 WLR 1513, paras 1, 7, 27, 45-46, 71.

as these the attention of the court was directed to the behaviour of the police in the jurisdiction where the defendant was questioned and the trial was held. This was almost inevitably so. But it is noteworthy that in jurisdictions where the Law is in general harmony with the English common law reliability has not been treated as the sole test of admissibility in this context". It has been canvassed on diverse occasions throughout this chapter that evidence allegedly obtained by torture was either during detention overseas by the armed services, or detainees incarcerated by the allies of the UK.

In *Rochin v California* 342 US 165⁶⁴⁷ Frankfurter J, giving the opinion of the United States Supreme Court, held that "a conviction had been obtained by "conduct that shocks the conscience"⁶⁴⁸ and referred to a "general principle" that "States in their prosecutions respect certain decencies of civilized conduct."⁶⁴⁹ He had earlier⁶⁵⁰ referred to authority on the due process clause of the United States constitution which called for judgment whether proceedings "offend those canons of decency and fairness which express the notions of justice of English

⁶⁴⁷ (1952)

⁶⁴⁸ (p 172)

⁶⁴⁹ (p 173)

⁶⁵⁰ (p 169)

speaking peoples even toward those charged with the most heinous offences."

In *The People (Attorney General) v O'Brien*⁶⁵¹ the Supreme Court of Ireland held, per Kingsmill Moore J, that "*to countenance the use of evidence extracted or discovered by gross personal violence would, in my opinion, involve the State in moral defilement.*"

The High Court of Australia, speaking of a discretion to exclude evidence, observed per Barwick CJ in *R v Ireland*⁶⁵², "*that "Convictions obtained by the aid of unlawful or unfair acts may be obtained at too high a price."*

In *R v Oickle*⁶⁵³, a large majority of the Supreme Court of Canada cited with approval⁶⁵⁴ an observation of Lamer J that "*What should be repressed vigorously is conduct on [the authorities'] part that shocks the community" and considered*⁶⁵⁵ *that while the doctrines of oppression and inducements were primarily concerned with reliability, the confessions rule also extended to protect a broader concept of voluntariness that*

⁶⁵¹ [1965] IR 142, 150,

⁶⁵² (1970) 126 CLR 321, 335)

⁶⁵³ [2000] 2 SCR 3

⁶⁵⁴ (Para 66)

⁶⁵⁵ (Para 69)

focused on the protection of the accused's rights and fairness in the criminal process".

Finally upon the issue of torture it is clear from the historical record that torture was practiced in England in the 16th and early 17th centuries. But this took place pursuant to warrants issued by the Council or the Crown, largely⁶⁵⁶ in relation to alleged offences against the state, in exercise of the Royal prerogative.⁶⁵⁷ Of course since 1640 'torture, was abolished'⁶⁵⁸, or so it appeared⁶⁵⁹

In November 2004, the UN Committee Against Torture expressed its concern that UK law failed to fully implement its obligations under Article 15 and recommended that,⁶⁶⁰ the [UK] should appropriately reflect in formal fashion, such as legislative incorporation or by undertaking to Parliament, the Government's intention ... not to rely on or present in any proceeding evidence where there is knowledge or belief that it

⁶⁵⁶ (but not exclusively)

⁶⁵⁷ see Jardine, *op cit.*; Lowell, *op cit.*, pp 290-300

⁶⁵⁸ One of the first acts of the Long Parliament in 1640 was, accordingly, to abolish the Court of Star Chamber Ibid.

⁶⁵⁹ Where detainees were hooded during interrogation by the British Forces, which led to Court Marshal's Ibis.
⁶⁶⁰ Para 5(d), *Conclusions and recommendations of the Committee against Torture in respect of the United Kingdom of Great Britain and Northern Ireland, Crown Dependencies and Overseas Territories, CAT/C/CR/33/3*, 25 November 2004. See also, Liberty and JUSTICE submission to the United Nations Committee Against Torture in response to the United Kingdom's fourth periodic report (October 2004), paras 8-14

has been obtained by torture; the [UK] should also provide for a means whereby an individual can challenge the legality of any evidence in any proceeding plausibly suspected of having been obtained by torture.

This latter recommendation reflects the fact that not only is evidence obtained by way of torture in a third country admissible in SIAC proceedings, but SIAC lacks any procedure by which the fact of such torture can even be established.⁶⁶¹ In other words, SIAC has no way of knowing or no procedure by which it can assess whether the evidence put before it has been obtained by torture or not.

The failure of SIAC to rule out the use of evidence gained under torture abroad stands in stark contrast to the express purpose of the Convention, which is 'to make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world'⁶⁶².

⁶⁶¹ See *A and others*, n13 above, at Para 129 per Pill LJ: 'It would be...unrealistic to expect the Secretary of State to investigate each Statement with a view to deciding whether the circumstances in which it were obtained involved a breach of Article 3. It would involve investigation into the conduct of friendly governments with whom the Government is under an obligation to co-operate'

⁶⁶² Preamble to Convention Against Torture, n14 above. The International Commission of Jurists has now identified excessive counterterrorism measures as a grave threat to the rule of law (see the Berlin Declaration on Upholding Human Rights and the Rule of Law in Combating Terrorism, 28 August 2004). In particular, Article 7 states, '[e]vidence obtained by torture, or other means which constitute a serious violation of human rights against a defendant or third party, is never admissible and cannot be relied on in any proceedings'

Indeed, SIAC's failure also contrasts markedly with the position set out in the FCO's 2004 Human Rights Report that 'torture is abhorrent and illegal and the UK is opposed to the use of torture in all circumstances'⁶⁶³.

The report further quotes the Foreign Secretary Jack Straw as saying, 'I am proud of the UK's leading efforts in the campaign to prevent torture worldwide'.⁶⁶⁴ On the basis that the use of torture evidence anywhere weakens the struggle against torture everywhere, we regard SIAC's refusal to exclude such evidence from its proceedings as a thoroughly retrograde step.

Detention without Trial

The dilemma therefore is far from resolved when contrasted with the basic rights that those challenging any decision do so by reason of taking point by point upon the evidence presented to the tribunal/court. To this end certain procedures are followed however as we have seen above there remains

⁶⁶³ Foreign and Commonwealth Office, *Human Rights: Annual Report 2004* (Cm 6364: September 2004) at 182

⁶⁶⁴ *Speech at the UK ratification of the Optional Protocol to the UN Convention Against Torture, 10 December 2003, ibid at 183*

procedures in even the lowest of decision-making bodies⁶⁶⁵ ensure a balance of fairness and proportionality.

It follows therefore that the issue of detaining without trial, those who are a threat to national security but who cannot be immediately removed, is a major violation of the Convention. The Convention provides at Article 5⁶⁶⁶... "Everyone has the right to liberty and security of the person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law ... Article 5(1) (f) the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition".

Members are allowed to derogate from the above under Article 15; which provides ... "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

⁶⁶⁵ Employment Tribunal, for instance who directions very often order disclosure of documents/evidence in order to do justice. Likewise even small claims in the County Court are subject to the rigours of Civil Practice Rules.

⁶⁶⁶ of the Convention states the following; "5(1)

the situation, provided that such measures are not inconsistent with its other obligations under international law".

The removal of the presumption of innocence and the attendant lowering of the standard of "proof" to one of reasonable belief and suspicion a standard lower even than the civil standard of proof, is totally unacceptable.

The presumption of innocence contains a number of vital safeguards for the avoidance of miscarriages of justice. Implicit is the duty on the state to prove its case so that any doubt is resolved in the accused's favour. The presumption of innocence, enshrined in Article 6(2) of the Convention and 14(2) of the ICCPR is a peremptory norm, which states cannot lawfully violate by invoking Article 15 of the Convention or *Article 4* of the ICCPR.

It should be noted that section 21 of ATCSA permits the Secretary of State to certify not on the basis of 'proof', but merely of 'suspicion' and belief, albeit held on reasonable grounds. As SIAC noted this "is not a demanding standard for the Secretary of State to meet"

The difficulty arises from the nature of the threat now posed, which is at opposite poles when the Convention was agreed and ratified,⁶⁶⁷ in essence there is arguably a disjuncture between the international human rights Conventions which we have inherited and the reality of the threat we face from terrorism. The instruments within the framework were addressed by Lord Falconer⁶⁶⁸ who was asked whether he thought there were gaps he surprisingly replied, "*I do not think there are gaps.*"

Lord Falconer was then asked whether it was common ground that we do not need to alter the international human rights Conventions because of terrorism, and he replied, "*I completely agree with that because I strongly believe that these instruments provide the basis whereby you can alter what your operational response is within the context.*" He went on to say that he agreed that we should be "*unequivocal in our commitment to international instruments*"⁶⁶⁹

⁶⁶⁷ Ibid.

⁶⁶⁸ JOINT COMMITTEE ON HUMAN RIGHTS 21st May 2007

⁶⁶⁹ Ibid Q252

Lord Goldsmith QC, in his reply to the Committee;⁶⁷⁰ confirmed that he stood *"in exactly the last place that you have identified [above]. I believe it is very important that we should stand by our international commitments and standards. I believe that because I believe these set out the basic values upon which our societies are based. I believe that these are values, which the terrorists "....*

"I also think that it is very important that we stand by those standards so as to demonstrate that what we stand for is fairness, justice, the rule of law, rather than the seductive but hugely dangerous narrative of al-Qaeda that everything that is done by the West is an oppression of the Muslim minority" ..

