PUBLIC LAW UPDATE

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INTRODUCTION

1. I would like to record my thanks to Vikram Sachdeva QC who undertook the onerous job of looking at all the reported public law cases in the last year and identifying the most important 40 or so. We have divided those cases between us and I will cover half of them in this paper. I would also like to thank Tom Tabori for his help with the research.

2. I have separated out the 20 or so cases that I am going to cover into 6 subject areas:

   (1) Legal aid, court fees and costs;

   (2) Immigration;

   (3) Consultation;

   (4) Extra-territoriality;

   (5) Information Rights;

   (6) Prison, parole and policing;

(1) Legal aid, court fees and costs

3. There have been several cases concerning access to justice in the last year, most of which had the Lord Chancellor as the Defendant. I have divided them into (a) civil legal aid; (b) criminal legal aid; and (c) Employment Tribunal fees.

(a) Civil legal aid

4. At the end of 2014, the Court of Appeal handed down judgment in *R (Gudanaviciene) v Director of Legal Aid and Lord Chancellor* [2014] EWCA Civ 1622; [2015] 1 WLR 2247. The Court of Appeal found the Lord Chancellor's guidance on what could be an 'exceptional case' within section 10 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("LASPO") was wrong and incompatible with Art.s 6 and 8 of the ECHR. In particular, the guidance wrongly suggested that legal aid should only be given under section 10 in rare and extreme cases. Further,

it wrongly suggested that the ECHR did not require legal aid to be given in immigration cases. Although such cases did not involve civil obligations, within the meaning of Article 6, there was an analogous procedural right under Article 8 which could be breached if an immigrant would not have sufficient involvement in the decision making process (e.g. because of language difficulties or the complexity of the case).

5. On 9 June 2015 the Lord Chancellor published amended guidance in light of this judgment, entitled 'Lord Chancellor's Exceptional Funding Guidance (Non-Inquests).[1]

6. *R (IS) v Director of Legal Aid Casework* [2015] EWHC 1965 (Admin) followed on from *Gudanaviciene*. IS was a blind Nigerian who wished to bring a claim relating to his immigration status. He was one of the original claimants in *Gudanaviciene* but the Lord Chancellor's appeal in his regard was discontinued. Even though IS had been granted legal aid by the time of the hearing, his case continued to consider further issues of general importance.

7. Collins J added to the criticisms in *Gudanaviciene* by pointing out further ways in which the exceptional case funding scheme was unlawful in practice inter alia because:

   (1) The application forms were too complex and the information required excessive;

   (2) The '50% prospect of success' merits test was inappropriate – legal aid might be required to prevent a breach of a Convention right even where the prospect of success was below 50%.

8. *R (Rights of Women) v LC* [2015] EWHC 35 (Admin) concerned regulation 33 of the Civil Legal Aid (Procedure) Regulations 2012 ("the 2012 Regulations") which were enacted under section 12 of the LASPO.

9. LASPO removed legal aid funding for parties to private family law proceedings subject to certain specified exceptions, one of which was in relation to victims of

[1]https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/433502/legal-aid-chancellors-guide-exceptional-funding-non-inquests.pdf

domestic violence. Reg. 33 specified the evidence of domestic violence which needed to be provided in order to obtain legal aid. The claimant NGO argued that Reg. 33 was too restrictive and too rigid and thwarted the statutory purpose.

10. The court accepted that many of the criticisms of Reg. 33 were justifiable. In particular, there were time limits cutting off certain evidence of domestic violence if it was more than 24 months old. The court accepted that these time limits might well exclude meritorious applications. However, the court held Reg. 33 to be lawful partly because there was always a risk of meritorious applications being excluded and partly because there were other ways for a victim of domestic violence to provide evidence that they were still at risk. Evidence that Reg. 33 might not be operating effectively in practice was '*for the Defendant and ultimately Parliament to address.*' The court said it was fortified in its view by looking at the legislative history and noting that the 2012 Regulations had been considered by Parliament when LASPO was passed (§§73-81). To have intervened would have required the court to substitute its views for those of Parliament.

11. The court did however note that Reg. 33 could lead to a violation of an individual's rights under Article 6 if s. 10 of LASPO (the exceptional circumstances provision) could not be applied (§72).

12. *R (Letts) v LC* [2015] EWHC 402 (Admin) concerned the Lord Chancellor's guidance to the Legal Aid Agency on when relatives of a deceased should be granted legal aid. The Lord Chancellor's guidance suggested that legal aid should only be granted where there has been an arguable breach by the state of its substantive obligations under Article 2. Green J found that this was too narrow – the investigative duty under Article 2 can arise even when there is no hint of state culpability, for example when a psychiatric patient commits suicide.

13. As a result, Green J found the guidance to be unlawful – it would lead to, permit or encourage an unlawful approach by the LAA (§118). However, he declined to quash the guidance, giving declaratory relief instead (§§19, 124). New guidance has

been published by the Lord Chancellor, which takes into account the judgment in *Letts*.[2]

14. *R (Ben Hoare Bell) v LC* [2015] EWHC 523 (Admin) concerned a challenge by legally aided public law solicitors' firms to the new regulation 5A, to be inserted into the Civil Legal Aid (Remuneration) Regulations 2013. Reg. 5A provides that legal aid shall not be paid for a judicial review application except where permission is granted or permission is neither granted nor refused and the Lord Chancellor concluded that it was reasonable to pay legal aid.

