Review of The Year in Public Law

15th November 2018

020 7404 1313

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What to expect from this event

The last twelve months have seen public law practitioners busy with cases involving a wide range of subjects; privacy, data, fairness, equality and discrimination - and lots more besides - have all been in the spotlight. Our review looks to highlight some of the most significant legal and procedural developments from the last year, and hopes to equip you with practical guidance and assistance for your caseload in the next twelve months.

Please join us on 15th November, and we hope you will be able to stay afterwards for drinks and some food, when our speakers and other members of our Public Law Team will be on hand to answer any other questions you may have.

Whilst all are welcome, the content of the talks are likely to be of most benefit to practitioners who already have some familiarity with public law and judicial review.

Programme:

Martin Westgate QC
(Chair)

Bad practices will not be tolerated - key procedural developments over the last 12 months and the new July 2018 Administrative Court Judicial Review Guide

Stephen Cragg QC

Who's watching you? Privacy, secrecy and surveillance 2018. The talk will consider surveillance and the retention/disclosure of data, interception of communications cases after Big Brother Watch v. United Kingdom and R (Privacy International) v. IPT, closed material procedures, public interest immunity and R (Haralambous) v. St Albans Crown Court.

Adam Straw

Discrimination in public law. Adam's talk will summarise the important points from the cascade of recent public law discrimination cases, involving the Equality Act 2010, the public sector equality duty, article 14 ECHR, and discrimination under common law. It will include the cases on benefits, autism, children, schools, prisons, and the gay cake. It will consider how the key principles may be used in future by claimants in judicial review and potential challenges.

Katie O'Byrne

In fairness: Consultation, reasons and candour. This talk will explore key developments concerning aspects of fairness, including the duty to consult, the duty to give reasons and the duty of candour, and will give guidance to public lawyers on current approaches to these issues. Core cases include those dealing with the rights of refugee children in Europe and with the Chagos Islands.

SPEAKERS

Martin Westgate QC (Call: 1985) (Silk: 2010)
m.westgate@doughtystreet.co.uk

Martin Westgate has a consistent track record of advice and representation in a wide range of subject areas although he concentrates on public and administrative law, housing and social care. Much of his work is in, and on appeal from, the Administrative Court and he is experienced in professional negligence and costs litigation, particularly in cases related to his main practice areas. His broad based practice makes him an ideal choice for cases that have a multidisciplinary aspect or that are difficult to categorise.

What the Directories say

Martin is ranked in the 2015 edition of Chambers in the fields of Administrative and Public Law, Civil Liberties and Human Rights, Local Government and Social Housing and in the Legal 500 for Administrative and Public Law Civil Liberties and Social Housing. Commentators note that he *"has taken well to silk"* and is *"a clever man who translates his thoughtfulness into creative and effective legal arguments"*. He is described as a *"very skilful and formidable advocate"* whose wider experience of public law issues enables him to *"think out of the box on more challenging cases"*.

He is leader of the public law and housing and social welfare teams within chambers and vice chair of the Administrative Law Bar Association.

Stephen Cragg QC (Call: 1996) (Silk: 2013)
s.cragg@doughtystreet.co.uk

Stephen is an experienced public law practitioner and has appeared in over 100 full judicial review hearings and appeals.

He has been lead counsel in a number of Supreme Court cases involving retention/disclosure of information by the police, following his success in the DNA retention case *S and Marper v UK* [2009] 48 EHRR 50.

- *R. (GC) v Commissioner of Police of the Metropolis* [2011] 1 WLR 1320 which finally decided that police retention DNA retention a breach Article 8 ECHR
- The first 'right to be forgotten' case of *R (L) v Metropolitan Police Commissioner* [2010] AC 410, which set out the Article 8 compliant test for disclosure of non-conviction information by the police; and lead counsel for B in the
- *R (T and B) v Secretary of State for Justice* [2015] AC 49, which successfully challenged the disclosure of cautions in criminal record checks.

Also, *R (C) v Metropolitan Police* [2011] 1 WLR 1320: Metropolitan police policy for retaining custody photographs breached Article 8.

Stephen has been a Special Advocate since 2008, appearing for appellants in many of the nationality appeals before SIAC, as well as acting in control order and TPIM cases, judicial review applications, and cases before the Security Vetting Appeal Panel.

Stephen also sits as a judge in the Information Rights Tribunal, ruling on FOIA and DPA appeals.

He is team leader for Doughty Street's Data Protection and Information Rights Team https://www.doughtystreet.co.uk/data-protection-and-information-law

He was a member of the Independent Advisory Panel on Deaths in Custody from 2014-2018 and was a member of the Harris Review into the deaths of young people in prison (2016)

He has a significant actions against the police practice and is co-author of LAG's *Police Misconduct: Legal remedies*.

Stephen is an experienced social welfare law practitioner. He was lead counsel in the leading community care/discrimination case in the Supreme Court/ European Court of Human rights: *R (McDonald) v RB Kensington and Chelsea* [2011] P.T.S.R. 1266; and *McDonald v UK* (2015) 60 E.H.R.R. 1. He acted for claimants from Northern Ireland challenging the lack of access to abortion services in the rest of the UK in the Supreme Court: R (A & B) v Secretary of State for Health [2017] 1 W.L.R. 2492.

He is the legal update editor for the LAG Community Care Law Reports.

Adam Straw (Call: 2004)
a.straw@doughtystreet.co.uk

Adam specialises in judicial review, human rights and civil claims against public authorities. Adam is ranked in band 1 by Chambers and Partners 2019 in four categories: administrative & public law, civil liberties and human rights, inquests and public inquiries, and police law. His public law practice includes cases involving inquests, prisons, police, privacy, surveillance, children's rights, discrimination, immigration detention, community care, benefits, terrorism and international law. He is currently representing Sarah Ewart in her claim for a declaration that the legislation in Northern Ireland criminalising abortion is incompatible with article 8 ECHR, and acted for her in the Supreme Court in Re. NIHRC. Other ongoing cases pending before the Court of Appeal or Supreme Court include a judicial review of national provision for autistic prisoners (R (Hall) v. Secretary of State for Justice), a challenge to the compatibility of legislation on miscarriage of justice compensation with article 6 ECHR (R (Hallam) v. Secretary of State for Justice), and a challenge to national law and policy on the disclosure by police of criminal records imposed on a child (R (R) v. National Police Chief's Council). Adam is a contributing editor of the Sweet & Maxwell Human Rights Practice encyclopedia, wrote part of the book on Judicial Review by Supperstone et al, and is co-editor of the community care update for the CCLR. He was awarded Chambers & Partners Human Rights & Public Law junior of the year 2014.

Katie O'Byrne (Call: 2013)
k.obyrne@doughtystreet.co.uk

Katie specialises in public law, public inquiries, international law and human rights, especially children's rights. She is Junior Counsel to the Independent Inquiry into Child Sexual Abuse, acting in both the Westminster Investigation and the Child Migration Programmes Case Study. She was a panel member with Sir Keir Starmer QC on an independent review of the failed prosecution of related sexual abuse, rape and terrorism cases in Northern Ireland, commissioned by Northern Ireland DPP Barra McGrory QC.

Katie is frequently instructed in judicial reviews for vulnerable children, including by the Official Solicitor in urgent claims under the Children Act 1989, and for vulnerable adults under the Care Act 2014. She has expertise in women's rights, domestic violence and discrimination under Article 14 ECHR, acting for a vulnerable domestic violence victim, A, in the challenge to the 'bedroom tax' in the Supreme Court and the European Court of Human Rights. She has intervened on behalf of the AIRE Centre in litigation concerning asylum seekers on the UK's Sovereign Base Areas in the Supreme Court and in the 'Dubs amendment' case in the Administrative Court and Court of Appeal. She specialises in civil claims with human rights elements, advising on international law in claims for unlawful detention and torture of civilians in conflict situations in Cyprus and Iraq. She has represented hundreds of construction workers in the Construction Industry Vetting Information Group Litigation and related claims for alleged blacklisting by a group of major construction companies.

Katie has provided reports to MEPs and given evidence in the European Parliament on the human rights consequences of Brexit. She has published book chapters and articles on gender, children's rights and international law, is the co-editor of *Surrogacy, Law and Human Rights* (Ashgate/Routledge, 2015), and is a contributing author to *Halsbury's Laws on Judicial Review* and *Supperstone, Goudie and Walker on Judicial Review*.

Judicial Review procedure update

15 November 2018

MARTIN WESTGATE QC

Statistics

1. In the High Court in the 1st half of 2018:

    a. 1800 applications for judicial review lodged.
    b. 1100 reach permission stage.
    c. 780 were refused permission (71%)
    d. 120 (11%) totally without merit.
    e. 30 granted permission following a hearing.
    f. Overall permission rate 24.5%.

2. Upper Tribunal IAC 2nd quarter of 2018
    a. 2137 receipts
    b. 1744 cases determined on paper.
    c. 7% were granted permission.
    d. 623 were reconsidered at an oral permission hearing.
    e. 23% (143) granted permission.
    f. Overall permission rate 15%.

A more rigorous approach

3. Several recent cases at Court of Appeal level have indicated a more rigorous approach to identifying and spelling out issues in public law cases.

***R (Talpada) v SSHD* [2018] EWCA Civ 841**

4. Permission to appeal granted on 2 grounds "expanded into several components" at the appeal

5. Hallett LJ [23] Deprecating "attempts to expand the grounds significantly beyond those upon which permission was granted. It is not open to an advocate in this Court to advance whatever grounds occur to them without identifying them fully, giving proper notice and without the permission of the Court".

6. Singh LJ [67-9]:

    a. Grounds of appeal must be clearly and succinctly set out.

b. Only grounds for which permission is granted may be pursued on an appeal.

c. The courts should resist allowing grounds to "evolve" in the course of proceedings, for example when a skeleton argument comes to be drafted.

d. If grounds have not been properly pleaded or where permission has not been granted to raise them courts should be prepared not to permit them to be advanced.

***Hickey v SSWP* [2018] EWCA Civ 851 @74**

7. An appeal in a PIP case from the UT to the CA. The UT gave permission on one ground only, but the grounds of appeal went further and took 3 different points, none of which had been put to the original FTT.

8. Coulson [48]:

"In this way, as so often happens in public law cases, none of the three grounds of appeal now pursued arise directly out of the decision of the FTT, and only one (the qualitative difference point) arises out of the decision of the UT, and even then it is tangential to the UTJ's decision. This haphazard approach has been compounded by the fact that, prior to the hearing of this appeal, the only ground for which permission was granted to appeal to this court was an argument about the counsellor, which (as explained below) was doomed to fail. Unlike *MMcK* therefore, this is not a case where the points now argued were taken fair and square by the applicant at the outset of the proceedings. Instead, I consider that the claimant's case has been continually reshaped over the years, in an attempt to rely on the developments in the authorities referred to above".