Lord Goldsmith continued *"I think it is very important from that point of view. I also believe - and I have spoken publicly quite a lot about this - that the international standards to which we subscribe do not constrain us from taking the action that we need to take to protect ourselves. I do not think it is either national security or fundamental values. I think you can balance the two Sometimes you need to adjust the balance to take account of particular circumstances, but I think you do that by*

⁶⁷⁰ JOINT COMMITTEE ON HUMAN RIGHTS Tuesday 26 June 2007

respecting the rule of law; by standing by fundamental values, some of which is non negotiable; and by making changes only where they are proportionate (that is to say, they are necessary to meet the threat and proportionate to that threat)".

With the above in mind this is a stark contrast in failing to even notify a detainee of the nature of charge and failing to even adhere to basic disclosure. Yes there is a need to protect the nature of sources, however to even fail to identify the gist of the charge or even its nature falls foul of even the basic human rights.

As Mr. Anver Jeevanjee concluded⁶⁷¹; "[c]ourts like SIAC and the legislation under which it operates, should have no place in any credible justice system of any democracy".... at the very least former terrorists or freedom fighters like Gandhi or Nelson Mandela or even other minor players were made fully aware of charges against them, even under the apartheid laws, which gave them an opportunity to plead either way.

⁶⁷¹ Ibid in his evidence to the Committee.

David Pannick QC⁶⁷² commented on the decision by the Government to derogate from Article 5 of the Convention and he took the view [t] hat it; "*indicates an alarming lack of understanding of the importance of human rights in combating terrorism*".... "*We should respect human rights in terrible times as well as in tolerable times. The Human Rights Act is not a chocolate box of treats to be enjoyed on special occasions*"⁶⁷³"

Liberty⁶⁷⁴, raised "*given the nature of terrorist threats to European countries generally, it will need to be asked why the majority of the other 40 or so countries signed up to the Convention do not feel that similar measures are so 'strictly required' in their countries!*"⁶⁷⁵"

It is clear that the present situation is as diverse as is the need to ensure that the terms of the HRA are adhered to in it entirety and in accordance with the 'spirit of the Convention, with no compromise that will undermine the spirit of the HRA.

⁶⁷² a leading public law silk

⁶⁷³ We must protect civil liberties in the fight against terror, Times Law Supplement, Tuesday 23rd October 2001.

⁶⁷⁴ John Wadham, Director of

⁶⁷⁵ John Wadham and Shami Chakrabarti, Indefinite detention without trial, New Law Journal, October 26th 2001 - pages 1564 - 1565

In relation to detention powers it is necessary to ensure a fair balance is struck between the two competing objectives of combating terrorism and protecting individual rights.

It is not acceptable to have an indefinite detention of individuals merely on the basis of their political, national, ethnic, or religious affiliation, which is clearly at the forefront under Article 15 it seems, for now at least, that the Government's decision to derogate from Article 5 of the HRA, must not derogate from the fundamental freedoms of the 'right to a fair trial'⁶⁷⁶

Perhaps the final say upon this point should stand from the Foreign Secretary⁶⁷⁷ Jack Straw who stated ... 'I am proud of the UK's leading efforts in the campaign to prevent torture worldwide'.⁶⁷⁸ On the basis that the use of torture evidence anywhere weakens the struggle against torture everywhere, we regard SIAC's *refusal* to exclude such evidence from its proceedings as a thoroughly *retrograde* step.

⁶⁷⁶ Article 6

⁶⁷⁷ As he was then.

⁶⁷⁸ *Speech at the UK ratification of the Optional Protocol to the UN Convention Against Torture, 10 December 2003, ibid at 183*

Chapter 9

A Case Study

In the matters before the Special Immigration Appeal Commission

An overview is the workings and determination of cases/applications before SIAC. It is interesting to note in which the speed these applications were dealt, all in one day.⁶⁷⁹ The applications were brought before The Honourable Mr. Justice Ousley, who is the President; of SIAC.

There were eight applications for bail⁶⁸⁰, the remaining raised other issues. With regard to bail the question in each of those cases is whether SIAC is satisfied that there is a real risk that any individual applicant would abscond if allowed bail and whether a real risk would be created to National Security if he were allowed bail, whether or not he absconded.

The bail conditions in answering those questions are obviously important.

⁶⁷⁹ Friday, 16th December 2005

⁶⁸⁰ Re: SC/33,34,35,36,37,38,41/05

The Honourable Mr. Justice Ousley commented...

1. "We have taken into account the stage, which the Secretary of State's case has reached in relation to safety on return and the duration of likely detention before appeals are heard. We have also, so far as possible, taken some account of the potential impact of the House of Lord's decision recently in relation to torture.

2. We heard submissions on 5th December 2005, in brief, in a number of cases, about the significance of the stage reached and about what does or does not appear to be proposed for agreement with Algeria. The Secretary of State's evidence on safety on return is due by 24thFebruary 2006 in the lead Algerian cases.

We have ruled that we could not yet conclude that the Secretary of State has no reasonable prospect of being in a position lawfully to return Algerians, but the position now on the prospects of a concluded agreement and what it might contain would be relevant both to the expectation of any applicant that that return was a risk to be avoided by absconding and to the balance to be

struck between liberty and the risk to security. If there were no return to Algeria, a control order, we assumed, would be likely for these applicants.

3. With that in mind, I turn to the individuals.

Case of 'Y'

4. Following his alleged arrival in the UK on a false passport in 2000 and following a successful appeal against the refusal of asylum, he was granted indefinite leave to remain in 2001. The Secretary of State at present says that he is subject to two sentences of life imprisonment and one of death passed in Algeria in his absence. These followed convictions in his absence for terrorist related offences. His extradition is, apparently, sought. The precise timing of his departure from Algeria in relation to these offences and in relation to what he did before arriving in the UK may be a matter of dispute later. But he was acquitted in the poisons plot trial and never charged in relation to false document-related offences.

5. He was released from custody in April 2005, where he had been since January 2003. He was on bail for five months living in NASS accommodation.

There was no evidence of a breach of the limited bail requirements then imposed. No control order was made in respect of him. He is not married. He has a fiancée who he met during the trial. He is 33 years old. There is medical evidence supporting the allegations of torture in Algeria. He suffers from low mood and a sense of helplessness.

6. We take the view that, whilst there is material that suggests that he could abscond were he minded to, it does not satisfy us that there is a real risk that he will do so, at least at this stage. He is rationally able to assess the significance of the fact that he can challenge both the national security case and the safety on return case if the Memorandum of Understanding is, indeed, concluded with Algeria.

He is in a paradoxical position, which it is difficult to deal with other than on a case-by-case assessment, of being an individual who has very considerable reason to fear return to Algeria, on the very basis of which he has a proper case to argue that he cannot be returned. If he were to abscond, there is a risk that he would engage in activities, which would be a risk to national security, and indeed such a risk exists even if he were not to abscond. However, we consider that, for the period we are considering here and in the light of the history of his case, that that risk can adequately be controlled by appropriate conditions appropriately monitored.

7. We accept the Secretary of State's submissions that the sureties and address proposed are inappropriate, but, subject to finding an acceptable address and we would wish, in principle, for a surety in a significant though not necessarily equal sum, he is to be granted bail. I do not intend that the absence of a surety should preclude bail if it turns out to be unobtainable.

Case of 'X'

8. He arrived in the United Kingdom in 1995 on false French documents, having left Algeria for Italy, he says, in 1994. His asylum claim was refused, but he obtained exceptional leave to remain on medical and compassionate grounds, which was extended, and eventually he was granted indefinite leave to remain on 9th December 2002. 9.

He got married in a registry office in February 2004 to an Algerian national, who arrived in the United Kingdom in 2004 and made a claim, not yet determined, to stay as the dependant of her brother. They have no children. He has lived for the last two years at the same local authority address. Medical reports suggest that he is obese or considerably overweight and has been for some time.

There is some evidence of past acts of self-harm, though he is not at present on suicide watch. There are references to jinn's or spirits entering his body and telling

him to commit self-harm and making derogatory comments about him. He is vulnerable to stress and anxiety and very fearful of return to Algeria. It is assessed that he has had a psychiatric illness for ten years.

10. The national security case, in part, relates to his alleged involvement in the poisons plot, although the case against him was abandoned in October 2003. In part, it relates to other groups with whom he is allegedly involved and to the contacts that he has.

Again, it would be unnecessary and ill-advised to express any particular views about that part of the national security case. But it is evident that, in so far as it relies on the poisons plot and evidence from Meguerba, there is cause for encouragement on his part that the Secretary of State's case will not be taken at face value.

11. It is possible that, even giving no real weight to the ties of marriage in this case to an Algerian citizen and recognising that he did not breach immigration bail, bail

conditions might control the risk of absconding adequately. But it is less clear in this case that the risk is manageable because of a clear incentive to abscond in the longer term.

