



## Important developments in public law

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## **Policy challenges: *R(A) and BF (Eritrea)***

**Alice Irving**

# *Gillick v West Norfolk AHA*

*“It is only if the guidance **permits or encourages unlawful conduct** in the provision of contraceptive services that it can be set aside as being the exercise of a statutory discretionary power in an unreasonable way.”*

Lord Scarman, 181F

# R (Refugee Law Centre) v SSHD

*“There will in our judgment be something justiciably wrong with a system that places asylum seekers at the point of entry... at **unacceptable risk of being processed unfairly**....*

*Potential unfairness is susceptible to one of two forms of control which the law provides. One is access, retrospectively, to judicial review if due process has been violated. The other... is appropriate relief, following judicial intervention to obviate in advance **a proven risk of injustice which goes beyond aberrant... decisions and inheres in the system itself.**”*

Paras 6-7

# ***R (Tabbakh) v Staffordshire and West Midlands Probation Trust***

*“[T]he essential question the court [in Refugee Legal Centre] was asking itself was whether the system established by the policy under challenge was inherently unfair. An ‘unacceptable risk of being processed unfairly’ was a risk of unfairness in the system itself rather than one arising in the ordinary course of individual decision-making.”*

Richards LJ, para 35, 38



# **R (Tabbakh) v Staffordshire and West Midlands Probation Trust**

*“I would... put Gillick’s case to one side. It was concerned with the reviewability of guidance on the ground that it was erroneous in law and would therefore lead to unlawful decisions. That is a materially different issue from the issue of procedural unfairness that arises here, in relation to which the decision in the Refugee Legal Centre case is directly in point... It concentrates on **whether the system established by the relevant policy is inherently unfair... [and] effectively equates an unacceptable risk of unfairness with a risk of unfairness inherent in the system itself.**”*

Richards LJ, para 48.

# ***R (A) v SSHD***

- Supreme Court. 2021. Judgment of Lord Sales and Burnett, for the Court.
- Child Sex Offender Disclosure Scheme (CSOD) Guidance.
- Argued that CSOD is unlawful because there is a significant and/or unacceptable risk of a breach of art 8 and/or the common law, arising from lack of specificity in CSOD as to obtaining representations from those whose prior convictions may be disclosed.



# R (A) v SSHD

*“There is often no obligation in public law for an authority to promulgate any policy and there is no obligation, when it does promulgate a policy, for it to take the form of a detailed and comprehensive statement of the law in a particular area, equivalent to a textbook or the judgment of a court. Since there is no such obligation, there is no basis on which a court can strike down a policy which fails to meet that standard....”*

Para 39

# R (A) v SSHD

Broadly three types of cases where policy will be found unlawful by reason of what it says about the law:

- (i) Policy contains positive statement of law which is wrong (eg. *Gillick*)
- (ii) Authority promulgating policy has duty to provide accurate advice about the law, but fails to do so due to misstatement or omission.
- (iii) Authority decides to promulgate a policy and the policy purports to provide full account of legal position, but fails to do so because of misstatement or omission.

Para 46

# R (A) v SSHD

*“In our view, Gillick sets out the test to be applied. It is best encapsulated in the formulation by Lord Scarman at p 182F [sic] (reading the word “permits” in the proper way as “sanction” or “positively approve”) and by adapting Lord Templeman’s words: **does the policy in question authorise or approve unlawful conduct by those to whom it is directed?...**”*

Para 38

# R (A) v SSHD

*“The test set out in Gillick is straightforward to apply. It calls for a comparison of what the relevant law requires and what the policy statement says regarding what a person should do. If the policy directs them to act in a way which contradicts the law it is unlawful. The courts are well placed to make a comparison of normative statements in law and in the policy, as objectively construed. The test does not depend on a statistical analysis of the extent to which relevant actors might or might not fail to comply with their legal obligations...”*

Para 41



# R (A) v SSHD

*“[I]n our view the analysis and conclusion in Refugee Legal Centre can readily be assimilated with the approach to be derived from Gillick...*

*[W]here the question is whether policy is unlawful, that issue must be addressed looking at whether the policy can be operated in a lawful way or whether it imposes requirements which mean that **it can be seen at the outset that a material and identifiable number of cases will be dealt with in an unlawful way...***

*If one simply asks whether a policy creates an unacceptable risk that an individual will be treated unfairly... there is a danger that this could be taken as a freestanding principle distinct from that in Gillick, as seems to have been envisaged in Tabbakh.”*

Paras 62-4

# R (A) v SSHD

*“In UNISON this court held that there is a fundamental right under common law of access to justice...*