9. Hickinbottom LJ [74]:

a. "in respect of each way in which it is said that the decision below is wrong or unjust, the grounds of appeal must address, clearly and concisely, the relevant part of the decision and the way in which it is said to be wrong or unjust. The reasons *why* it is said the decision is wrong or unjust must not be included in the grounds, and must be confined to the skeleton argument"

b. The appeal court's jurisdiction is constrained by the scope of the grounds of appeal and of the permission that has been granted.

c. Therefore, where an appellant who has obtained permission to appeal wishes to rely upon a ground of appeal for which he has not previously sought permission to appeal, he must seek permission to amend.

d. Grounds of appeal cannot be covertly amended, for example by including changes to them in the skeleton argument.

e. Courts will not be sympathetic to late applications to amend or where no application is made.

Aswad Browne v Parole Board of England and Wales **[2018] EWCA Civ 2024**

10. In a challenge to a risk assessment the claimants grounds changed in the course of the litigation between arguing that the test was rationality, full merits review or proportionality.

11. Coulson LJ criticised:

"the production of over-long and contradictory skeleton arguments at every stage of the process, and the desire to pursue every possible point (whether good, bad or indifferent), regardless of the issues raised in the Detailed Statement of Facts and Grounds of Claim ("DSFGC"). This appeal has again demonstrated the need for claimants in the Administrative Court to demonstrate the same procedural and analytical rigour that can be found in other areas of the Civil Justice system" [2].

Pleading HRA claims

R (Nazem Fayad) v SSHD **[2018] EWCA Civ 54 @54-6**

12. The substantive claim related to delay in obtaining a passport that went on appeal and this was a review of a Master's decision as to who should bear the costs. C argued that they were in class (i) *M v Croydon* because they obtained a passport through the proceedings. C had pleaded damages (which included a claim for loss of earnings so not a nominal amount) but had failed.

13. Singh LJ agreed that there should be no order and made these comments about pleading damages in HR claims:
"[54]…claims for judicial review which include a claim for damages for breach of the HRA should be properly pleaded and particularised. They should set out, at least in brief, "the principles applied by the European Court of Human Rights" under Article 41 of the Convention which are said to be relevant. I note that, in the present case, the Claimant at one time claimed damages for loss of earnings and for "humiliation and distress". No explanation was given as to the principles applicable under Article 41 would govern such heads of loss: cf., for example, Scorey and Eicke, Human Rights Damages: Principles and Practice , ch. 2.

[56] In my view, this reflects an unfortunate culture which has developed in this area of legal practice. Too often claims for damages, in particular claims under the HRA, are thrown in at the end of a claim form, apparently as an afterthought and frequently as a makeweight. If I am right to detect that such a culture has developed, it is firmly to be discouraged. Courts and tribunals should be astute to require that claims for damages in judicial review proceedings are properly raised and pleaded. If they are not, they should be prepared to use the full range of their powers to ensure that they are. In appropriate cases this may have consequences in costs".

Administrative Court Guide 2018

14. The main new theme of the Guide is to draw attention to these cases and apply them to judicial reviews and not only appeals.

15. Detailed grounds [6.3.4.1] and skeletons [17.2.2.3-4]: "should be as short as possible, while setting out the claimant's arguments. The grounds must be stated shortly and numbered in sequence. Each ground should raise a distinct issue in relation to the decision under challenge. Arguments and submissions in support of the grounds should be set out separately in relation to each ground"

16. "Where the claim includes a claim for damages under the Human Rights Act 1998, the claim for damages must be properly pleaded and particularised" Human Rights Claims 6.3.4.2, 11.8.2.3

17. Grounds not pleaded:

    a. 8.1 emphasises that the substantive hearing is only on those grounds for which permission has been granted.
    b. 8.2.4.3 - may not raise or renew grounds at the substantive hearing where permission has not been granted unless (unusually) the court permits that to occur

18. Amendments

    a. 9.2 - If C wishes to file further evidence or rely on further grounds then they must make an application - *Hickey v SSWP* [2018] EWCA Civ 851 @74

    b. 9.2.5.1 – If D has made a fresh decision then it may be more convenient to amend the claim but the court may still decide that overall the proper conduct of the proceedings will be best promoted by refusing permission and requiring a fresh claim to be brought.

    c. See also 12.8.3 that a stay will not normally be granted to allow the D to reconsider the decision.

19. 15.7 reiterates guidance on fresh claim challenges to applications to remove and that should (i) be taken as early as possible and promptly after receipt of notice of a removal window and (ii) applications for interim relief must be made with as much notice as feasible to the Secretary of State.

20. 17.2 – Contents of skeleton arguments.

    a. 17.2.2.3-4 (see above_.

    b. 17.3.3 – rarely necessary to be more than 20pp in not less than 11pt.

21. Annex 4 – new listing policy.

22. Annex 5 – Costs guidance where cases settle.

23. New N 463.

Late submissions/evidence

***R (Liberty) v SSHD & SSFCA (Procedural Matters)* [2018] EWHC 976 (Admin) @ 17.**

24. D was 4 days late with their skeleton argument, failed to make a prior application to extend time and the application that they did make did not give full reasons for the failure. D to pay C's costs of the application extend time on an indemnity basis and outside the costs cap.

25. D also to pay the costs of a late application to admit evidence that could have been served earlier and where late service meant that C's skeleton was prepared without it.

26. The Court held that there "a continuing obligation on public authorities (in particular in a case as important as the present) to keep the Court up to date with relevant evidence". [31]

R (ES) v SSHD [2017] EWHC 3224 (Admin) Anthony Elleray QC.

27. A JR claiming unlawful detention when C was detained pending removal. The underlying certificate was withdrawn by consent leaving only the damages claim. SSHD filed no DG or evidence until 4 days before the hearing. The appropriate approach was to deal with this as an application for relief from sanctions. The delay was serious and there was no explanation put forward. Even though these were public law proceedings. D sought to make a point of law that had no substance but in an case the application was made too late and with no explanation.

Interested Parties

R (Davenport) v Parole Board [2018] 1 W.L.R. 2003

28. The SSJ is an interested party in a challenge to the decision of the Parole Board.

    a. Guardian of the public interest [20]. At para 21 the court also held that they were

    b. In a position to assist the court [21].

Duty of Candour

For Defendants

R (Horeau & Ors) Secretary of State for Foreign and Commonwealth Affairs [2018] EWHC 1508 (Admin)

29. Singh LJ [20]: "to *assist the court* with full and accurate explanations of all the facts relevant to the issues which the court must decide. It would not, therefore, be appropriate, for example, for a defendant simply to off-load a huge amount of documentation on the claimant and ask it, as it were, to find the "needle in the haystack".

R (Citizens UK) v SSHD [2018] EWCA Civ 1812

30. Singh LJ [106]:

"(2) One of the reasons why the ordinary rules about disclosure of documents do not apply to judicial review proceedings is that there is a different and very important duty which is imposed on public authorities: the duty of candour and co-operation with the court. This is a "self-policing duty". A particular obligation falls upon both solicitors and barristers acting for public authorities to assist the court in ensuring that these high duties on public authorities are fulfilled.

(3) The duty of candour and co-operation is to assist the court with full and accurate explanations of all the facts relevant to the issues which the court must decide. As I said in *Hoareau* at para 20:

"It is the function of the public authority itself to draw the court's attention to relevant matters; as Mr Beal [leading counsel for the Secretary of State in that case] put it at the hearing before us, to identify 'the good, the bad and the ugly'. This is because the underlying principle is that public authorities are not engaged in ordinary litigation, trying to defend their own private interests. Rather, they are engaged in a common enterprise with the court to fulfil the public interest in upholding the rule of law."

(4) The witness statements filed on behalf of public authorities in a case such as this must not either deliberately or unintentionally obscure areas of central relevance; and those drafting them should look carefully at the wording used to ensure that it does not contain any ambiguity or is economical with the truth. There can be no place in this context for "spin".

(5) The duty of candour is a duty to disclose all material facts known to a party in judicial review proceedings. The duty not to mislead the court can occur by omission, for example by the non-disclosure of a material document or fact or by failing to identify the significance of a document or fact".

31. In Citizens UK there was a serious breach of the duty where the evidence gave an incomplete picture and gave the impression that the reason why "sparse" reasons were given (unaccompanied asylum seeking children at the Calais "Jungle") was not because of urgency or because the French authorities demanded it, but that the British authorities did not want to give more reasons because of the perceived risk of a legal challenge.

32. There was still a very serious breach even if it was unintentional [168, 188].

Claimants

***R (SB) (Afghanistan) v SSHD* [2018] EWCA Civ 215.**

33. C changed advisers at the last minute and did not give full information to his new solicitors. They challenged his removal arguing that the removal window had been suspended because the Article 8 claim had been certified as manifestly unfounded. This was a wrong extrapolation from the documents and the solicitor had not seen the underlying documents.

34. Lord Burnett CJ said:

[57]: "…there is a strong imperative for those instructed late in the day to make no representations or factual assertions which do not have a proper foundation in the materials available to them. Gaps in knowledge should not be filled by wishful thinking. In almost all such cases there will have been extensive engagement between the putative applicant and the immigration authorities and often the independent appellate authorities. So too in many cases there will have been dialogue between the authorities and previous lawyers. There will be a large reservoir of information available. Without access to that information it behoves those who come on to the scene at the last minute to take especial care in the factual assertions they make".

35. At the very least the application

"should have been explained that the account given in the grounds of claim was put forward without the documents having in fact been checked, and giving reasons to support the stated belief that this is what they contained, so that the judge could make a critical assessment of those reasons and would be put on alert to check the position with OSCU" [59].

36. In addition:
"There are times when advisers have clear instructions from a client which turn out to be wrong. In the context of last minute applications of the sort which arose in this case great care should be taken before accepting them without inquiry".

37. There was also a failure to give notice to the Defendant. It was argued that the Guide did not expressly require this but that was "unsustainable" because basic fairness required notice and there was nothing in the guide to displace it. This required the solicitor to take practical steps to notify the D (in this case by notice to the Home Office as well as GLD rather than simply relying on GLD as representing the HO).

38. All of this was in the context of an urgent challenge to a removal but there is every indication that the court intends it to apply more widely.

COSTS

Costs Capping Orders

39. These replace protective costs orders in judicial review claims and can only be granted if the conditions in sections 88-90 of the Criminal Justice and Courts Act 2015 are met.

R (Hawking & Ors) v Secretary of State for Health and Social Care **[2018] EWHC 989 (Admin) Cheema Grubb J**

40. 5 claimants challenged the introduction of Accountable Car Organisations within the NHS which they contended were ultra vires. They were all retired or professional people of means and would each have been able to meet 1/5 of an adverse costs order. They had crowd funded £180,000 and their representatives were acting on a discounted CFA.

41. The application was refused on the papers. On reconsideration at a hearing the judge had simply to apply the statutory test and did not have to be satisfied that there was a compelling or exceptional basis for reconsideration.

42. The decision whether the proceedings were "public interest proceedings" turned mainly on whether the issues were going to be addressed in a consultation announced after the claim was issued. Cheema Grubb J held that the issues about excess of power remained valid.