He has no convictions in Algeria, but interest in him would arise from involvement in the poisons plot and other allegations made as part of the Secretary of State's case. Again, paradoxically, there is for that reason more reason for him to Judgment fear return. His psychiatric illness and his jinns make his behaviour less predictable and this would be a marginal case for bail given the degree of risk of absconding.

12. However, what has decided us to refuse bail in this case is evidence, which satisfies us that, absconding, or no, there is a real risk that he would engage in activities directly contrary to national security and he would not adjust his behaviour in the light of any conditions.

The basis for this conclusion lies in the closed material. We recognise that, if the appeal is successful, he would

have to be dealt with by a control order, if one were sought, but the relative strength of detention as opposed to a control order in dealing with that risk, where detention is a lawful option as it is here, means that he should stay in custody. 13. There will be a short closed judgment.

Case of 'AA'

14. This applicant is an Algerian. He entered the UK on false documents from Algeria via Italy and has used a cousin's French passport three times to try to obtain residency in Spain. He re-entered the UK in that false name. He was arrested in connection with charges of possession of false documents for terrorist purposes in September 2002, but also in connection with the poisons

plot. After a number of interviews the identity now asserted was accepted. He was acquitted of the conspiracy charges and most of the charges of possession of false passports in relation to which the terrorist-purpose aspect had already been dropped, but

he pleaded guilty to two counts of possession of false passports.

He was sentenced to 15 months' imprisonment, which led to his immediate release following the acquittals in April 2005. He was then subject to immigration detention while his outstanding asylum claim was determined. It was not suggested then that he posed a threat to national security. He was granted immigration bail on not very onerous terms.

15. He was re-arrested in September 2005 following the decision of the Secretary of State to make a deportation order based on the expectation of the conclusion of an appropriate Memorandum of Understanding so as to permit his return to Algeria.

It is inappropriate to express any firm views on the strength of the national security case, but there are particular features about his behaviour in the early days, which Mr. Mansfield QC is entitled to pray in aid in attenuation of the risk, though we also accept Mr. Eadie's

submission that we do not have, inevitably, the full picture yet.

16. We have also considered the helpful submissions of the Special Advocate in these matters.

17. There is evidence of long-term use of a false identity, contacts with the Algerian community and other matters, which show that, if he were minded to abscond from bail, he could do so and it could not, in reality, be prevented. He has no family ties either.

18. However, his past behaviour on immigration bail, albeit in different circumstances because there was no such active threat to deport as now exists, is of real weight in his case and we also take account of the acceptable address that has been provided, living with a responsible and acceptable surety.

We recognise the strengths of his fears but believe that his recognition of the process yet to be undertaken by SIAC in his case, his ability to challenge the national

security and safety case, coupled with a desire for stability, mean that he is unlikely to abscond and the risk of absconding in his case can adequately be controlled by conditions and the sureties proffered. We also conclude that, on bail, the risk he poses to national security can adequately be controlled. In principle, he would be required to reside at ... and the two sureties that he has indicated would be required.

Case of 'Z'

19. 'Z' arrived in the UK in 1991. He became an overstayer after six months. He claimed asylum when arrested in 1997 on PTA charges. Those charges were withdrawn, but he pleaded guilty to six fraud charges. The PTA charges were dropped in circumstances where the prosecution could not give the requisite evidence. The defence of the charges was in part that the provision of the support materials at the heart of the case for the defence of Algerian communities was a form of self-defence rather than terrorism.

The national security case alleges that he is a leading GIA member in the UK. 20. He was sentenced in March 2000 to three years' imprisonment on fraud charges, which led to his release in February 2001. He had been on bail from March 1998 to March 2000, complying with his residence, a curfew and reporting requirement. He breached bail through a fraud offence, seemingly dealt with in the Magistrates' Court, but this did not lead to the revocation of his bail.

21. When arrest under Part IV of the ATCSA was imminent in December 2001, he disappeared and went underground in hiding. The certificate was not served on him. He came to the notice of the Security Services some two years later. He had been living at the same address since early 2002 when he was arrested.

He had been living since 2002 with his Algerian wife, whom he had married in 2002 in an Islamic ceremony to whom he had become betrothed some 15 years before. He now has two young children. Ms Peirce says that he was living openly. The evidence for that is very limited

and manifestly incomplete and we are not willing to accept it in the brief and general form in which it was expressed. We accept the broad point that this was not absconding in breach of bail, although there would have been an obligation on him to keep in touch with the Home Office and notify them of his address and changes in it which he breached.

22. He has a national security case to answer and it is of some weight. If he is, indeed, a leading member of the GIA, it is not necessarily the case that his actions should be seen, even in the context of the Algerian conflict, as actions of self-defence.

Conversely, as with others who would be seen as very hostile to the Algerian regime, he may rationally feel that his case on safety on return is sufficiently strengthened not to make absconding worthwhile. We acknowledge that he was on bail between March 1998 and March 2000.

23. But it is plain that he has the means and the contacts to go into hiding successfully and to stay there. A family might inhibit others from going into hiding or make it more awkward to do so, but we do not regard the family in this case as likely to be of much weight to him if he felt he needed to go into hiding again. He has an incentive to do so greater than when he was on bail before.

His view of his ability to do so would be the key to his decision, in our view. We believe that there is at least a very real risk that he would see no reason at all to take a chance on removal and would see no reason to believe that he could not go underground again with his range of contacts and do exactly what he has done in the past with some success.

We also believe that there is at least a very real risk that he would be unwilling to accept effective restrictions on his activities if he could avoid those restrictions by absconding. Whilst those risks might have to be accepted

under the control order regime, it is not necessary to accept them now. Bail is refused.

Case of 'W'

24. 'W' is 34. He claims to have entered the UK illegally in 1999 and claimed asylum shortly thereafter. The asylum claim is still outstanding. 25. He was arrested in January 2003 in connection with the poisons plot and released into immigration detention in April 2005, when he was acquitted as part of the second group of defendants following the jury verdicts of not guilty on the first group. He was released on immigration bail in May 2005. He was arrested again in September 2005. No control order was made.

26. There is a national security case to answer. This applicant has already had experience of success in the poisons trial and would not be without cause for some optimism here, though his dealings with Bourgass may call for more explanation from him. As we have said before, the Secretary of State's safety on return evidence is incomplete and, when complete, there will be

considerable scope for argument about its effectiveness in relation to some of his case, which is that he deserted from the Algerian Army in the middle of a fight with terrorists.

His ability to make rational assessment of that may be affected, however, by his psychiatric state, which involves delusional disorders. He has been on bail in the past. Although we accept that he has breached its terms through sleeping rough as opposed to sleeping in his accommodation, this is not typical absconding, as he maintained his life in the accommodation in which he was required to reside.

His mental state seems to have affected his reaction to his accommodation at night. He has no real ties as such here but probably has no better roots elsewhere now. He could abscond but we believe that the risk that he will abscond can realistically be dealt with by conditions and they would also reduce to adequate and manageable levels such risks to national security as he poses if properly monitored.

27. He proffers two sureties, which we will take. We do not know if the address remote from Finsbury Park Mosque.

The Case of 'V'

28. It cannot be said that this man's identity is established with any reasonable certainty. He arrived in the UK in 1997 and claimed asylum as a Palestinian called ... He withdrew the claim and was removed to Italy.

29. He arrived in the UK again in 1999, having been returned from Eire on false French identity papers, claiming asylum as a Libyan. His claim was refused but he was granted ELR until 5th December 2002.

30. In January 2003 he was arrested in connection with the poisons plot and stayed in custody until released into immigration detention in April 2005, when he was acquitted as part of the second group of defendants. He was released on immigration bail in May 2005. He went

through the asylum claim, trial process and application for immigration bail as a Libyan national called...

Shortly afterwards, he said in an attempt, apparently, to make a clear breast of his position, that he was someone called 'V, an Algerian. It is not accepted yet or denied by the Secretary of State that he is that man.

31. He was taken into detention again on 15th September 2005.

32. The notice of intention to make a deportation order covers both identities and both nationalities which will undoubtedly give rise to some issues as the case proceeds.

33. There is no allegation of a breach of bail terms even after the August arrests. We accept that he has always had an uncertain position in the UK, whoever he is. He has an outstanding asylum claim.

34. Again, without going into the details, it is plain that both sides have proper cases to put so far as risk or degree of risk to national security is concerned. 'V' can take some comfort, so far as the poison plot allegations are concerned from the acquittal, from the limited role asserted by the prosecution, at least so far as ... is concerned, and the absence of false document charges. The question of whether, he did or did not provide a safe house for Bourgass and, if so, why is a live issue.

35. He has the second argument available on safety on return.

36. There is a helpful bail history but that is offset by the lengthy false identity, as it is now claimed to be, and we do not know the answer to that. All that is known is that he says, maybe truthfully, maybe not, that he had a false identity for five years.