*The test applied was whether the making of the order created ‘a real risk that persons will effectively be prevented from having access to justice’... As Lord Reed observed... it is sufficient if a real risk of prevention of access to justice is demonstrated. This means that, in order to test the lawfulness of a measure on this basis, it is legitimate to have regard to evidence regarding its likely impact and the court has to make an overall evaluative assessment whether this legal standard is met or not (and statistics might have a part to play in making such an assessment.”*

Para 80

# R (A) v SSHD

*“In our view... the wider formulation of a test of systemic inherent unfairness in relation to a legal scheme which has been taken to be laid down in the line of cases stemming from Refugee Legal Centre will in most, if not all, circumstances dissolve into the Gillick principle and the UNISON principle, each with its own precise focus.”*

Para 83

# *R (BF (Eritrea)) v SSHD*

- Supreme Court. 2021. Judgment of Lord Sales and Burnett, for the Court.
- Policy guidance on age assessment of asylum seekers.
- Argued unlawful because does not remove possibility asylum seeker who is a child may be subject to adult regime.
- CA found unlawful on basis that the terms of the policy created a real risk of a more than minimal number of children being detained.



# R (BF (Eritrea)) v SSHD

SC rejected the argument that a policy permits or encourages unlawful conduct if it does not sufficiently remove the risk of unlawfulness:

*“Mr Hermer’s submission as to the effect of Gillick distorts this test to comparing a normative statement with a factual prediction, ie comparing the underlying legal position with what might happen in fact if the persons to whom the policy guidance is directed are given no further information...*

*If correct... [this] would transform the obligation from one not to give a direction which conflicts with the legal duty of the addressee to an obligation to promulgate a policy which removes the risk of possible misapplication of the law... There is no general duty of that kind in common law.”*

Para 51

What now for policy challenges?



***THE TWO CHILD RULE CASE  
SC and Others v Secretary of State for Work and  
Pensions [2021] UKSC 26***

# The two child rule

- Welfare reform in manifesto for 2015 election.
- Limits entitlement to child tax credits and Universal Credit to two children in the household, where third or subsequent child born after 6 April 2017.
- Limited exceptions: multiple births, adoption, kinship carers and rape.
- Claimants' challenge legislation under s6 HRA for breach of:
  - Article 8 (right to family life)
  - Article 12 (right to marriage and find a family)
  - Article 14 (prohibition on discrimination).



# Issues before the UKSC

1. Compatible with A8 and A12? **Yes.**
2. **Indirect discrimination against women v men? Yes (but justified).**
3. Direct discrimination against children? **No.**
4. Indirect discrimination against children? **No.**
5. Direct discrimination against children living in larger households? **Yes (but justified).**
6. **Appropriate for Court to determine compliance with UNCRC? No.**
7. Test for justification under A14? **MWRF, but with strict scrutiny for suspect grounds.**
8. Use of Parliamentary materials? **May be relevant as background only.**
9. Is the 2 child rule objectively justified? **Yes.**

# Indirect sex discrimination

*"In short, more women than men are affected because more women than men are bringing up children. **That is an objective fact.** There is no suggestion that that is itself the result of discrimination on the ground of sex. The differential impact on women is not, therefore, a special feature of this measure." (paras 197-8).*

## See also...

Adiatu v HM Treasury [2020] EWHC 1554 (Admin) at [141]:

*"The rate of SSP is **not a barrier or gateway** in this sense. It is a sum that is paid, in exactly the same way, to everyone who receives SSP, regardless of their protected characteristics. It does not place women or BAME employees at a particular disadvantage: everyone is treated the same."*

## See also...

R (The Motherhood Plan) v HM Treasury [2021] EWHC 309 (Admin) at [67]:

*“The disadvantage identified by the Claimants follows from the fact - for that is what it is - that they earned less in past years. I fail to see how that state of affairs requires them to be compensated through the benefits system now, by receiving a higher level of benefit. This is the Adiatu point: **the disadvantage is not caused by the measure but rather it exists independently of the measure.**”*

# Unincorporated treaties

*There is, accordingly, no basis in the case law of the European court, as taken into account under the Human Rights Act, for any departure from the rule that **our domestic courts cannot determine whether this country has violated its obligations under unincorporated international treaties.** (para 84)*

# Unincorporated treaties

*Cf.:*

- (i) Lord Wilson in *Mathieson v SSWP* [2015] UKSC 47;
- (ii) Lady Hale *In Re McLaughlin* [2018] 1 WLR 4250;
- (iii) Lord Wilson in *DA v SSWP* [2019] UKSC 21



# Unincorporated treaties

*“One might add that what Lord Wilson took from the unincorporated international treaties was that the Secretary of State had been under a duty to treat the best interests of children as a primary consideration before making the legislation. There could have been no objection if he had instead treated **the best interests of children as a relevant factor** in the court’s assessment of whether the differential treatment resulting from the legislation was justified under article 14 of the Convention...” (para 92).*

# QUESTIONS