43. The court was satisfied that the claimants would withdraw if a CCO was not made. Moreover they would be acting reasonably in doing so. The test was one of objective reasonableness. The claimants were a group of responsible people acting out of apparent public spiritedness in bringing a challenge that had been granted permission to proceed and where they were prepared to meet a substantial degree of costs through crowdfunding. CCOs should be available in a wide variety of circumstances and not just where "a single claimant of very modest means may be unable to bring a claim at all in the absence of such an order".

    "Having considered the jurisprudence to which my attention has been drawn with care, it seems to me that this is just the sort of case in which a judicial review costs capping order should be harnessed and it is unreasonable to expect the claimants to bear the burden of a high degree of financial risk and to declare that their stated intention to withdraw, should an order not be made, is unreasonable objectively in the circumstances" [22].

44. As to the level of the cap, where both were being funded publicly (the claimants via crowd-funding and the department by taxpayers) it was "entirely appropriate for a judicial review costs capping order to be made at appropriate level which will not artificially limit either side's efforts and expenditure but which will enable this claim to be heard" [25].

45. The claimants' liability for costs was capped at £80,000 and the Defendant's at £115,000.

Hopeless claims

R. (on the application of Webster) v Secretary of State for Exiting the European Union [2018] EWHC 1543 (Admin)

46. Gross LJ: "We think it is right that the defendant should get some award of costs, so recognising that pursuing hopeless claims may not be cost free. That is important in other cases". £1,500 out of £4,000 awarded.

Costs following settlement

***ZN Afghanistan, KA (Iraq) v SSHD* [2018] EWCA Civ 1059**

47. The Appellants challenged a decision to remove them to another EU country under the Dublin III Regulation. The SSHD withdrew the decisions to refuse and to certify but only because administrative failures on her part meant that she could not remove them in time. The appeals were withdrawn following the concession but the CA considered that if they had proceeded on their merits then they would have failed [66]. For that reason they could not claim to be successful within *M v Croydon*.

"[67] The underlying rationale for the normal rule that costs follow the event is that a party has been compelled by the conduct of the other party to come to court in order to vindicate his legal rights. If those legal rights had been respected in the first place by the other party, it should never have been necessary to come to court. Accordingly, there will normally be a causal link between the fact that costs have been incurred and the underlying merits of the legal claim. This underlying rationale also explains why civil procedure normally requires a party to send a pre-action protocol letter to the other party. If the response to that letter had been to accept the merits of the claim in advance, it should never have been necessary to bring that claim to court" – Singh LJ.

48. See also *RL v Croydon LBC* [2018] EWCA Civ 726 where accommodation was provided because of a s.17 Children Act 1989 assessment and not because of the bringing of proceedings.

49. The D's administrative failings were collateral matters and not conduct to be taken into account under CPR 44.2(4)(a) since that conduct is normally to do with the litigation itself (or at least the facts giving rise to it).

50. A further issue was as to whether it was relevant that the Appellants were legally aided:

51. A majority (Sir Brian Leveson P and Singh LJ) also held that it may be relevant that a party to the proceedings is in receipt of legal aid despite s. 30 of LASPO. That section did not set out an absolute rule that legal aid is absolutely irrelevant. However, "effective access to justice is of profound concern

to the courts, especially in the field of public law, which concerns the legality of the actions of the executive and so relates in a direct way to the rule of law in this country" [88].

52. This did not make a difference in the present case but Singh LJ gave an example where it might:

"[92] Suppose a claim for judicial review is brought to challenge the Secretary of State's decision to remove an adult from the UK. The grounds of challenge include a complaint that there will be a breach of the right to respect for family life in Article 8 and also a complaint that the Secretary of State failed to have regard to the best interests of the claimant's children under section 55 of the UK Borders Act 2007. Before the case gets to court the Secretary of State concedes that she did not have regard to section 55 and agrees to a consent order by which her decision will be quashed so that she can reconsider her decision. Not all of the grounds have succeeded but the claimant may feel that he has obtained a victory in substance and he has obtained the outcome which is often the most a person can realistically hope to obtain in judicial review proceedings. When the court comes to consider the issue of costs, I stress again that everything depends on the particular facts but the court may feel that in such a case the claimant should be awarded his costs and not engage in too technical an exercise about precisely which ground succeeded".

53. Leggatt LJ disagreed but he proposed a more nuanced approach to the discretion under to give effect to the public interest in facilitating access to justice in that the court should [103]:
    a. Analyse the circumstances of the particular case to try to work out whether the claimant has been successful rather than too readily adopting the fallback position of making no order for costs.
    b. Not set the bar too high in judging what constitutes success and treat as sufficient to characterise the claimant as the successful party that as a result of the litigation the claimant has achieved any material part of the relief sought.
    c. Not be too astute to pare down awards of costs just because the claimant has not been wholly successful, provided that the claim has been conducted reasonably.

54. Leveson P thought that there was unlikely to be much practical difference between the two approaches while agreeing with Singh LJ.

Coroner not neutral

R. (on the application of Adath Yisroel Burial Society) v Senior Coroner for Inner North London [2018] EWHC 1286 (Admin)

55. Judicial officers such as coroners are not normally liable to pay costs but may be required to do so applying the approach in *R (Davies) v Birmingham Deputy Coroner [2004] EWCA Civ 207; [2004] 1 WLR 2739*. Costs may be ordered where:
    a. There is a flagrant instance of improper behaviour or when the inferior court or tribunal unreasonably declines or neglects to sign a consent order disposing of the proceedings.
    b. The inferior court or tribunal resists the application actively such a way that it made itself an active party to the litigation.
    c. If, an inferior court or tribunal appears in the proceedings to assist the court neutrally on questions of jurisdiction, procedure, specialist case law and such like it will be normally be treated as a neutral party, so that the court will not make an order for costs in its favour or an order for costs against it whatever the outcome of the application.
    d. Costs may be awarded in a class (3) case so that a successful applicant, who has to finance their own litigation without external funding, may be fairly compensated out of a source of public funds and not be put to irrecoverable expense in asserting their rights after an inferior tribunal, has gone wrong in law, and [where] there is no other very obvious candidate available to pay his costs.

56. Costs were awarded against the coroner on 2 bases.

    a. Firstly she failed to reconsider her policy. This was not so unreasonable as to bring her within class (1) but it was relevant to the question where, in fairness costs should fall (para 4).

    b. The coroner lost her neutrality. She had not done so in explaining her policy in response to a pre-action letter or in her detailed grounds of response. However, she then filed an addendum which sought to defend her policy in the face of reasoned argument for the chief coroner and that amounted to "written advocacy, seeking to justify the policy and thereby challenging the Chief Coroner's case" [30]. In adopting a "defensive" stance she "crossed the line into active participation" [31-2]

57. Costs were only awarded from the date of the addendum.

***R (Lockerby) v Medway County Court* [2018] EWHC 2496 (Admin)**

58. MCC failed to comply with orders when it was a defendant to JR proceedings. There were no instructions to staff as to the correct procedure to follow and the courts actions were "shockingly poor and shambolic". It was ordered to pay C's costs whatever the outcome of the JR claim on an indemnity basis.

Who's watching you? Privacy, secrecy and surveillance 2018.

Stephen Cragg QC, Doughty Street Chambers

15 November 2018

Bulk interception of communications

1. *Big Brother Watch and Others v. the United Kingdom* (nos. 58170/13, 62322/14 and 24960/15) 13 September 2018 concerned applications which were lodged after revelations by Edward Snowden (former contractor with the US National Security Agency) about programmes of surveillance and intelligence sharing between the USA and the United Kingdom. The case concerned complaints by journalists and civil liberties organisations about three types of surveillance:

    - the bulk interception of communications;
    - the obtaining of communications data from service providers.
    - intelligence sharing with foreign governments; and

2. The applicants argued that the mass interception programmes infringed UK citizens' rights to privacy protected by Article 8 of the European Convention on Human Rights as the 'population-level' surveillance was effectively indiscriminate, without basic safeguards and oversight, and lacked a sufficient legal basis in the Regulation of Investigatory Powers Act 2000 (RIPA).

3. For relevant background, the ECHR website explains

    > "This is not the first time the Court has looked at bulk interception. Most recently, in June 2018 it found that Swedish legislation and practice in the field of signals intelligence did not violate the European Convention on Human Rights (*Centrum För Rättvisa v. Sweden).* Among other things, it found that the Swedish system provided adequate and sufficient guarantees against arbitrariness and the risk of abuse. Some ten years ago, it considered similar provisions in the G10 Act in the case of Weber and *Saravia v. Germany*, and in *Liberty v. the United Kingdom* it considered the predecessor to the current bulk interception regime. The obtaining of communications from communications service providers has also been considered in earlier judgments, including the recent case of *Ben Faiza v. France*.

4. Intelligence sharing had not been considered by the Court in any previous judgment. In the present case it examined, for the first time, the way in which authorities request and receive signals intelligence from foreign Governments.

5. The Court found that the UK's previous legislative regime for external surveillance under RIPA was

incompatible with Article 8 ECHR and Article 10 ECHR.

6. The Court held that the **bulk interception regime** violated Article 8 (right to respect for private and family life) as there was insufficient oversight both of the selection of internet bearers for interception and the filtering, search and selection of intercepted communications for examination.

7. In reaching this conclusion, the Court found that the operation of a **bulk interception regime** did not in and of itself violate the Convention, but noted that such a regime had to respect criteria set down in its case-law. The Court recognised the potential for surveillance regimes to be abused, with serious consequences for individual privacy. Therefore, the Court has identified six minimum safeguards which all interception regimes must have: *Weber and Saravia v. Germany*.

8. The safeguards are that the national law must clearly indicate:

   (a) the nature of offences which may give rise to an interception order;
   (b) a definition of the categories of people liable to have their communications intercepted;
   (c) a limit on the duration of interception;
   (d) the procedure to be followed for examining, using and storing the data obtained;
   (e) the precautions to be taken when communicating the data to other parties;
   (f) and the circumstances in which intercepted data may or must be erased or destroyed.

9. The Court expressly recognised the threat of issues such as global terrorism and other serious crime, such as drug trafficking, human trafficking, the sexual exploitation of children and cybercrime. It also recognised that advancements in technology have made it easier for terrorists and criminals to evade detection on the internet. States should therefore enjoy a broad discretion in choosing how best to protect national security. Therefore, the operation of a bulk interception regime can be justified if a state considers that it is necessary in the interests of national security.

10. However, in finding that the UK regime concerning the bulk interception of breached Article 8 ECHR, the Court said:-

> 346…In a bulk interception regime, where the discretion to intercept is not significantly curtailed by the terms of the warrant, the safeguards applicable at the filtering and selecting for examination stage must necessarily be more robust.
>
> 347. Therefore, while there is no evidence to suggest that the intelligence services are abusing their powers ….the Court is not persuaded that the safeguards governing the selection of bearers for interception and the selection of intercepted material for examination are sufficiently robust to provide adequate guarantees against abuse. Of greatest concern, however, is the absence of robust independent oversight of the selectors and search criteria used to filter intercepted communications.