37. He puts forward as a surety Mr. Omar Butt, a dentist, who was introduced to the applicant by Hassam Butt, the proposed surety's brother, via a human rights

organisation of which Hassam but could not remember the name. Mr. Omar Butt, the dentist, who we accept is a respectable and responsible person, wishes to help devout and practising Muslims in difficulty and did so often. He did not share the extremist views attributed to his brother, which the brother said he had now renounced. Mr. Butt did not regard the use of false names, even in this way, as unusual for asylum seekers. We accept that, whatever identity is correct; he has not breached the bail terms required of him in immigration bail.

38. Like many other applicants, he has access to funds, false documents and contacts and could, if he wished, abscond and no conditions could prevent it for sure. It would be a marginal decision on bail in view of the surety, to be set against the very considerable doubts over what the applicant would do in the light of his lengthy history of deceit, still, as we see it, unresolved. His identity goes to the country of return and, as we have said, the notice of intention to deport covers both

countries and goes to the risks faced and how he appraises them.

39. However, there are activities in the closed material, which are important in understanding this applicant and the significance of any continuing risk, which we are satisfied cannot readily be controlled by bail conditions. These factors taken together persuade us that this is not a case for bail. Were his identity properly to be established, that would remove a significant variable and the application could be reconsidered.

Case of 'CC'

40. He is a 46-year old Libyan who left Libya in 1998. He married in Jordan and arrived in the UK in September 2002 with his wife and one child, where he claimed asylum. 41. Following refusal and appeal, he was granted asylum in September 2003 and a year later ILR as a refugee.

42. The Secretary of State had rejected on credibility grounds his claim to be at risk in Libya for Islamist activities.

43. There was a period of six months during which his appeal had initially been rejected by the adjudicator before it were ordered to be re-determined by the IAT, in which his position can properly be regarded as having been more precarious.

44. His wife, who is not a Libyan, may be stateless, but he now has three children, one of whom is a British citizen and one of whom is entitled to be registered as such.

45. He was arrested in October 2005, as the result of a making of a notice of detention to deport. A Memorandum of Understanding was concluded between Libya and the UK on 18th October 2005. The Libyan Islamic Fighting Group of which the Secretary of State says the applicant is a prominent member was proscribed on 14th October 2005.

46. This applicant has never been subject to Part IV control or to a control order. Throughout his period in the UK, he complied fully with all the requirements of temporary admission, punctiliously notifying the Secretary of State of changes of address on each of many occasions, not going to ground at any stage, including when his first appeal was dismissed.

47. Apart from the documents upon which he arrived, he and his wife have not used in the UK any false documents or names.

48. The Secretary of State is entitled to point to the fact of the Memorandum of Understanding as capable of giving rise to real fear that the applicant will be returned to Libya and that that is a significant change. The applicant explains his attitude towards the UK, his belief in its system of justice and the damage to his credibility and that of the opposition to Gaddafi were he to abscond, and he does so in the light of the support that he says he has here.

49. We accept that for those and other reasons, including family ties in this instance, a rational appraisal of his prospects on Article 3 and Article 8 grounds, that, subject to suitable conditions, the real risk that he would abscond can adequately be obviated. What has been of greater concern in this case is whether there is a risk to national security on the basis that he does not abscond.

The question is whether conditions can adequately control this and whether, while detention is lawful as it is, it is best that it be controlled by detention. We have not found this straightforward and the basis of our concerns is to be found largely in the closed material. But we have in the end concluded that bail should be granted, but it is being granted on stricter terms than would be necessary simply to prevent absconding. The surety proffered will be necessary.

The Honourable Mr. Justice Ousley also dealt with review decisions made earlier that year in October 2005⁶⁸¹.

⁶⁸¹ Review decisions which had been made on 20th October 2005

50. I propose to deal next with the review that I said that I would undertake in relation to those who were dealt with on 20th October 2005.

51. I said on 5th December I would reconsider the decisions which we had reached, in the light of the potential impact of the state of negotiations between Algeria and the UK, on the risks of absconding, in particular, and the balance between detention and those risks if the hearings in those cases were not to be dealt with before mid-June.

52. I point out that, if the lead Algerian cases reject the Secretary of State's case, it follows that the other Algerian cases will be dealt with rapidly and will be resolved shortly after. If, on the other hand, the Secretary of State's case is accepted in the lead Algerian cases, strength would have been gained by the Secretary of State's case over that interim period, which would increase the absconding incentive.

53. We have also considered the possible impact of the recent House of Lords' decision on cases where we regard it as potentially relevant.

Case of 'P'

54. We believe that he would continue to be motivated by quite a high level of subjective fear of return to Algeria, which might well not be greatly assuaged by what he might properly be advised about the implications for him of the current state of negotiations between Algeria and the UK.

He represents an abscond risk on bail. His activities on bail, even if tightly controlled, could run a degree of risk to national security. However, he has mental problems, which in the past have led to his being detained in Broadmoor. His use or absence of use of prosthetics for his hands is an inhibitor to some degree of absconding, as would be the receipt of medical treatment.

We have, however, come to the view that the uncertainty should tell in his favour largely because of the particular

and overall medical circumstances in his case and the treatment needs which would act in some degree as an inhibitor. Accordingly, once a suitable address has been found and arrangements for his care by qualified medical staff been made, he will be released on bail on very strict terms.

Case of 'K'

55. He continues to represent a high abscond risk and it is our view that the state of negotiations with Algeria would not affect that at all.

Case of 'I'

56. We remain of the same view, that his abscond risk is not significantly reduced nor his risk to national security by the state of negotiations.

Case of 'Q'

57. Likewise 'Q'. We remain wholly un-persuaded that he would not abscond.

Cases of 'H', 'G', 'A'

58. So far as 'H' and 'A' are concerned, there will be adjustments to the bail terms to reflect two matters. First of all, though it is a matter of detail, there are the matters most recently raised in relation to GPs by Birnberg Pierce. There will be a variation to the hours to which they are allowed out. There will be adjustments to reflect the visits to the GP.

59. In relation to 'H', 'G' and 'A', there will be some lifting of the restrictions. That is to say, in 'H's case, he will be allowed out for four hours within the same area; 'G', in addition to the adjustments that have already been made, will be allowed out, in any event, between 12 and two it is the two hours rather than the particular period - and 'A' will be able to leave his house between 12 and two or any other period of that which the applicant may prefer in the hours of daylight within a particular area, but in his case there will be a proviso, because of the degree of the abscond risk that we consider he represents, that he will have to be accompanied at all times by his wife or at least one of his children.

60. Those are our conclusions in relation to those matters. There are inevitably some tidying up and ancillary matters to be dealt with. I think that it is probably best to deal with those now before dealing with the two short closed judgments, which I have.

The above allows an insight to the procedure adopted and the enormity of applications dealt with in the shortness of time. It is difficult to canvass too many arguments without being possessed of the facts of each particular case and of course without hearing legal argument in each and every case.

CHAPTER 10

THE DIALOGUE MODEL AS A CRITICAL LENS FOR PRACTICAL REFORM

Throughout the preceding chapters the success of the HRA has been presented as contingent upon two issues. First on the judiciary to ensuring that the spirit of the statute is applied. Second, in Parliament aspiring to remedy any ambiguities, and defect that may have been found prevalent within the terms of a particular legislation. Of course the latter chapter has to some extent dealt a blow, when it has called into question the whole procedure adopted under SIAC, and the obvious violations that take place, which in itself under mines the HRA.

Great emphasis has been laid on the way the judiciary perceive their role, but now it is important, drawing upon the normative 'dialogue model' presented in chapter 4 to consider broadly the way Parliament deals with human

rights, and moreover what reform would necessitate a greater understanding and scrutiny of human rights issues.

In Parliament remedying breaches, it is important that delay is not prolonged and the offending legislation rectified swiftly as time will allow. Having said that, the time; actual duration Parliament takes to consider declarations, should vary as a matter of degree, depending on the gravity and interests at stake.

This would enable the gravity of offending legislation to be balanced against social policy and political unrest. From the analysis of the case law, this dissertation has, of course, deduced that it is the gravity and enormity of policy change which is not within the remit of the judiciary but best suited in a democratic society to Parliament.

Throughout focus has been placed upon the role of the judiciary in protecting the rights enshrined within the HRA, conversely it has been argued that the role should go no further than to identify the defects in light of the complaint before them, but it is the inherent duty of the

elected body to amend the legislation in light of social trends and needs. It is upon this basis that enormity of change is entrusted in those elected by the populist to serve and account to them when next they are called upon to do so.

The preceding paragraphs represented the importance of the dialogue model proposed in chapter 4. The value of the dialogue model here is its capacity to act as a critical lens by which to judge practical issues of reform. By starting from a fixed point, which presupposes the importance of dialogue and debate, future reforms to both the HRA and its supporting institutions can be tailored around this fixed point.

This issue is of great practical significance because the notion of time limits for amendments, the idea that a minister can make a swift remedial order and the objectives of a human rights commission can be designed so as to foster greater dialogue within Parliament on the nature of human rights.

The need for reform

To refresh, Section 10 empowers a minister to decide what to do once a declaration of incompatibility has occurred. If the responsible minister 'considers that there are compelling reasons' for so acting, the minister 'may' by order, make such amendments to the legislation as he considers necessary to remove the incompatibility⁶⁸².