11. The Court also held that the regime for **obtaining communications data from communications service providers (CSPs)** violated Article 8 as it was not in accordance with the law. The Court noted

'concern that the intelligence services can search and examine "related communications data" apparently without restriction' – data that identifies senders and recipients of communications, their location, email headers, web browsing information, IP addresses, and more. The Court expressed concern that such unrestricted surveillance 'could be capable of painting an intimate picture of a person through the mapping of social networks, location tracking, internet browsing tracking, mapping of communication patterns, and insight into who a person interacted with'. The Court said:-

> 467. It is therefore clear that domestic law, as interpreted by the domestic authorities in light of the recent judgments of the CJEU, requires that any regime permitting the authorities to access data retained by CSPs limits access to the purpose of combating "serious crime", and that access be subject to prior review by a court or independent administrative body. As the Chapter II [RIPA] regime permits access to retained data for the purpose of combating crime (rather than "serious crime") and, save for where access is sought for the purpose of determining a journalist's source, it is not subject to prior review by a court or independent administrative body, it cannot be in accordance with the law within the meaning of Article 8 of the Convention.

12. The Court found that both regimes violated Article 10 (freedom of expression) as there were insufficient safeguards in respect of confidential journalistic material. The Court found the bulk interception regime did not meet the requirements under Article 10 since there were no "above the waterline" requirements that would limit the State's ability to search and examine confidential journalistic material. The regime for acquiring communications data from CSPs was similarly found to be problematic under Article 10 due to insufficient safeguards limiting access to the data.

13. However, the Court found that the regime for **sharing intelligence with foreign governments** did not violate either Article 8 or Article 10 of the Convention, and was proportionate and in accordance with the law.

14. Going forward, the court stated that it has a number of other cases in the pipeline:-

    - *Association confraternelle de la presse judiciaire v. France* and 11 other applications.. involves complaints by lawyers and journalists, as well as legal persons connected with those professions, about the French Intelligence Act of 24 July 2015, which concerns electronic surveillance measures.

    - *Tretter and Others v. Austria* (no. 3599/10 concerns 2008 amendments to the Police Powers Act, which extended the powers of the police authorities to collect and process personal data.

    - *Breyer v. Germany* (no. 50001/12) concerns the legal obligation of telecommunications providers to store the personal details of all their customers.

15. The Government passed the Investigatory Powers Act (IPA) in November 2016, replacing the contested RIPA powers and putting mass surveillance powers on a statutory footing. The Court did not examine the new legislation in its decision.

The Investigatory Powers Tribunal (IPT)

16. The IPT is a special tribunal which was established under the Regulation of Investigatory Powers Act 2000 (RIPA) with jurisdiction to examine, among other things, the conduct of the intelligence services: Security Service, the Secret Intelligence Service and the Government Communications Headquarters or (GCHQ). The IPT consists of judges and retired judges at High Court level and has its own detailed set of rules which includes provision for closed hearings where there is a risk that national security will be damaged if there is disclosure.

17. Section 67(8) of RIPA stated:

> "Except to such extent as the Secretary of State may by order otherwise provide, determinations, awards and other decisions of the Tribunal (including decisions as to whether they have jurisdiction) shall not be subject to appeal or be liable to be questioned in any court".

18. In *R (Privacy International) v Investigatory Powers Tribunal* [2018] 1 WLR 2572 the Court of Appeal considered whether this section was sufficient to exclude judicial review of IPT decisions.

19. The leading case in the area of 'ouster clauses' is the House of Lords decision in *Anisminic Ltd v Foreign Compensation Commission* [1962] 2 AC 147. In that case the House of Lords concluded that ouster clauses need to be construed very narrowly. As Sales LJ said at para 21:-

> 21 Ms Rose submits that the restrictive approach to interpretation of ouster clauses which is illustrated by the *Anisminic* case is an example of the application of the principle of legality: compare *R v Secretary of State for the Home Department, Ex p Simms [2000] 2 AC 115* . I think that is right. The principle of legality is an approach to statutory interpretation in the light of a strong presumption that in promulgating statutes Parliament intends to legislate for a liberal democracy subject to the rule of law, respecting human rights and other fundamental principles of the constitution. The rule of law and the ability to have access to a court or tribunal to rule upon legal claims constitute principles of this fundamental character.

20. In *Anisminic* the House of Lords held that an ouster clause that the 'determination of any application…. shall not be called into question in any court of law' was not sufficient to oust judicial review of decisions of the Foreign Compensation Commission as an ultra vires determination would only be a "purported determination" not a "real determination".

21. The Court of Appeal held (unanimously with Sales LJ giving the main judgment) decided that s67(8) did have the effect of ousting judicial review of all decisions of the IPT:-

> 26 In my judgment, however, on its proper construction, section 67(8) does clearly mean that all determinations, awards, orders and decisions of the IPT "shall not … be liable to be questioned in any court", including in the High Court on judicial review. This includes those

determinations and decisions which the IPT may have made on the basis of what (if there were a judicial review or appeal) might have been found by a court to have been an erroneous view of the law. This interpretation is given clearly, in my view, by the language used in the provision as read in its legislative context.

22. The language used in s67(8) RIPA was materially different from that used in the *Anisminic* example and the case could be distinguished as S67(8) expressly covers the situation where the IPT has made an error of lae going to its jurisdiction or power to act, by the words in parenthesis 'including decisions as to whether it has jurisdiction': eg a 'purported decision'.

23. The Court also made the following points:-

    (a) Whether the IPT is making a 'decision' or a 'determination' does not alter the position and Parliament had not intended there to be a different approach.

    (b) The statutory context of the regime under s67 and s68 RIPA is important:-
        (i) There is a framework of special rules;
        (ii) It is a tribunal capable of dealing with claims under closed conditions against the intelligence services;
        (iii) There has to be complete assurance that no disclosure of confidential information occurs.

24. Sales LJ thought that to find that judicial review was not ousted would be a 'subversion of Parliament's purpose'. The Court also relied on dicta of the Court of Appeal and Supreme Court in *R(A) v Director of Establishments of the Security Service* [2010] 2 AC 1 as supporting the position that the IPT is set up as a specialist tribunal to enable claims against the intelligence services to be properly determined. Lord Brown, obiter, had described the ouster in s67(8) as an 'unambiguous' ouster, and commented that to allow judicial review of the IPT would lead to a bypass at the High Court stage of the procedures established for the IPT.

25. Permission to appeal to the Supreme Court has been granted and the case will be heard before seven justices of the Supreme Court next month.

26. RIPA has been amended and s67A now provides for a limited right of appeal to the Court of Appeal on a point of law, but it is not yet in force.

Search warrants and public interest immunity (PII)

27. In *R (Haralambous) v Crown Court at St Albans* [2018] AC 236 the appeal to the Supreme Court concerned the extent to which courts can rely on information which, in the public interest, cannot be disclosed to a person affected by a search and seizure warrant.

28. In 2014, search and seizure warrants were issued under s.8 **PACE** by a magistrates ' court as the result of an *ex parte* application. Two months after the execution of the warrants, the Appellant was

provided with redacted version of the application for the warrants, and he sought an unredacted version, which was refused on grounds of **PII**. Shortly afterwards the appellant applied for judicial review on the grounds that the entries, searches and seizures had been unlawful. In March 2015 the police agreed to the quashing of the warrants, but also made an application under s.59 of the Criminal Justice and Police Act 2001 ("**CJPA**") for continued retention of the seized materials, which was granted by the Crown Court, and the appellant applied for judicial review of the decision, which was dismissed. The central question was whether, at each of these stages, the relevant judicial for a were precluded from having regard to information which, on public interest grounds, cannot be disclosed to the person affected by the warrant who wishes to challenge it.

29. The Supreme Court addressed five issues on appeal [11]:

    (i) how far a Magistrates' Court, on an *ex parte* application for a search and seizure warrant under ss.8 and 15(3) of PACE, can rely on information which in the public interest cannot be disclosed to the subject of the warrant;
    (ii) whether in proceedings for judicial review of the legality of a search warrant, issued ex parte under ss. 8 and 15(3) of PACE (a) it is permissible for the High Court to have regard to evidence upon which the warrant was issued which is not disclosed to the subject of the warrant and (b) whether, where a Magistrates' Court is permitted to consider evidence not disclosable to the subject of the warrant, but the High Court is not, it follows that the warrant must be quashed if the disclosable material is insufficient on its own to justify the warrant;
    (iii) whether there is jurisdiction in a Crown Court to rely on evidence not disclosable to the subject of the warrant in an application made in the presence of both parties ("**inter partes**") to retain unlawfully seized material under s.59 of CJPA;
    (iv) whether in proceedings for judicial review of an order made *inter partes* for retention of unlawfully seized material under s.59 of CJPA it is permissible for the High Court to have regard to evidence (upon which the warrant was issued) which is not disclosed to the subject of the warrant; and
    (v) whether the principles concerning irreducible minimum disclosure apply to proceedings concerning search warrants.

30. There is no statutory authorisation for the operation of a closed material procedure (CMP) in any of the contexts outlined in the issues. It was assumed that the Justice and Security Act 2013 had no application, because proceedings relating to a search warrant or under section 59 of the CJPA are criminal in nature, not civil [11].

31. On issue (i), the statutory scheme under ss.8 and 15 of PACE, is designed to be an *ex parte* scheme whereby a magistrates' court can grant a search and seizure warrant having had regard to material which cannot on public interest grounds be disclosed to a person affected by the warrant or order. The scheme is designed to be speedy and simple and there is no restriction on the information the magistrates court can consider, and that includes PII material. If the police were unable to rely on such material it would limit the efficacy of police investigations. The procedure did not come within the within the general prohibition on closed procedures without express statutory authorisation

recognised in *Al Rawi v Security Service* [2012] 1 AC 531.

32. On issue (ii) the Supreme Court decided that the same approach must apply to applications to the Crown Count under s59 CJPA, where an order is sought to seize property where it has just been returned. An analogy was drawn with Bank Mellat v HM Treasury (No 2) [2014] AC 700 where there was no express provision enabling the Supreme Court to operate a CMP on appeal, Lord Mance said at para 42:-

> Section 59 postulates that the Crown Court will be able to put itself into the shoes of a hypothetical magistrates' court. This will not work, unless the Crown Court can operate, so far as necessary, the same closed procedure as the magistrates' court could and would have done.

33. The Court took a similar approach in relation to issue (iv), finding that the High Court can conduct a CMP on judicial review of a magistrate's order for a warrant under s.8 of PACE or a magistrate's order for disclosure or a Crown Court's order under s.59 of CJPA A procedure where the Court would not be able to consider closed material would deprive the judicial review process of any real teeth. The Court held it would be unjust and potentially absurd if the High Court on judicial review had to address a case on a different basis from the magistrate or Crown Court or quashed the order and remitted it to the lower court on a basis different from that which the lower court originally adopted.