In short the Section 10 fast-track provision embodies ideas of practicality and effective management of human rights breaches by enabling them to be dealt with firmly, swiftly and authoritatively.

However, it is important not to overlook that many human rights issues are sensitive in nature that this initial presumption of ministerial amendment should not apply in all cases. Rather than placing the onus on ministers, there are important circumstances where Parliament should be more engaged in the settling of human rights disputes.

⁶⁸² Section 10(2)

Of course, there is nothing stopping Parliament from debating and creating legislation duly considering human rights issues, but the argument is here is that there needs to be greater Parliamentary involvement at the initial stage where a declaration of incompatibility has been made.

Bellinger provides a prime example of a controversial issue, which has passed through the courts and declared incompatible and now an integral part of the debate on gender recognition.

Whilst the number who would benefit from the scheme would be small, it is widely recognised that amendments would have far reaching social implications⁶⁸³. For example, in Grand Committee, Baroness O'Cathain said....⁶⁸⁴ "The Bill takes away the ability of a Church to know whether a person who presents himself for marriage, membership or even employment in the

⁶⁸³ The legal difficulties presently being experienced by around 10,000 transsexual people in the United Kingdom: Early Day Motion No. 302 of the 1995-96 session House of Commons

HL Debate 14 January 2004 c71GC. Ibid *The Gender Recognition Bill* [HL] Bill 56 of 2003-04 9 [17 February 2004]

Church is of the sex that he claims to be. The same is obviously true for mosques, synagogues and temples”.

We have seen that under the terms of Section 10 of the HRA there are provisions for a speedy resolution, enabling the offending legislation to be amended to accord to the Convention. However as in Bellinger social policy had a greater bearing than a ‘quick fix’ by a minister⁶⁸⁵

Unsurprisingly the Church in considering the possible legislative changes following Bellinger presented diverse views⁶⁸⁶ to the House of Lords,⁶⁸⁷ which are outlined below.

By in large the churches view was one of displeasure, in that “by giving transsexual people an officially altered birth certificate, it creates an official way of concealing their true sex from religious groups that they might try to join. That is an issue of great religious importance. As Christian teaching is that sex is determined by God from

⁶⁸⁵ In Bellinger there was a substantial debate examining the ramifications both to employment rights, and religious policy on the sanctity of Christianity and teachings thereto Ibid

⁶⁸⁶ HL Deb 3 February 2004 c626-7: The Lord Bishop of Worcester indicated that the Church’s view was not necessarily unanimous on the conscience clause which enables clergy of the Church of England to refuse to conduct a marriage for someone they reasonably believe to be transsexual

⁶⁸⁷ HL Debate 14 January 2004 c71GC. Ibid The Gender Recognition Bill [HL] Bill 56 of 2003-04 9 [17 February 2004]

conception, Christians believe that to reject one's God-given sex is to reject God's will for one's life"⁶⁸⁸. ... "They also believe that the male and female sexes reflect the image of God and that to attempt to switch the two is a desecration of the image of God in oneself."

Baroness O'Cathain said....."It would be puzzling—and this is where I am somewhat disconcerted—knowing the views of a religious minister or religious organisation, if a transsexual person who was an adherent of that same religious faith were to seek to force the conscience of a co-believer; or indeed, knowing the views of that minister or organisation, if a transsexual person were to conceal the fact that he or she had been recognised in the acquired gender.

I think that when such issues arise between members of a religious community—issues of conscience—the state should have as minimal a role as possible"⁶⁸⁹.

It is against this background that the government must reflect to do justice to competing interests. It should be

⁶⁸⁸ On Report, Baroness O'Cathain set out her view that the Bill takes away rights from religious people: HL Debate 14 January 2004 c71GC. Ibid *The Gender Recognition Bill* [HL] Bill 56 of 2003-04 9 [17 February 2004]

⁶⁸⁹ HL Deb 14 January 2004 C78-9GC

borne in mind that the changes in gender recognition only affect a small number of the populous; and yet the impact was immense.

It is upon the basis that all areas of concern were explored in a democratic society and ultimately recognition that even a small group or class of persons whose human rights had been violated led to a statement from the government⁶⁹⁰ on transsexual people on 13th December 2002 by Rosie Winterton MP:

"[O]n 11 July the ECtHR delivered its judgments in the cases of Goodwin -v- The United Kingdom⁶⁹¹ and I -v- The United Kingdom...⁶⁹²

"The Court found that the UK had breached the Convention rights of these two transsexual people, under Articles 8 and 12 (the right to respect for private life and the right to marry). In answer to Questions before the Parliamentary recess, colleagues and I made clear the Government's commitment to announce later in the year how we proposed to implement the rulings"

⁶⁹⁰ By Rosie Winterton MP Parliamentary Secretary at the Lord Chancellor's Department

⁶⁹¹ Goodwin v United Kingdom [2002] 35 EHRR @ 18

⁶⁹² Ibid

She continued ... "The Interdepartmental Working Group, whose initial report the then Home Secretary presented to Parliament in July 2000, had recently been reconvened to give further consideration to the implications of giving transsexual people full legal recognition in their acquired gender. In light of the Goodwin and "I" judgments, the Group's terms of reference were expanded and it was tasked to report in October. Ministers have now collectively considered the recommendations received from officials".

"We will aim to publish, in due course, a draft outline Bill to give legal recognition in their acquired gender to transsexual people who can demonstrate that they have taken decisive steps towards living fully and permanently in the gender acquired since they were registered at birth. That will make it possible for them (if otherwise eligible) to marry in their acquired gender".

A victory for a small class of individuals whose sad plight had occupied so much time and yet through the democratic system enshrined within our Parliamentary

process has now led to the Gender Recognition Bill;⁶⁹³
which since preparing this Thesis has received to Royal
Assent⁶⁹⁴

The value, then, of a broad approach favouring wide
intensive review cannot be underestimated. Therefore,
the locus for dealing with human rights incompatibilities
should be a job for Parliament as a whole on a more
regular basis.

Strengthening dialogue a human rights commission

In response to the HRA the Secretary of State announced
that Government plans to set up a Commission for
Equality and Human Rights;⁶⁹⁵ this followed a
consultation document produced in October 2003 entitled
'Equality and Diversity':

Making it happen to seek views on the role, priorities and
structure for Great Britain's statutory equality institutions
in the new century to help meet this vision of a cohesive

⁶⁹³ The Gender Recognition Bill [HL] Bill 56 Of 2003-04

⁶⁹⁴ On 1st July 2004

⁶⁹⁵ Hereafter referred to as 'CEHR'

and prosperous society'. The consultation drew a strong response from a wide range of interested groups and individuals.

In the light of the consultation the Government concluded that a single body represents the best option for realising its vision of a fairer, more inclusive and prosperous Britain.

A single equality body provides an effective and flexible framework for supporting our equality legislation as well as underlining the importance of equality as a mainstream concern.

Many respondents also highlighted the potential role a new body might play in providing support for human rights as well as equality. The Government also considered carefully the sixth report of the Joint Committee on Human Rights, which called for integrated institutional support for human rights and equality.

Following the spirit of the plans, a society that is to flourish must make full use of the talents of all its members. Thriving societies and economies are based on

strong, cohesive communities where diversity is celebrated as a strength and discrimination tackled. The White paper headed "Fairness for All a New Commission for Equality and Human Rights"⁶⁹⁶ (hereafter "the CEHR") promises equality matters to everyone⁶⁹⁷.

The Rt Hon Tony Blair MP⁶⁹⁸ set out in the body of the white paper that the Commission will, for the first time, provide institutional support for human rights, and that this underlines their strong belief in the importance of human rights including their position at the heart of public service delivery.

The introduction continues "*We cannot achieve our vision of high quality public services for all, if those services do not respect individual, rights to dignity, privacy and respect*".⁶⁹⁹

The CEHR will have a responsibility to keep the working of discrimination legislation and the HRA under review. It will need to consider the effectiveness and adequacy of

⁶⁹⁶ Presented to Parliament by the Secretary of State for Trade and Industry and Secretary of State for Constitutional Affairs May 2004. Cm 6185

⁶⁹⁷ 30th October 2003

⁶⁹⁸ Introduction to Fairness For All A New Commission for Equality and Human Rights *by the Prime Minister*

⁶⁹⁹ Ibid

these statutes and, if necessary, make recommendations or proposals to the relevant Secretary of State for changes⁷⁰⁰.

The CEHR will also be able to give Ministers advice or make proposals on any aspect of current or proposed law that relates to any part of its remit⁷⁰¹.

The CEHR will have explicit powers only to support cases under discrimination legislation. It will not have powers to support freestanding human rights cases. Where relevant, however, it will be able to draw on human rights arguments in those discrimination cases it supports, reflecting the obligation on public authorities to act compatibly with the rights enshrined within the HRA⁷⁰².

The white paper made it clear that it is not envisaged that the CEHR's conciliation service will be available for freestanding Human Right Act cases.⁷⁰³ It was further

⁷⁰⁰ Chapter 3 @ 3.34

⁷⁰¹ Para 3.35

⁷⁰² 4.18. One suspects that it may well have been too involved as this would have called for statutory interpretation although possibly a lost opportunity for a panel of specialized Human Right lawyers.