34. In relation to issue (v), the Court said that open justice should prevail to the maximum extent possible, but pointed out at para 62 that 'it is established by decisions of both the European Court of Human Rights and the Supreme Court that there are circumstances where it may in the public interest be legitimate to withhold even the gist of the material relied on for a decision which a person affected wishes to challenge'. The Court appeared to play down the importance of a warrant when it concluded at para 64 that:

> The issue of a warrant authorising a search of premises and seizure of documents involves a short term invasion of property. Such a warrant is, as I have pointed out, not specifically directed at, or necessarily even linked with, anyone occupying the premises or having any proprietary or possessory interest in the documents. Save that the taking of documents for so long as is required for the limited purposes of an investigation necessarily affects possession, such a warrant does not affect the substantive position of anyone who does occupy the premises or have any proprietary, possessory or other interest in any documents found therein. All it may do is provide information, and maybe direct evidence, of potential use in a current investigation into an indictable offence which the magistrate or Crown Court is satisfied that there are reasonable grounds for believing has been committed.

Disclosure by the police

35. In *R (on the application of AR) v Chief Constable of Greater Manchester Police* [2018] UKSC 47; [2018] 1 WLR 4079 the appellant had applied for an enhanced criminal record certificate (ECRC) pursuant to s113B Police Act 1997 when he applied for a job as a lecturer. However, only two months before he made the application he had been acquitted at trial on a charge of rape of a 17 year old woman, when he had been working as a taxi driver. The details of the charge and the allegations against the appellant were included in the ECRC. The appellant objected to the inclusion but this was unsuccessful on the basis that the CPS had believed that there had been a realistic prospect of conviction, the information was relevant to the job he was applying for and disclosure was proportionate having taken into account the damage it would do to the appellant's prospects of employment, and no more than necessary to secure the objective of protecting young and vulnerable persons.

36. A further application, a year later, also led to an ECRC with the same information included and the appellant challenged the decision to include the information, by way of judicial review, on the basis that there was an unjustified breach of his Article 8 right to respect for private life. The trial judge rejected arguments that chief constable should have consulted the appellant before deciding on disclosure, and that the chief constable should have obtained the full transcript of the rape trial. In the Court of Appeal the court decided that it could only interfere with the judge's decision on proportionality if it had been reached by way of a significant error of principle, which the court did not find to have occurred.

37. The Supreme Court had to decide whether the approach of the Court of Appeal was correct, whether the chief constable should have consulted with the appellant prior to disclosure, and whether disclosure was, in fact, proportionate.

38. The Supreme Court decided that the Court of Appeal had taken too narrow a view of the test to be applied. The role of the appeal court was to decide both whether had been an error of principle by the judge, but also whether the conclusion reached on proportionality was wrong (having considered the whether the judge's reasoning was flawed, illogical or had failed to consider material factors, for example).

39. However, applying the correct test, the Supreme Court reached the same conclusion as the Court of Appeal and decided that the chief constable was fully aware from the evidence at trial of the nature of AR's defence, and his personal circumstances, and took account of the potential impact on his employment prospects. There was no indication of any further information he would have wished to advance, and the Court held that it was not necessary to consult with the appellant in those circumstances before disclosure was made. Further, it was not necessary for the police to conduct a full analysis of the likelihood of the appellant's guilt (despite his acquittal) and it was enough that an opinion had been formed that the allegation of rape might be true.

40. The Supreme Court applied the approach set out in the leading case of *R (L) v Metropolitan Police Commissioner* [2010] AC 410 in reaching a balance between the need to protect vulnerable people

and the requirement to respect a person's right to respect for private life (which includes the right to pursue chosen employment and professions). However, the Court was concerned about the lack of guidance available to the police and employers in cases where there had been an acquittal. In L the allegations included in the ECRC were not the subject of criminal charge and were largely undisputed, but of course in acquittal cases the inclusion of allegations is likely to be highly contested. The Supreme Court advised that careful thought needed to be given to the circumstances in which allegations are included where there has been an acquittal, and noted the available evidence that indicated that ECRC's relating to acquittals represented a very small proportion of the whole, suggesting that many chief constables 'find no cause for disclosure of risk in cases following acquittals' (para 76).

41. Another case on the theme of disclosure was *R (on the application of QSA and others) v Secretary of State for the Home Department* [2018] EWHC 407 (Admin); [2018] 1 WLR 4279 . Those applying for jobs with vulnerable children or adults do not have the benefit of the usual approach to 'spent' convictions when seeking a criminal record certificate (or an ECHC as discussed in the previous case) under the Police Act 1997. In particular, although some convictions (usually minor) are 'protected' from being disclosed in such cases, if a person has more than one conviction, then this protection is lost. The claimants in this case had multiple convictions, many years ago, under s1 Street Offences Act 1959, which meant that the convictions were disclosed (even though spent) when applying for certain types of employment.

42. The claimants' case was that the statutory framework which required this disclosure was not in accordance with the law and disproportionate for the purposes of Article 8 ECHR and the right to respect for private life. The Divisional Court agreed with the claimants, applying the approach of the Court of Appeal in *R (on the application of P) v Secretary of State for the Home Department* [2017] EWCA Civ 321. The court found that the multiple conviction rule acted in an arbitrary and indiscriminate manner, and was also not necessary in democratic society for the protection of vulnerable people. The rule meant that there was no place for an examination of a link between the convictions disclosed and the risk posed in any particular employment. The rule worked against the aim of the 1959 Act to support those who wished to leave prostitution.

43. The case is the latest in a line of cases which challenges rules that are applied in relation to disclosure of convictions and cautions which make no provision for taking into account the nature of the offences, the length of time since the offences were committed, or the possible relevance of the convictions to the particular job applied for. These include the P case referred to above and the leading case of *R (on the application of T) v Chief Constable of Manchester* [2014] UKSC 35. The *P* case was recently heard by the Supreme Court, and judgment is awaited. Depending on the outcome of that case, the government can be expected to bring forwarded a more nuanced scheme in relation to the disclosure of cautions and convictions in the employment context. Although the claimants were successful in their Art 8 arguments, the court found that the multiple conviction rule was not discriminatory for the purposes of Art 14 ECHR, as any discrimination could be justified as a proportionate means of achieving the legitimate aim of protecting vulnerable people.

Discrimination in public law 2017-2018

- Adam Straw -

1. This talk will consider important points from some of the cases involving discrimination in judicial review over the last year or so. There have been a large number of recent cases of this type, which demonstrate the power of discrimination in public law. The courts have been prepared to quash or declare unlawful controversial legislation and other decisions.

Equality Act 2010

Direct discrimination

2. In *R (Coll) v. Secretary of State for Justice* [2017] 1 WLR 2093, the Supreme Court decided that the limited national provision of probation hotels for women as compared to men was direct discrimination, contrary to s.13 EA 2010. That is because some (albeit not all) women would be less favourably treated by being placed further away from their homes than men. The Supreme Court held that, to establish direct discrimination, it was not necessary to show that all people who shared the protected characteristic would be less favourably treated.

3. Normally direct discrimination is unlawful, regardless of justification. But in the context of public functions, there are a series of exceptions to that set out in schedule 3. This discrimination was capable of being justified under para 26 that schedule. However, it was not justified in this case. The Secretary of State could not show that it was a proportionate means of achieving a legitimate aim, because he had breached the equality duty in s.149 EA 2010. This indicates the importance of considering s.149 EA 2010 in any discrimination claim.

Indirect discrimination

4. Indirect discrimination is prohibited by s.19 EA 2010. It occurs where a provision, criterion or practice is applied to all relevant people, but it puts persons who share a protected characteristic with the claimant at a particular disadvantage. It is lawful if it is a proportionate means of achieving a legitimate aim.

5. *Essop v. Home Office* [2017] 3 WLR 1343 considered a test for promotion in the civil service, for which the BME pass rate was 40% that of white people. The SC indicated that this statistic was sufficient of itself to show that a provision, criterion or practice put BME people at a particular disadvantage. The reason why the pass rate was lower was irrelevant at this stage.

6. It is then effectively for the defendant to justify the discrimination. The SC remitted the case to the Tribunal, indicating that it would be for the Home Office to disprove indirect discrimination by showing that the claimant was put at the disadvantage (failing the test) solely because he or she performed poorly and not because of race.

7. There are many fields where people with a protected characteristic are at a statistical disadvantage. The Lammy Review identified a number of respects in which minorities in the criminal justice system are

statistically worse off[1]. *Essop* would suggest that many such cases are prima facie indirect discrimination, and the burden passes to the government to justify them.

8. The defendant must produce concrete evidence to justify indirect discrimination, as *R (TW) v. Hillingdon* [2018] EWHC 1791 (Admin) demonstrates. A local authority's housing scheme provided that households with at least 10 years' continuous residence were qualified to join certain priority bands in the housing register. This put Irish Travellers at a disadvantage and indirectly discriminated against them.

9. The court applied the four-stage test familiar in human rights cases, in deciding whether the measure was proportionate and justified. When the local authority decided upon the scheme, and within its equality impact assessment, there was no evidence that it considered the adverse impact specifically on Irish Travellers, whether any such impact was justified, or whether it could be mitigated. This was the central reason for the court finding the discrimination was not justified and was unlawful.

10. (By contrast, the same rule was not unlawful discrimination against the refugee claimant in *R (G) v. Hillingdon LBC* [2018] EWHC 1937 (Admin)).

Duty to make reasonable adjustments

11. The duty to make reasonable adjustments is defined in s.20 and 21 EA 2010. Ordinarily it requires asking whether the disabled claimant has been placed at a substantial disadvantage. However, in public law claims, the court must decide whether *disabled persons generally* have been placed at a substantial disadvantage: s.20(1 and 13) read with sch.2, para 2 EA 2010.

12. In practice, this requires a focus on the particular type of disability, and the particular group of people, who are at issue in the claim. For example, the relevant group may be wheelchair users on buses (*Paulley v FirstGroup plc* [2017] UKSC 4; 1 WLR 423); or immigration detainees with mental disabilities (*R (VC) v. Secretary of State for the Home Department* [2018] EWCA Civ 57; 1 WLR 4781), or autistic prisoners (*R (Hall) v. Secretary of State for Justice* [2018] EWHC 1905 (Admin).

13. It follows that the first requirement (in s.20(3) EA 2010) would become this, where the claim involves autistic prisoners:

> "where a provision, criterion or practice of A's puts autistic prisoners at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage."

14. It is not necessary to show that everyone in the chosen class is put at a substantial disadvantage. It is sufficient that a significant number of them will be. In *VC* the relevant PCPs included that immigration detainees with mental illness were not provided with assistance in understanding the reasons for segregating them or for their continued detention, or in making representations in respect of those matters. These PCPs would place some detainees who, as a result of mental illness were unable to understand or make representations, at a substantial disadvantage: §154. That was sufficient to engage the duty, even though many such detainees would not need assistance.

[1] www.ethnicity-facts-figures.service.gov.uk/crime-justice-and-the-law/policing/stop-and-search/latest

15. If the class of disabled persons is put at a substantial disadvantage, the next question is whether reasonable adjustments have been made. The question is also a general one: has the defendant taken reasonable steps to avoid the disadvantage to autistic prisoners as a class? In *Finnigan v. Chief Constable of Northumbria* [2014] 1 WLR 445 §38 and 42 the first instance judge erred insofar as he considered whether the defendant failed to make reasonable adjustments by reference to the needs of the claimant individually, rather than by reference to the needs of deaf persons as a class.