⁷⁰³ Consistent with the approach proposed for supporting HRA litigation at Para 4.22

announced that the launch day for the CEHR would not take place before the end of 2006 at the earliest⁷⁰⁴.

Role of the New Body⁷⁰⁵

The role of the CEHR will be to promote an inclusive agenda, underlining the importance of equality for all in society as well as working to combat discrimination affecting specific groups. It will promote equal opportunities for all and tackle barriers to participation.

It will play a key role in building a new, inclusive sense of British citizenship and identity in which shared values of respect, fair treatment and equal dignity are recognised as underpinning a cohesive, prosperous Society. It will promote a culture of respect for human rights, especially in the delivery of public services.

There was a strong call in the consultation for the body's arrangements in Scotland and Wales to fit well with devolved legislation, institutions and policies and for its policies to take account of the social, cultural and economic circumstances of Scotland and Wales.

⁷⁰⁴ @ 11.12.

⁷⁰⁵ The CEHR will take office in October 2007

The Government will set out proposals for the Commission's Scottish and Welsh arrangements in the White Paper to be published next spring.

Key Priorities for the New Commission

The CEHR will have explicit powers only to support cases under the discrimination legislation. It will not have powers to support freestanding human rights cases.

Where relevant, however, it will be able to draw on human rights arguments in those discrimination cases it supports, reflecting the obligation on public authorities to act compatibly with the rights enshrined in the HRA and to interpret legislation so that it is compatible with these rights. This will continue the practice of the existing Commissions where discrimination cases involve human rights issues.⁷⁰⁶

It is apparent that the CEHR do not wish to fund cases in order to challenging human right cases. It was seen that

⁷⁰⁶ @ 4.18. Commission for Equality and Human Rights [White Paper]

this was best funded by legal aid, effectively costs met by the taxpayer but from a different source.⁷⁰⁷

Reference was made to the courts role to ensure human rights were upheld⁷⁰⁸. This contention ignores that costs to bring actions are extremely expensive and a prohibitive factor to those who pass the merits test but fall outside the financial limits set⁷⁰⁹, will not necessary be able to fund litigation to enforce those rights.

In essence whilst the CEHR will have specific powers relating to enforcement of discrimination this will not extend to enforcement to human rights⁷¹⁰. Complaints alleging breaches of human rights will be against 'public authorities'.

Local authorities were no strangers to applications by way of judicial review for alleged breaches of statutory duty⁷¹¹, and fundamentally human rights, to this end substantial costs were saved by the implementation of a

⁷⁰⁷ Ibid @ Para 314.

⁷⁰⁸ Ibid

⁷⁰⁹ Legal funding sets out financial limits, and those falling outside the criteria will not be funded

⁷¹⁰ At Para. 4.2 CEHR's work on both equality and human rights, although it will have specific powers relating to the enforcement of discrimination legislation. There will not be additional enforcement powers relating to human rights legislation for the reasons explained in paragraph 3.16. White Paper Cm 6185

⁷¹¹ Usually under the Housing Act 1985 (as amended) Part III homeless Provision. (Now repealed)

complaint being first being brought before a review committee.⁷¹²

The Employment Tribunals are no strangers to detailed and complex legislation either, and therefore the provision of an 'independent tribunal' would to hear and deliberate upon issues involving human rights would be no more onerous, than a tribunal considering say sex discrimination, which of course may well encompass a violation of human rights. If one element was unproved leaving the human right in place, then arguably funding from Convention may well end.

This move to a human rights commission, albeit contingent on equality, is an important step in improving the quality of information and support for human rights claims.

However, it arguably adopts a narrow focus by viewing the important locus of human rights decision making in courts, rather than acting as an important advisory service to Parliament and its members. To support a

⁷¹² However, those committees would now be in breach of the HRA as against the independence and bias, within the terms of Article 6.

fully-fledged dialogue model, it ought to be appreciated in defining the remit of this body to both advise and encourage Parliamentarians to understand human rights issues.

In further support of this contention is that the underlining cases and statements referred to throughout this dissertation demonstrates the uncertainty within the dialogue of "*public authority*", and the judicial intervention in trying to legitimize the judicial approach and yet falling short of establishing a principled approach, whilst trying to underpin statutory provisions.

The judiciary's attempt to balance the injustice against the opposing parties is as diverse as the wording itself.

The approaches taken by various members of the judiciary appears to be adopt a test of 'status' rather than 'function,' such a diverse approach falls short in promoting the spirit of the HRA.

As we saw the CEHR will have specific powers relating to enforcement of discrimination this will not extend to

enforcement to human rights⁷¹³. Complaints alleging breaches of human rights will be against 'public authorities'. Such issues were contained within the body of the final report of the CEHR, *Fairness and Freedom*⁷¹⁴:

The CEHR published its report and made the following statement: - In Britain, this is a particularly important moment in time for equality and we need to act now. The right conditions are all with us and this opportunity is unlikely to arise again.

The commission for Equality and Human Rights (CEHR) will take over its full range of functions in October 2007; the Government's Comprehensive Spending Review is taking place just at the right time to take on board the Review's findings; and the Discrimination Law Review is overhauling the current anti-discrimination legislative framework. More and different action is needed if we are

⁷¹³ At Para. 4.2 CEHR's work on both equality and human rights, although it will have specific powers relating to the enforcement of discrimination legislation. There will not be additional enforcement powers relating to human rights legislation for the reasons explained in paragraph 3.16. White Paper Cm 6185

⁷¹⁴ The Final Report of the Equalities Review

to address those inequalities that are proving particularly hard to shift, where progress is very slow. Since the White Paper⁷¹⁵

It follows that in promoting a distinctively British human rights culture, that is framed around defence of the individual against authority on the one hand, and around building good relations on the other, the CEHR will find itself stepping well outside the courtroom and wading into the public square, including the political parts of that square.

it was announced by the newly formed CEHR, that on 1 October 2007 the CEHR will be formed out of the Equal Opportunities Commission, the Commission for Racial Equality and the Disability Rights Commission⁷¹⁶

To be successful it will have to give human rights a resonance with the British public. It will have to show how they apply to everyone - the people it cares about who are vulnerable to the heavy-handed state, the people one tends to forget about who are equally at risk,

⁷¹⁵ Ibid

⁷¹⁶ This has involved a restructuring exercise which will reduce current staff numbers from about 500 to around 350

and all of us, when we use public services and when we navigate the uncharted waters of our hyper-diverse society⁷¹⁷

The CEHR will be a statutory body established under the Equality Act 2006. Its vision is built on fairness and respect, thus leaving people confident in all aspects of their diversity⁷¹⁸.

It will enforce equality legislation on age, disability and health, gender, race, religion or belief, sexual orientation or transgender status, and encourage compliance with the HRA.

The CEHR will work to bring about effective change, using its influence and authority to ensure that equality and human rights remain at the top of agendas for government, employers and society. It will campaign for social change and justice.

The CEHR will take on all of the powers of the existing Commissions as well as new powers to enforce legislation more effectively and promote equality for all. The

⁷¹⁷ Fairness and Freedom: The Final Report of the Equalities Review

⁷¹⁸ CEHR 11th September 2007.

Commission will champion the diverse communities that make up modern Britain in their struggle against discrimination.

The CEHR will act directly and by fostering partnerships at local, regional and national levels. It will stimulate debate on equality and human rights.

It will give advice and guidance, including to businesses, the voluntary and public sectors, and also to individuals.

The CEHR will develop an evidence based understanding of the causes and effects of inequality for people across Britain, and will be an authoritative voice for reform.

The CEHR propose a more holistic approach: a new framework for working towards equality. They set out data showing that at the present rate of progress it may take some decades to achieve parity in employment or education for some groups; over 75 years in the case of women's political representation and equal pay, half a century in the case of educational attainment of some ethnic minority children.

The Commission finally argue that modern equality policies will benefit the community as a whole; and that they will target groups not commonly considered, for example the children of poorer White families and poorer White boys in education. In particular, we need a new definition of equality that will be relevant to our society now and in the future.

Traditional approaches – based on equality of outcomes, opportunities, process and respect – have either resulted in a focus on income, or wealth, rather than on all the aspects of life that are important to people in leading a fulfilling life, or have not taken serious consideration of the economic, political, legal, social and physical conditions that constrain people's achievements and opportunities.

It was identified that this has meant that we do not have a consistent and clear understanding of the causes of inequality and what to do about it. The Review's approach draws on these traditional concepts but overcomes their limitations: it recognises the equal worth

of every individual, as reflected in human rights principles; it is sensitive to both outcomes and opportunities, and recognises the necessary role of institutions in removing barriers and making sure that opportunities to flourish are real. An equal society seeks equality in the freedoms that people have to lead a fulfilling life.

It follows that equality for all is to be commended in the approach to address the imbalance within society.

The CEHR identified the definition of an equal society "*An equal society protects and promotes equal, real freedom and substantive opportunity to live in the ways people value and would choose, so that everyone can flourish. An equal society recognises people's different needs, situations and goals and removes the barriers that limit what people can do and can be.*"

The new approach proposed is also very practical and the CEHR to measure and track progress towards equality. The CEHR set out a framework for measuring inequality that is based on ten dimensions: Freedoms and activities

that people have reason to value – derived from international human rights principles and consultation with the general public, including groups at high risk of disadvantage.

It was identified that achieving equality means narrowing gaps in people's educational attainment, employment rates and real opportunities open to them. There is now strong evidence that a more equal society benefits us all.

A more equal society does not constrain growth and prosperity. On the contrary, by focusing on those groups who experience persistent disadvantage because of factors beyond their control, a more equal society uses scarce resources more efficiently, increases the level and quality of human capital, and creates more stability, all necessary to growth and prosperity.

So, a more equal society does not need to drag down those at the top, discourage people's desire to excel or hold back those who exercise more effort. But it does need to focus on those at the bottom end and make sure

that their achievements improve at a faster rate than those at the top. Equality is also a shared value in our society: The CEHR commented that "*we are traditionally concerned about equality and, even in the wake of the London bombings in the summer of 2005; our commitment to equality was not affected by heightened concern about security*".

The CEHR considered that over the last 60 years there have been landmark improvements in addressing the starkest aspects of inequality and discrimination faced by different social groups. This has been achieved through hard-fought campaigns and struggles, political leadership and powerful economic and social trends.

Many of the battles for equality since the 1940s have been about ensuring that access to public goods is a reality for everyone, and ensuring that different groups have been afforded the legal protection offered to others. Progress has been made, but entrenched inequalities in education, employment and quality of life remain, prejudice towards certain groups is still a strong feature

of our society and future trends indicate that there are threats on the horizon which may push us backwards rather than forwards.

The CEHR set out their definition of an equal society which can be summarised as follows:-

An equal society protects and promotes equal, real freedom and substantive opportunity to live in the ways people value and would choose, so that everyone can flourish. An equal society recognises people's different needs, situations and goals and removes the barriers that limit what people can do and can be.

Legislation⁷¹⁹ against discrimination has been very important in raising the profile of equalities issues; it has helped to establish the public value of eliminating prejudice and unfairness, given representation and voice to different groups and ultimately made a difference to people's behaviour. Equally important has been the expansion in social and employment rights from Beveridge onwards which, although aimed at the general

⁷¹⁹ Executive Summary from the Final Report of the CEHR

population, worked to the benefit of the most disadvantaged.

Past action to promote equality occurred piecemeal, in reaction to immediate social pressures. Now there are clear signs that this approach has run out of steam. Britain is increasingly subject to global economic and social influences as a result of growth in technology and increasing globalisation. Internally, too, the nature of inequality will alter as a result of demographic changes and labour market pressures, in particular an ageing, more ethnically diverse and proportionally more disabled population.

As the drivers of future trends evolve, the tools that are used to effect change have to evolve in response. The old approach of a top-down state which pulls levers to improve outcomes for particular groups is no longer appropriate or effective. We must take account of the ways in which an enabling state operates in the 21st century and ensure that we focus on ends and not means.

The CEHR⁷²⁰ accepted that we must acknowledge the multi-dimensionality of inequality and tackle change across economic, social and political spheres. Our approach must empower people in local communities to promote equality in ways most suited to their own needs, and be based on shared rights and responsibilities for government, employers, public services and citizens.

In Chapter three of the report the CEHR looked at some of the worst, most persistent inequalities in our society today. The CEHR highlight inequalities in the early years, education, employment and retirement, health and crime and justice, and highlight some areas of progress from which lessons may be learned.

In the early years, the CEHR found⁷²¹ that, families with under -fives in the home is very important to future learning and behavioural outcomes.

⁷²⁰ Fairness and Freedom: The Final Report of the Equalities Review

⁷²¹ Chapter 3. Fairness and Freedom: The Final Report of the Equalities Review

In the early years the protective effect of a good Home Learning Environment is more influential on a child's development than parents' qualifications, income or ethnicity, and the effect persists even to age 10. Boys and children from some ethnic minority groups tend to experience poorer Home Learning Environments.

The quality of pre-school education is also very important to future learning and behavioural outcomes, especially for disadvantaged or vulnerable children: a high-quality pre-school, whether attended part-time or full-time, can reduce the risk of future Special Educational Needs, and can even partially compensate for a poor Home Learning Environment.

The Beveridge Report⁷²², authored by William Beveridge in 1942 (officially the *Social Insurance and Allied Services Report*), formed the basis of the 1945–51 Labour Government's legislation programme for social reform.

⁷²² The Beveridge Report, authored by William Beveridge in 1942 (officially the *Social Insurance and Allied Services Report*), formed the basis of the 1945–51 Labour Government's legislation programme for social reform

The CEHR⁷²³ recognised that Poorer White families and some ethnic minority families, such as those of Pakistani and Bangladeshi origin, are less likely to use pre-school education for their children. Many disabled children are unable to go to pre-school because appropriate provision is limited. At school age and in transition to adulthood, we find that: In England.

It was found that there were and are significant and persistent attainment gaps for pupils from Gypsy/Roma and Traveller of Irish Heritage backgrounds throughout primary and secondary school, who “linger on the periphery of the education system”⁷²⁴. Pupils from some ethnic minority groups are doing well (for example, Chinese, Mixed White and Asian and Indian pupils) and others, particularly Bangladeshi pupils, are catching up quickly.

However the CEHR expressed serious concerns about attainment at primary level among Pakistani, Black Caribbean, Black African and pupils from other Black

⁷²³ 8. Fairness and Freedom: The Final Report of the Equalities Review

⁷²⁴ (Ofsted).

backgrounds, as well as Mixed White and Black Caribbean heritage pupils.

The CEHR found that many pupils with Special Educational Needs (hereafter "SEN") are not achieving their true potential at primary and secondary school. Further it would appear that there are disproportionate levels of exclusion from school for pupils with SEN, as well as Gypsy/Roma and Traveller of Irish Heritage pupils, and pupils from Black Caribbean, Black Other and Mixed White and Black Caribbean heritage backgrounds.

Disabled young people are at greater risk of being not in education, employment or training (hereafter "NEET"); however this is not broken down by type of disability. The evidence base on ethnicity is less strong, but suggests that young people from some ethnic minority groups may also be at greater risk of being NEET.

The CEHR⁷²⁵ looked closely too at disadvantage in employment, and found that there has been remarkable

⁷²⁵ Executive Summary

progress in the employment prospects of the working age population in the past decade.

The UK now has, at 75 per cent, the highest employment rate of the richest countries and an aspiration to reach 80 per cent. However, this progress has not touched the whole of the population equally and some groups are well behind.

Looking back over the past thirty years, three groups below retirement age stand out as facing particularly large and persistent employment penalties. These are disabled people, Pakistani and Bangladeshi women, and mothers of young children. These groups are also more likely to suffer from disadvantage in the workplace, in terms of limited career progression, large pay gaps and discrimination.

Lastly, the CEHR looked at crime and criminal justice, and were of the opinion that more work was needed to understand the impact of crime and how this can be minimised, particularly for those crimes that we know to

have a long-lasting impact on their victims, such as domestic violence.

The CEHR considered that the criminal justice agencies must work harder to improve people's confidence in the criminal justice system, particularly people from ethnic minorities. Data was found to be patchy in many areas of criminal justice; and the efforts that have been made are to be welcomed. The CEHR highlighted "*more remains to be done if we are to have confidence that the criminal justice system is fair for all. As in so many areas highlighted in this Report, inequalities in one area can be linked directly to inequalities elsewhere. This is particularly so with high rates of offending among young Black men*"...

.. "We know that there is a strong association between offending, and exclusion from school and failure at school – and that some ethnic minority groups are significantly more likely to experience these than others. So, we believe that action to address rates of offending among

young Black men can only be tackled through action across government".

Chapter four⁷²⁶ sets out the reasons why inequalities still persist in Britain today. The evidence suggests that the key barriers to progress lie in the following areas. First, despite a strong public value of fairness and equality, prejudice persists. This has serious negative consequences for the treatment of women, people of different ages, ethnic minorities, disabled people, and people with particular beliefs, transgender people, and lesbian and gay people.

This prejudice the CEHR held forms a backdrop for the other three key problems that are holding progress back:

- 1) a lack of agreement about what needs to happen;
- 2) uncertainty about who should act; and
- 3) The tools we have not being fit for purpose.

⁷²⁶ Fairness and Freedom: The Final Report of the Equalities Review

The CEHR found; *"there remains a lack of awareness and understanding about what equality means, how it relates to what organisations do, what is required or permitted under the law, and who is responsible for delivering on this. It is too frequently regarded as code for 'political correctness' or petty bureaucracy"*.

"Poor measurement and a lack of transparency have contributed to society and governments being unable to tackle persistent inequalities and their causes. The data available on inequality are utterly inadequate in many ways, limiting people's ability to understand problems and their causes, set priorities and track progress. And even where data do exist, they are not consistently used well or published in a way that makes sense"...

"Third, there has been little clarity over who should deliver what, and whose responsibility it is to take the lead. This is made worse by limited accountability: across sectors, promoting equality has not been a central or significant part of the leadership role. Many organisations have viewed equality as peripheral to their core business.