Burden of proof

16. Under s.136 EA 2010 the burden of proof shifts to the defendant if there are facts from which the court could conclude, in the absence of an explanation by the defendant, that a provision was contravened. For example, in the context of the duty to make reasonable adjustments: "once a potential reasonable adjustment has been identified by the claimant, the burden of proving that such an adjustment was not a reasonable one to make shifts to the defendants": *Finnigan,* §38 and 42.

17. In *VC* there was a breach of the duty to make reasonable adjustments because the claimant outlined adjustments which could have been made. They included providing a system involving advocates to assess and assist those with mental illness. The Secretary of State failed to discharge her burden to show those adjustments were unreasonable, and so the court held she breached the duty: §156, 160 and 193.

18. If there was a breach of the duty to make reasonable adjustments for disabled persons, the court must go on to consider the impact on the claimant. The question is, had the duty had been complied with, was there a real prospect that this would have made a difference to the claimant (*Paulley* §60, *VC* §177)? If so, the breach will be unlawful.

Discrimination by association

19. It is direct discrimination to treat a person less favourably because of a protected characteristic, whether or not that person has that characteristic (s.13 Equality Act 2010, with certain exceptions). For example, it is unlawful to treat the mother of a disabled boy less favourably because he is disabled: *Coleman v Attridge Law* (Case C-303/06) [2008] ICR 1128. However, there must be a sufficiently close association between the claimant and the protected characteristic.

20. In *Lee v. Ashers Baking Co Ltd* [2018] UKSC 49; 3 WLR 1294 a bakery refused to produce a cake with the words "support gay marriage" on it, due to a sincere belief that gay marriage was inconsistent with biblical teaching. The Supreme Court held this was not a case of associative discrimination. There was not a sufficiently close association because the less favourable treatment was on the ground of a message, not a particular person or persons.

21. *Lee v. Ashers* also considered Northern Ireland legislation which prohibits discrimination on the ground of religious belief or political opinion. (The Equality Act 2010 is slightly different: religious or philosophical beliefs[2] are protected in s.10, but there is no explicit mention of political opinion.) The Supreme Court decided that support for gay marriage was a political opinion. However, the

[2] The key case defining what is a philosophical belief is *Grainger Plc v. Nicholson* [2010] ICR 360

discrimination was not unlawful. That was because to require the bakers to produce the cake would be contrary to their rights under articles 9 and 10 ECHR, which included that they should not be forced to express an opinion with which they disagreed.

Article 14 of the European Convention on Human Rights

22. Article 14 states:

> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

23. Article 14 has certain limitation, and certain advantages as compared to the Equality Act 2010. For example, a court may declare legislation incompatible with article 14, whereas preparing or making legislation are excluded from the protections in the provisions of the Equality Act 2010 (by paras 1 and 2 of sch.3 EA 2010).

Within the ambit

24. To engage article 14, it is necessary for the facts to fall "within the ambit" of another Convention right. What this means is not entirely clear, but it may be satisfied even if the measure does not engage the relevant Convention article.

25. In *Re McLaughlin* [2018] 1 WLR 4250 the claimant lived in a relationship with a man for 23 years, and they had four children together. After he died, her claim for widowed parent's allowance, under s.39A of the Social Security Contributions and Benefits (Northern Ireland) Act 1992, was rejected on the grounds that it could only be paid to a spouse of the deceased. That was despite the man having paid enough contributions during his life as would have entitled the claimant to the allowance had they been married. The Supreme Court declared this was incompatible with article 14 read with article 8.

26. The court reiterated that the denial of a contributory social security benefit falls within the ambit of the protection of property within article 1 of protocol 1 ('A1P1' – the protection of property[3]). It also concluded that the payment of the widow's parents allowance fell within the ambit of article 8. The Supreme Court referred to some of the cases currently going through the courts relevant to the question of whether a measure falls within the ambit of article 8, but did not come up with a clear answer to that question. It held that the provision of the benefit had a *more than tenuous connection with the core values protected by article 8*, namely securing the life of children within their families. There was no need to show an adverse impact other than the denial of the benefit. This was sufficient to engage article 14.

Analogous situation

27. Unlike in domestic anti-discrimination law, article 14 does not require the identification of a comparator, real or hypothetical, with whom the complainant has been treated less favourably. The test is more flexible: there must be a difference in treatment between two persons *in an analogous situation*.

[3] In *R (Mathieson) v. Secretary of State* [2015] UKSC 47; 1 WLR 3250 the Supreme Court held that DLA fell within the ambit of A1P1.

28. For example, married people may or may not be in an analogous situation, depending on the specific context. For example, in *Re McLaughlin* the unmarried claimant was in an analogous situation to a married woman in respect of widowed parents allowance. That was because that allowance was paid only when the survivor was responsible for children: its purpose was to benefit the children. From the children's perspective it makes no difference whether their parents were married or not.

29. The opposite conclusion was reached in *R (Harvey) v. Haringey LBC* [2018] EWHC 2871 (Admin), in respect of a survivor's pension paid for the claimant's benefit, where the unmarried deceased partner had not paid sufficient contributions, but the comparator survivor's deceased spouse had done. The survivors were not in an analogous situation.

30. Autistic children with a tendency to physical abuse were held to be in an analogous position to disabled children with no such tendency in *C v. Governing Body of a School* [2018] UKUT 269 (AAC).

Protected status

31. Article 14 specifies a number of grounds upon which discrimination is prohibited, which include "other status". That is interpreted in an increasingly broad way. It is no longer limited to a personal or innate characteristic, but includes:
    - Being married, or not being married[4];
    - Being a prisoner, having a particular sentence length[5] or type[6], and being on remand[7];
    - Having unspent convictions[8];
    - Being employed, or unemployed[9];
    - Place of residence, and having moved from one local authority to another[10]; and
    - Immigration status[11].

32. "Other status" can have more than one component, such as a woman who was black and a prostitute: *R (A) v. Health Secretary* [2017] 1 WLR 2492 §27.

33. The circumstances in which discrimination occurs on the ground of age, are under-developed. Being in a particular age range will ordinarily amount to a protected status. For example, in *Khamtokhu v. Russia* [2017] 65 EHRR 6 the Grand Chamber held that article 14 was engaged in respect of national legislation which exempted offenders who were aged under 18 or over 65 from life imprisonment: §59-62.

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[4] *Re McLaughlin* §31

[5] See e.g. *Shelley v. UK* (223800/06), 4 Jan 2008; *Clift v. United Kingdom* (7205/07) 13 July 2010.

[6] Suspended sentence: *Alexandru Enache v. Romania* (16986/12), 3 October 2017 §69; expulsion order: *Rangelov v. Germany* (5123/07) 22 March 2012

[7] *Aleksandrov v. Russia* (14431/06) 27 March 2018

[8] *R (McNeice) v. Criminal Injuries Compensation Authority* [2018] EWCA Civ 1534

[9] *Arras v. Italy* (17972/07) 14 Feb 2012

[10] *R (TP) v. Secretary of State for Work and Pensions* [2018] EWHC 1474 (Admin) and *Carson v. United Kingdom* [2010] 51 EHRR 13, §70-71

[11] *Bah v. United Kingdom* [2012] 54 EHRR 21.

Justification

34. The key question in many article 14 cases, is whether the discrimination is justified.

35. In *R (Steinfeld) v. Secretary of State for International Development* [2018] UKSC 32; 3 WLR 415 the Supreme Court declared that sections 1 and 3 of the Civil Partnership Act 2004 were incompatible with article 14 taken with article 8, to the extent that they precluded a different sex couple from entering a civil partnership. It reiterated the four-stage test for deciding whether an interference with a Convention right (including article 14) is justified:

> "(a) is the legislative objective (legitimate aim) sufficiently important to justify limiting a fundamental right;
> (b) are the measures which have been designed to meet it rationally connected to it;
> (c) are they no more than are necessary to accomplish it; and
> (d) do they strike a fair balance between the rights of the individual and the interests of the community?"

(a) Legitimate aim/legislative objective

36. Normally, it will be easy for the government to establish that there was a legitimate aim. However, in *Steinfeld* the government put forward a 'wait and see' justification. Following a debate in Parliament and two public consultations, the government decided it should examine how the fairly recent extension of marriage to same-sex couples impacted on civil partnerships, before making a final decision. The Supreme Court held that this was not a legitimate aim which was sufficiently important to justify discrimination. The aim was not "intrinsically linked" to the discriminatory treatment. The government had been obliged to eliminate immediately the inequality of treatment.

37. It is important to correctly identify the legislative objective. In *Re. Brewster* [2017] UKSC 8; 1 WLR 519 the Supreme Court considered Northern Ireland legislation which limited a survivor's pension to the spouse, civil partner or a co-habiting partner who had been nominated by an existing member of the scheme. It held this was incompatible with article 14 read with A1P1 ECHR.

38. The government argued that the legitimate aim involved a proportionate means of limiting administrative costs. This was rejected, principally because that had not been the objective of the legislation in question. Rather, that objective had been to extend survivors' pensions to unmarried couples, and remove the difference in treatment between cohabitees and married people or civil partners. The Supreme Court decided that there was no rational connection between this objective, and the imposition of the nomination requirement.

39. The objective of the legislation at issue may be relevant to other stages of the analysis. For example, in *Brewster,* the legislative purpose described above supported a stricter standard of review of whether discrimination between cohabitees, and married people/civil partners, was justified. A central reason for deciding that the pension legislation in *McLaughlin* was incompatible with article 14, was that the legislative purpose was to diminish the financial loss caused to families with children by the death of their parent. The loss is the same whether or not the parents were married to each other.

(b) Rational connection

40. As seen in *Brewster* there must be a rational connection between the legislative objective/legitimate aim pursued, and the measure challenged. In *Re. McLaughlin* the court identified the legitimate aim as being to promote the institutions of marriage and civil partnership. The court said it was debatable that there was a rational connection between that and the limitation on widowed parent's allowance: it seemed "doubtful in the extreme" that any couple is prompted to marry by the prospect of bereavement benefits. The Supreme Court also said that, where means-tested benefits are concerned, it seems difficult to see a justification for granting them to those who are married, but denying them or paying them at a lower rate to couples who are not married.

41. The case was ultimately decided on the basis that denying the claimant and her children the benefit was not a proportionate means of achieving the legitimate aim of privileging marriage.

(c) No more than necessary

42. This at times has been held to mean that there is no less intrusive way of achieving the aim pursued: *R (A) v. Health Secretary* [2017] 1 WLR 2492 at §32. In that case, a policy which limited free abortion services to those ordinarily resident in England was narrowly held to be justified discrimination. That was in part because the policy aim was to preserve devolved decision-making as to this type of health service, and there was no less intrusive way of achieving that aim.

43. By contrast, in *R (Tigere) v. Secretary of State for Business, Innovation and Skills* [2015] 1 WLR 3820 the Supreme Court decided that a law limiting student loans to those with indefinite leave to remain ('ILR'), breached article 14. The aim of the rule was to ensure that limited funds were targeted at those most likely to stay in the country and to make an economic contribution. The rule was unjustified, in part because there would be some migrants who would be just as likely to remain in the country as those with ILR, and a rule could have been chosen which more closely fitted the aims of the measure (§32-41).

(d) Fair Balance

44. In *C v. Governing Body of a School* [2018] UKUT 269 (AAC), the Upper Tribunal considered the Equality Act 2010 (Disability) Regulations 2010. Reg.4(1) states that a number of conditions, including (c) a tendency to physical abuse, do not amount to impairments for the purpose of the EA 2010. That means the EA 2010 does not provide any protection from discrimination on the basis of any such condition, even if it is a symptom of a disability. The claimant was autistic and was excluded from school because of his tendency towards physical abuse, which arose from his autism. The Upper Tribunal held that reg.4(1)(c) breached article 14 ECHR, read with article 2 of protocol 1 (A2P1 the right to education).

45. The case turned on the fourth stage: the measure did not strike a fair balance. The consequences of the measure were serious, as it allowed special educational needs schools to exclude children such as L, or to refuse to make reasonable adjustments for them. Aggressive behaviour was not a choice for autistic children. The Secretary of State had not properly considered the balancing exercise between the respective interests, which meant little weight should be given to his view. He put forward no evidence to show the measure is justified, and so there was a breach of the ECHR.

Burden of proof

46. As *C* demonstrates, once a relevant difference in treatment has been established, it is for the government to prove justification. That principle is reiterated in a number of the recent cases, for example in *Steinfeld.* It appears to have been a basis for the conclusion in that case. The court concluded that a fair balance had not been struck. That was because the interests of the community in denying opposite sex couples the option to form civil partnerships was "unspecified and not easy to envisage" (§52); while the consequences for the couples themselves were potentially far reaching.

Margin of appreciation/discretionary area of judgment

47. This is an issue which sometimes touches on all four of the above criteria. The margin of appreciation is not directly applicable in domestic courts, as it is based on the principle that the ECtHR will permit different member states taking different approaches to some issues. However, the government may have a discretionary area, depending on factors such as the nature of the right at issue, the purpose of the legislative measure at issue, whether the legislature made a fully informed choice, and whether the measure is a contentious political issue.

48. In *Steinfeld* the Supreme Court rejected the argument that, because this was a law regarding social policy which had been made by Parliament, it should be given a broad discretionary area of judgment. The Supreme Court held that any margin is narrow in respect of sexual orientation discrimination, the court must apply "strict scrutiny" to any justification, and "convincing and weighty reasons" are required (§32). The fact that Parliament created the inequality, and that the government did not appear initially to recognise that the measure interfered with Convention rights, were also relevant.

49. Similarly, in *Brewster* the Supreme Court noted that the pension scheme was chosen by the legislature, and was in the field of social-economic policy. However, the fact that the impact of the scheme had not been addressed by the government department responsible for it, or the scheme was defended on different grounds to those given by the government department initially, meant the court need be less reticent about intervening. And in *R (A) v. Health Secretary* the Supreme Court held that the court must decide for itself whether a fair balance had been struck, even in respect of a controversial social and economic issue such as payment for abortion services.

Bright line rules

50. The government often argues that a bright line rule is justified for the sake of good administration, even if it leads to unfair results in some cases. *Brewster* held that the government must produce evidence to establish that any bright line rule has administrative advantages. Further, the bright line rule must be rationally connected to the aim and a proportionate way of achieving it. A rule will not be justified if has irrational results in a legally significant number of cases, and a less intrusive measure could have been chosen: *R (F) v. Secretary of State for Justice* [2011] 1 AC 331; and *Tigere*, §37-38.

51. An interesting example in the age context is *Hunter v. Student Awards Agency for Scotland* [2016] CSOH 71. The Scottish Court of Session concluded that an age limit of 55 for student loans was unjustified discrimination, contrary to article 14 read with A2P1. Although there was a rational purpose of the limit, which was to target funds to those who could still enter the workforce, it was not lawful because there would be some people aged over 55 who could enter the workforce and repay the loan.

Discrimination, vulnerable groups and articles 2/3

52. The ECtHR has on many occasions emphasised that more stringent duties are owed under articles 2 and 3 to children and other vulnerable individuals, e.g. *DMD v. Romania* (23022/13) 3 October 2017, §41 and 51. Similarly, the court has noted that, in determining whether there was a violation of article 2 or 3, an important factor is whether the individual is particularly vulnerable.

53. Vulnerability may arise, for instance, because the individual is suffering from a mental disorder, is young, or belongs to a category at heightened risk of abuse such as those with HIV, those convicted of war crimes, gay people, police collaborators, relatives of prison guards, or sexual offenders (e.g. *Martzaklis v. Greece* (20378/13) 9 July 2015, and *Dimcho Dimov v. Bulgaria (No. 2)* (77248/12) 29 September 2017 §61, with further references). Groups who have been targeted in the past, whether because of their race, health or other status, require special protection under the Convention: *DH v. Czeck Republic* (57325/00) 13 Nov 2007 §182; *Balazs v. Hungary* (15529/12) 20 Jan 2016, §53).

54. This may mean that a relatively low threshold of mistreatment against those in a vulnerable position will breach article 2 or 3. Treatment that is lawful if inflicted on an adult, may breach article 3 if inflicted on a child: *Zherdev v. Ukraine* (34015/17) 27 July 2017, §86. In *Zherdev* the applicant was a minor who was handcuffed in his underwear in a police cell for 2 ½ hours. The authorities had a valid reason for taking his clothes, no-one of the opposite sex was present; and the applicant was in a relatively enclosed space with no public exposure. Nevertheless, there was a violation of article 3 (§93). Similarly, in *Lyalyakin v. Russia* (31305/09), 12 March 2015, §§75-78, there was a violation of article 3 due in part to the stripping of a nineteen-year-old army recruit down to his briefs.

55. A discriminatory motive, and a background of discrimination against a particular group, means violence is more likely to reach the threshold necessary to breach article 3: *M.C. and A.C. v. Romania* (12060/12) 12 July 2016, §116-119. Discrimination can of itself amount to degrading treatment within the meaning of article 3: *Balazs v. Hungary* (15529/12) 20 Jan 2016, §49; *Abdu v. Bulgaria* (26827/08) 11 June 2014, §38.

56. Special diligence is required when dealing with complaints concerning domestic violence: *Talpis v. Italy* (41237/14), 2 March 2017. In *Talpis* the ECtHR concluded that there was a violation of article 14, taken together with articles 2 and 3. The principle bases for the finding were that the applicant presented statistical data to show domestic violence primary affects women; and the domestic authorities had failed in the particular case to provide the applicant with effective protection. In *Bălşan v. Romania* (49645/09) 23 May 2017 there was a breach of article 3 and article 14 for failure to protect the applicant from a known risk of domestic violence. It was relevant that the woman was said to have provoked the violence.

57. The authorities are under a duty to take all reasonable steps to investigate the existence of any possible discriminatory motive behind acts of violence, whether racist, sexist, homophobic or otherwise: *M.C. and A.C. v. Romania* (12060/12) 12 July 2016, §105 and 113; *Skorjanec v. Croatia* (25536/14) 28 June 2017 §54-57. The court describes this as "a difficult task" §113. In *M.C.* the police investigation did not properly examine possible homophobic motives behind an attack, in breach of the article 3 procedural duty: §124-125.

58. Where there is a credible allegation that a person was killed as a result of his political journalism, the authorities must explore "with particular diligence" whether that is correct: *Huseynova v. Azerbaijan* 10653/10, 13 April 2017.

Public law discrimination?

59. In *R (Gallaher) v. Competition Markets Authority* [2018] UKSC 25; 2 WLR 1583 the Supreme Court was called upon to decide whether there are distinct principles in public law of equal treatment or substantive fairness. It essentially decided there are not. It noted that issues of consistency may arise, but they generally do so as aspects of the standard grounds for review, such as rationality or legitimate expectation. Similarly, while procedural fairness is well established, substantive fairness is not a distinct legal criterion.

Adam Straw

A REVIEW OF THE YEAR IN PUBLIC LAW
15 November 2018

In fairness: Consultation, reasons and candour

Katie O'Byrne
Doughty Street Chambers

Introduction

1. This talk will explore three aspects of the duty to act fairly where there have been important developments in 2018: the duty to consult, the duty in certain contexts to give reasons, and the duty of candour.

2. The grounds of judicial review are sometimes split into three sub-sets: unfairness, unlawfulness and unreasonableness.

3. However, grounds are not rigid but open-textured, overlapping and interlinking. In the words of Lord Donaldson MR in *R (Oladehinde) v SSHD* [1991] 1 AC 254, at 280E:

> "*It would be a mistake to approach the judicial review jurisdiction as if it consisted of a series of entirely separate boxes into which judges dipped as occasion demanded. It is rather a rich tapestry of many strands, which cross, re-cross and blend to produce justice.*"

4. The concept of fairness in public law (or the duty of public authorities to act fairly) forms its own tapestry of interweaving threads: fair hearing, including notice of decisions and adequate consultation; the rule against bias; and the provision of adequate reasons to allow decisions to be understood and challenged. Again, these categories are not finite. The broad rubric of fairness can also encompass what might be called 'behavioural' obligations of cooperation and candour between the parties before the court.

Duty to consult / Fair consultation

5. A duty to consult prior to the making of a decision may be imposed by statute, statutory guidance, the common law and / or by way of legitimate expectation.

6. Whether or not there is an express duty to consult, if consultation is embarked upon it must be carried out properly: *R v North and East Devon Health Authority ex p Coughlan* [2001] QB 213.

7. The leading case on consultation is now *R (Moseley) v Haringey LBC* [2014] 1 WLR 3947. The Supreme Court held that irrespective of the source of the duty to consult, the common law duty of procedural fairness will inform how the consultation should be conducted: [23] (Lord Wilson). What fairness requires will vary, and is linked to the purpose of the consultation: *Moseley*, [24] (Lord Wilson), [36] (Lord Reed JSC).

8. In *Moseley*, the Supreme Court endorsed the so-called 'Sedley criteria' (submitted in argument by Stephen Sedley QC, as he then was, in *R v Brent London BC ex p Gunning* (1985) 84 LGR 168 at [189]) as a 'prescription for fairness' in consultation. To be fair, a consultation:

   (i) Must occur when proposals are at a formative stage;

   (ii) Must give sufficient reasons for any proposal to permit intelligent consideration;

   (iii) Must allow adequate time for consideration and response;

   (iv) Requires clear evidence that the decision maker has considered the responses, or a summary of them, before taking its decision.

9. These were endorsed by Lord Woolf MR, giving the judgment of the Court of Appeal in *R v North and East Devon Health Authority ex p Coughlan* [2001] QB 213, [108].

10. There has sometimes been confusion about the test for a fair consultation. The correct test is whether the consultation was "*so unfair as to be unlawful*": *R (West Berkshire DC) v SSCLG* [2016] EWCA Civ 441.