There also remain questions about the influence and impact of the media. A lack of meaningful engagement also contributes to this problem:

Communities and individuals are often not sufficiently empowered to have their say on the issues and services that affect their lives.

Finally, the tools available are not fit for the purpose of achieving equality in today's Britain".

There CEHR also considered that there *were* "limitations in the law – which is complex, inconsistent in the way it treats different poorly understood. In some cases the law actually restricts action on inequality, and in others the action possible has been interpreted too narrowly – as for example with public procurement"...

.. "There has also been a tendency to focus legal requirements and the action that follows, on process rather than the outcomes sought. And problems with the form of the law have been made worse by unclear

guidance and insufficient support, and by a blunt and inflexible enforcement regime”.

The CEHR sets out;⁷²⁷ ten steps to lead to greater equality, which complement and reinforce each other, each contributing to a systematic overall framework for creating a more equal British society. These are⁷²⁸:

- 1: Defining equality
- 2: Building a consensus on equality
- 3: Measuring progress towards equality
- 4: Transparency about progress
- 5: Targeted action on persistent inequalities
- 6: A simpler legal framework
- 7: More accountability for delivering equality
- 8: Using public procurement and commissioning positively
- 9: Enabling and supporting organisations in all sectors
- 10: A more sophisticated enforcement regime.

⁷²⁷ Chapter 5 Fairness and Freedom: The Final Report of the Equalities Review
728 11 Executive Summary

Finally the CEHR set out a vision for the future, "*against which progress should be checked: what would success look like, five years from now? There will be a shared understanding of what we mean by equality and a common framework of measurement at national, regional and local levels. Political, managerial and community leaders will take direct and personal responsibility for promoting greater equality and will test themselves on progress by the outcomes they achieve rather than the processes they have adopted.*"

The CEHR considered the "*promoting greater equality and tackling entrenched inequalities will be embedded in the way that public institutions carry out their business. There will be an active pursuit of their public duty and a dynamic, systematic, and evidence-based approach to taking action, and promised that there will be an honest, transparent means of assessing the progress of the public, private and voluntary sectors, in achieving a more representative workforce at all levels. Information will be readily available on a consistent basis*".

On prejudice in society on grounds of age, gender, race, religion and belief, disability, sexual orientation and gender identity the CEHR stated *"that this will have demonstrably reduced. We will no longer place the burden of tackling this on those who have been discriminated against. Last, but most important, we will see measurable progress in achieving greater equality and tackling the most entrenched inequalities identified in the Report"*.

The report is a great challenge to society as a whole, and has dealt with the most rigours that society has to offer, an insight into the past provided an in road to the future, and therefore as outlined in the Bill above, equality for all is within the spirit of the Act,

It is only tackling these inherent problems that we will see a reduction of prejudice within society as greater education and understanding will or should lend itself into a more caring society as a whole.

Whilst it was noted above under the Bill⁷²⁹ that the ECHR may be able to take free-standing cases, Trevor Phillips⁷³⁰ In giving his key note speech stated..." *In terms of our legal work, the CEHR is not able to take freestanding human rights cases directly, although we can through funding help organisations that do take on human rights casework, and we will be able to intervene in any human rights case'*.

"We will also be able to carry out human rights inquiries and investigations, which is a powerful tool. But it would be wrong to pretend that we possess the same range of enforcement powers in relation to human rights as we do in the field of equality'.

Trevor Phillips confirmed that this does not mean that ECHR will be more passive in the human rights arena than they are in equality. It just means that they will have to be active in a different way. *"Building a positive culture of human rights, in which human rights become a guiding framework that inform the way we behave, will*

⁷²⁹ Ibid

⁷³⁰ Trevor Phillips gave the keynote speech at the Human Rights Lawyers Association annual conference on 15 June.

be one of our earliest priorities. That means demonstrating how human rights can change society for the better, for us collectively, and for us individually. It includes talking up the cases in which a human rights culture can genuinely transform real people's lives.

All this is disappointing overhaul the ECHR is and will become the corner stone in addressing the issues and support for pressure groups and those facing the bureaucracy of those in power. It will be Great Britain's first national body tasked with promoting the values of the Human Rights Act. It will be the first full spectrum equalities and human rights organisation of our kind and size in the world. The Commission will be able to tackle inequality, discrimination and injustice in a way that no British public body has previously been able.

Trevor Phillips confirmed *"It will have greater flexibility, independence, power and resources than any of the heritage equality commissions have enjoyed. And we will be broader in scope than many government departments. The CEHR will be an advocate for, and defender of, the disadvantaged"*.

"We have to be. But we have to be more. We have to be a change maker for the whole of society - a body which uses its leadership role, powers and capability to build a society that recognises the worth of all people, and ensures that no-one is excluded or treated inhumanely. In essence, we must start from the point of view, not that we are here to defend separate interests, but to create a society that makes such a defence unnecessary. This means a society at ease with all aspects of human diversity, based on fairness and justice". . .

"So I do not need to emphasise the scale of our ambition. Yet to read the reports this week of the Government's Green paper on the reform of Discrimination Law, which will be part of our mandate you might imagine that the last remaining frontiers for the battle against inequality were access to the bar for women - not your legal Bar, but that of the local golf club - and the right to breast feed in public, both issues of genuine importance for some. But for those of us without the desire to exploit the former or the equipment to do

the latter we might be forgiven for thinking that bigger challenges remain for the Commission. And the conditions could not be more favourable to high ambition".

Some encouraging words evolved from the speech when Trevor Phillips when he stated ...*"We have an Administration and a principal opposition both of whom are in theory at least friendly towards equality and human rights; we have a new Commission dedicated to both; and we have the possibility of a truly original and innovative piece of legislation on the horizon. This is a spectacular constellation of forces. We cannot let this chance slip. This is a once in a lifetime opportunity to transform the legal basis for Equality and Human Rights in our country from the restrictive, finger wagging bureaucratic monster much of our media alternately derides and disdains to a truly liberating set of instruments and institutions that help everyone in our society to realise their true potential as human beings.*

Conversely then this promotion, or if you like campaigning role is by no means the poor cousin to human rights legal work. Building a new narrative about anything is not an easy task. But if we are to have a society in which the basic principles of humanity, decency and fairness inform our *modus operandi* with the state and with each other, we have to make that positive narrative around human rights central to Britain's future⁷³¹.

Sobering thoughts accompanied the Commission and its remit, in that, the fact is that creating an active, popular human rights culture in Britain will be a central task for the Commission. It will also be the toughest and most controversial aspect of the Commission's mandate. The political risks of this, as history shows is that this is the sort of task the first leader of an organisation like the Commission for Equality and Human Rights may not survive⁷³²

⁷³¹ Ibid

⁷³² Ibid Trevor Phillips gave the keynote speech at the Human Rights Lawyers Association annual conference on 15 June 2007.

Chapter 12

CONCLUSION

This dissertation has engaged in descriptive, analytical and normative arguments into how the judiciary should approach their enforcement role under Sections 3 and 4. It has been descriptive by outlining the statutory and legal provisions contained in both the HRA and the Convention. It has been descriptive in trying to ascertain the precise formulation the courts have adopted to restrict what is 'possible' under Section 3(1) and what is deemed to be impossible for a Section 4(2) declaration of incompatibility.

However, the dissertation has gone further by putting descriptions of case law, the statutory framework, and the Convention in the context of a changing constitutional dynamic where old Conventions of legislative deference are breaking down and new ones are emerging.

It was argued that this dynamic acts as a silent prologue to many judicial determinations, and involves a necessary

analysis to ascertain the role and perception of the judiciary towards their enforcement obligations under Section 3(1) and 4(2).

This left the dissertation with a number of findings. It found that there is no agreement on the proper ambit of the judiciary's role in human rights enforcement, and this is made out in cases such as Mendoza, Bellinger and R v A; YL -v- Birmingham City Council. It found that these irreconcilable differences mean that a crude and mechanical examination of the case law would only provide a partial and practically impoverished understanding of what the judiciary are doing in these cases.

However it also found that for this analysis to be of any practical use, a normative stance would have to be made in to how the judiciary should approach their enforcement role in practical cases before them. Accordingly, a dialogue model was put forward, which calls for uniform use of Section 4(2) coupled with provisional use of Section 3(1). By making this call for reform, the ideas for a strengthened dialogue model can

bring greater understanding to a host of debates on how Parliament can be strengthened to facilitate sustained human rights debate.

For example, on a practically analytical level, would it be better if Parliament considers the content of human rights, rather than subjecting them to superficial consideration by way of a remedial order?

Moreover, this strengthened dialogue model can act as a critical lens on arguments for a fully-fledged human rights commission where the primary aim can be set at ensuring the accurate dissemination of information to Parliamentarians to debate human rights law.

By adopting this dialogue model, ensuing debates on reform to the HRA can therefore be given a new perspective, a finer texture, ultimately finding the locus for human rights deliberation a job for a Parliament strengthened by dialogue supporting initiatives. This is the corner to the rights of others and a new balance between the State and the populace.

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