11. In *R (Baird) v Environment Agency and Arun District Council* [2011] EWHC 939 (Admin), [50]-[52], Sullivan LJ held that: "*so unfair as to be unlawful … is likely to require 'a factual finding that something has gone clearly and radically wrong'*". However, "*clearly and radically wrong*" is not the test (*Baird*, [51]). Post-*Moseley*, to the extent that *Baird* is regarded as relevant at all, it has generally been applied in relation to common law rather than statutory duties to consult: see e.g. *R (L) v Warwickshire County Council & Anor* [2015] EWHC 203 (Admin) per Mostyn J ("*the high test of Sullivan LJ was still applicable where the common law had imposed the duty*": [22]).

12. A recent example of the application of the Sedley criteria and the "*so unfair as to be unlawful*" test is the case of *R (Law Society) v Lord Chancellor* [2018] EWHC 2094 (Admin), where the Law Society challenged the Lord Chancellor's decision to reduce fees payable under the Litigators' Graduated Fees Scheme for criminal defence work.

13. During the consultation on the fee reduction, in which the consultees included criminal law firms and others, no opportunity was given to comment on statistical analysis relied on by the Ministry of Justice in formulating its proposal. The analysis estimated a £33 million increase in expenditure following *R v Napper (Costs)* [2014] 5 Costs LR 947 (change in calculation of pages of prosecution evidence or "PPE"). The proposal was intended to offset that expenditure by reducing the maximum number of PPE which could be counted in fixing graduated fees. The Court regarded the analysis as "*pivotal to the justification for the Decision*": [82].

14. The Court held that consultees were entitled to expect that consultation conducted by government will be "*open and transparent*" and that any official analysis on the crucial question will be mentioned in the consultation documents: [93]. Without provision of the analysis, it was impossible for consultees to

intelligently consider the proposal or give reasons for disagreeing with it: [85]. The Court was critical of the Lord Chancellor's submission that consultees were sophisticated and should have inferred the facts; this was *"not a reason for withholding important information … if anything, the opposite is true"*: [95]. Failure to disclose the information was prejudicial to consultees and a fundamental flaw, rendering the consultation so unfair as to be unlawful: [97].

Duty to give reasons

15. There is no general duty to give reasons, but fairness may require it: *R v Secretary of State for the Home Department, ex p Doody* [1994] 1 AC 531. However, the case law is arguably trending towards a more general obligation (see e.g. Fordham, *Judicial Review Handbook* (6th ed (2012)), [61.1.2], and the cases cited therein).

16. In *Dover C v CPRE (Kent)* [2018] 1 WLR 108, the Supreme Court analysed the right to reasons in the planning context, revisiting *Doody*. The Court found that a local planning authority may be under a duty to give reasons for its decisions in the interest of fairness and openness, despite there being no general duty under the relevant statute.

17. The Supreme Court emphasised the link between procedural fairness, the right to reasons and the maintenance of the rule of law. This is a common theme. In *Doody,* "*[f]airness provided the link between the common law duty to give reasons … and the right of the individual affected to bring proceedings to challenge the legality of that decision*": [54] (Lord Carnwath).

Duty of candour

18. The duty of candour is the requirement on both parties to disclose all material facts known to a party in judicial review proceedings. For these purposes, the relevant duty is that on the defendant rather than that on the claimant.

19. In *R (Quark Fishing Limited) v SSFCA* [2002] EWCA Civ 1409, Laws LJ explained at [50]:

> "*[T]here is… a very high duty on public authority respondents, not least central government, to assist the court with full and accurate explanations of all the facts relevant to the issue the court must decide*."

20. The decision in *R (Hoareau) v Secretary of State for Foreign and Commonwealth Affairs* [2018] EWHC 1508 (Admin) concerned a specific disclosure application arising from judicial review of the government's resettlement decision in relation to the Chagos Islanders. Singh LJ outlined the relevant principles of the duty of candour, again linking it with the rule of law, at [8]-[24]. In particular:

    (i) Disclosure of documents, in the usual sense, is not automatic in judicial review proceedings;

(ii) Instead, the "*different and very important*" duty of candour and cooperation falls upon solicitors and barristers acting for public authorities. It is a "*self-policing duty*" (Fordham, *Judicial Review Handbook* (6th ed, 2012), [10.4]);

(iii) The duty of candour and co-operation is to assist the court with full and accurate explanations of all the facts relevant to the issues which the court must decide; to identify "*the good, the bad and the ugly*". "*[T]he underlying principle is that public authorities are not engaged in ordinary litigation, trying to defend their own private interests. Rather, they are engaged in a common enterprise with the court to fulfil the public interest in upholding the rule of law*": [20];

(iv) Witness statements filed on behalf of public authorities must not deliberately or unintentionally obscure areas of central relevance. Drafters should look carefully at the wording used to ensure that it does not contain any ambiguity or is economical with the truth. There can be no place in this context for 'spin';

(v) The duty of candour is a duty to disclose all material facts known to a party. The duty not to mislead the court can occur by omission, for example by the non-disclosure of a material document or fact or by failing to identify the significance of a document or fact.

Case study: Refugee children in Europe

21. The decisions of the Court of Appeal in *R (Citizens UK) v SSHD* [2018] 4 WLR 123 and *R (Help Refugees) v SSHD* [2018] EWCA Civ 2098 were significant for their discussion of the duties of fair consultation, giving reasons and candour. Both cases, brought by charities, concerned the fate of unaccompanied asylum-seeking children ("UASCs") in Europe following the demolition of 'the Jungle' camp in Calais in November 2016.

22. Citizens UK challenged the fairness of the UK government's 'expedited process' to assess the eligibility of UASCs to be transferred to the UK to live with family members (ordinarily under the Dublin III Regulation).

23. Help Refugees challenged the lawfulness of the SSHD's actions under s. 67 of the Immigration Act 2016 (called the 'Dubs amendment' after Lord Alf Dubs, formerly a child of the *kindertransport*, who introduced it). Section 67 contemplates the relocation of a specified number of UASCs to the UK despite having no family here:

> "***67. Unaccompanied refugee children: relocation and support***
>
> *(1) The Secretary of State must, as soon as possible after the passing of this Act, make arrangements to relocate to the United Kingdom and support a specified number of unaccompanied refugee children from other countries in Europe.*
>
> *(2) The number of children to be resettled under subsection (1) shall be determined by the Government in consultation with local authorities.*

(3) The relocation of children under subsection (1) shall be in addition to the resettlement of children under the Vulnerable Persons Relocation Scheme."

24. Help Refugees challenged both the fairness of the consultation with local authorities to specify the number (eventually set at 480), and the lack of reasons given to children who were refused eligibility for the scheme.

Consultation

25. In *Help Refugees*, the Court of Appeal stated that courts will not lightly find unfairness; it is for the public body to determine how to consult. Hickinbottom LJ (McCombe and King LJJ agreeing) perhaps unfortunately cited Sullivan LJ's standard from Baird, that unfairness is likely to require a factual finding that something has gone "*clearly and radically wrong*": [90](v).

26. The Court found no such error. The consultation was a complex exercise to determine local authority capacity, carried out in an uncertain and volatile situation. While the SSHD was required to determine "*the reasonably highest figure*", the consultation was necessarily "*broad-brush*" and not mathematically precise: [97]. The SSHD had "*a very wide discretion*": [98]. While some of the tools used for calculation were "*fairly crude*", they were not arbitrary or unlawful.

Reasons

27. In both cases, the UK government's reasons for refusal decisions were recorded on a single spreadsheet that was given to the French authorities to communicate to the children. The reasons were generally expressed in a single word or phrase: "*18+*", "*criteria not met*", or "*cousin*" (an insufficient relationship for the purposes of Dublin III).

28. In *Citizens UK*, Singh LJ held that the court's function is "*not merely to review the reasonableness of the decision-maker's judgment of what fairness required" (R (Osborn) v Parole Board* [2014] AC 1115, [65] (Lord Reed)), but to consider objectively whether there has been procedural unfairness. A person is entitled to be treated fairly at all relevant stages of the decision-making process, not merely in the outcome or in a 'corrective' further stage: [94].

29. In *Help Refugees*, the reasons were similarly "*patently inadequate*": [134], giving "*no real prospect of being able to challenge the decision*" and therefore a breach of the common law duty of fairness.

30. Hickinbottom LJ reflected on the increasing tendency in public law towards an obligation to give reasons for decisions, as an aspect of the duty to act fairly (*Citizens UK* at [184] and reiterated in *Help Refugees* at [127]):

> "*Once the Secretary of State had embarked upon that course, it was incumbent upon her to act lawfully in implementing it. In particular, she had a duty to act fairly. Although the conventional view is that the common law does not impose a general duty on all decision-makers to give reasons, the law has increasingly recognised that, with openness and transparency, fairness also often requires that reasons*

for decisions be given. In addition to improving the quality of decisions and instilling public confidence into the decision-making system, reasons not only assist the courts in performing their supervisory function over decision-makers but they are often required if that function is not to be disarmed. Reasons enable an interested party (and in due course … a court or tribunal) to understand why a decision has been made, and to come to a view as to whether it has been made lawfully or unlawfully."

Candour

31. In both cases, there was late disclosure of internal government emails showing that sparse reasons were given to the children, not due to urgency or to reluctance on the part of the French authorities, but because of perceived risk of legal challenge to the UK government. The French authorities were pressing for more detailed reasons to be given, and more detailed reasons were in fact recorded but not given to the children.

32. In *Citizens UK*, Singh LJ incorporated into his judgment the principles on candour from *Hoareau*: [105]. The Court found no evidence of bad faith, but concluded that there had been a "*serious*" breach of the duty of candour and cooperation (Singh LJ, [168]), which was particularly "*stark*" given the breach of procedural fairness (Hickinbottom LJ, [188]).

33. In *Help Refugees*, there was no allegation of breach of the duty of candour, but the evidence was in relevant respects the same, suggesting that the Court would have come to the same conclusion [133]-[134].

Conclusion

34. These developments, important in their own right, are also helpful to public law practitioners in giving a clear steer on current approaches in the courts to consultation, candour and reasons, and to the relationship between the concept of fairness and maintenance of the rule of law.

To discuss the work of our public law team, please contact the clerks:

Sian Wilkins
Senior Practice Manager (Civil)
s.wilkins@doughtystreet.co.uk

Rachel Finch
Senior Practice Assistant
r.finch@doughtystreet.co.uk

An 'amazing set of committed and talented barristers', Doughty Street Chambers has 'a great reputation, are leaders in their field' and is 'easy to work with'. Chambers has experts in public law and human rights, civil and international law matters, is 'the go-to set for inquest work', and 'covers everything under the crime umbrella' in London.

- **Legal 500**

"Sources are keen to highlight that the clerks are invariably very helpful."

- **Chambers & Partners**

"A "high calibre" set of staff led by the "extremely helpful" business development director Maurice MacSweeney, who attracts high praise from sources. One commentator states: "Maurice is very business-minded, and I think he's a massive credit to Doughty Street." The clerks here are described as user-friendly and organised."

- **Chambers & Partners**