15. The Divisional Court rejected what it called the 'strict ultra vires' argument – i.e. the argument that Regulation 5A was outside the powers provided by LASPO because it was taking away legal services, where LASPO only allowed for regulations that 'secure' legal aid services. Regulation 5A was only concerned with remuneration and does not, in itself, remove legal aid from work on a judicial review at the pre-permission stage.

16. However, the court upheld the claimants' second ground – i.e. that there was no rational or proportionate connection between the effect of Regulation 5A and its purpose. This was described as a *Padfield*[3] challenge but the court's reasoning goes beyond the language of *Padfield* ('frustrating the policy and objects of the Act') and looks at proportionality (§54). The court gave numerous examples where the outcome of Reg. 5A would be unfair, perhaps the most striking of which is where permission is refused because of something unforeseeable – e.g. by the time of the permission decision, the defendant has granted the remedy sought.

17. The government responded quickly, introducing within a month the Civil Legal Aid (Remuneration) (Amendments) Regulations 2015/898, which amended Regulation 5A so as to allow for payment of legal aid, even when permission has been refused, in certain specified situations, i.e. where the decision under challenge has been withdrawn or the court has ordered an oral or rolled-up hearing. This addresses the specific examples the divisional court gave but it is open to debate whether it goes far enough.

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[2]https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/454835/legal-aid-chancellors-guide-exceptional-funding-inquests.pdf

[3] *Padfield v Minister of Agriculture, Fisheries and Food* [1968] A.C. 997

(b) Criminal legal aid

18. *R (London Criminal Courts Solicitors Association) v LC* [2015] EWHC 295 (Admin) was the second judicial review to consider the Lord Chancellor's proposal to restrict the number of 'Duty Provider Work' contracts to 527 legal aid solicitors' firms. The first judicial review was successful because the Lord Chancellor had failed to provide key documents when consulting on the changes, in particular a report by KPMG. As a result, the Lord Chancellor disclosed the KPMG report, re-consulted and arrived at the same conclusion. The claimants brought another challenge, arguing that the Lord Chancellor had misunderstood the KPMG report and failed in his *Thameside* duty to '*ask himself the right question and take reasonable steps to acquaint himself with the relevant information...*' because he failed to enquire into something the KPMG report had not covered – i.e. the transitional costs necessitated by the proposed changes.

19. Laws LJ held that the appropriate standard for review was the conventional Wednesbury one and it was for the Lord Chancellor to decide, subject to Wednesbury review, what further investigation need be undertaken. As a result, the claim failed – the variables were too uncertain in this process 'larded with technical complexity' (§32); the claimant was asking the court to 'tighten its grip' on the process and take a 'policy view' as to the necessary procedures (§47).

20. In *R (Ryder) v Lord Chancellor* [2015] EWHC 1857 (Admin) the divisional court dismissed a challenge to the lawfulness of the amended regulation 12 of the Criminal Legal Aid (General) Regulations 2013 ("the 2013 Regulations"). Reg. 12, as amended, precluded legal aid for hearings before the Parole Board where the Parole Board did not have power to direct the prisoner's release. The court held that this was not ultra vires or discriminatory. The Lord Chancellor was entitled to restrict the provision of legal aid to where it was needed most and to exclude Parole Board hearings that could not result in release.

21. However, this is now to be looked at again when the substantive judicial review in *R (Howard League for Penal Reform) v LC* [2015] EWCA Civ 819 is heard by the Court of Appeal. On 28 July 2015 the Court of Appeal granted permission to apply for

judicial review of the 2013 Regulations on the basis that it was arguable that the amendments to the 2013 Regulations created an unacceptable risk of unfairness.

22. The Court of Appeal refused permission to pursue an argument that the consultation process had been unfair because there had been insufficient warning of the changes (in particular the changes to legal aid funding for pre-tariff reviews). The Court of Appeal pointed to the fact that, even if the language of the consultation could have been clearer, some consultees (such as Liberty) had understood it correctly.

(c) Access to employment tribunals

23. *R (Unison) v LC* [2015] EWCA Civ 935 was an appeal arising out of two judicial reviews brought by Unison against the Employment Tribunal and Employment Appeal Tribunal Fees Order 2013 ("the Fees Order"), which introduced for the first time a requirement that claimants and appellants before ETs and EATs should have to pay court fees.

24. The introduction of court fees had a dramatic effect on employment litigation – it reduced the number of employment claims brought by 80%. The principal ground of challenge was that the Fees Order breached the EU principle of effectiveness – employment claimants no longer had an effective right of access to the tribunals because it was too expensive to enforce that right. Underhill LJ said the basic question in any given case was whether the fee payable was one that the claimant could not realistically afford to pay (§41). Underhill LJ said he would have quashed the Fees Order if he found that it "inherently created a real risk that some claimants would be denied justice because they cannot realistically afford to pay" (§52).

25. However, on the evidence, this was not made out. Although the drop in claims was 'troubling' there was insufficient evidence that this was because the fees were unaffordable rather than because claimants were put off by having to pay a fee they could afford to pay but would rather not (§68). The 'exceptional circumstances' provision in the Fees Order should not be limited to 'idiosyncratic or very rare' cases but in such a way as to ensure that claimants who cannot realistically afford to pay should be entitled to remission (§73).

(d) Costs

26. In *R (HS2 Action Alliance) v Secretary of State for Transport* [2015] 2 Costs LR 411, the Court of Appeal held that local authorities were entitled to the same costs protection as other claimants in Aarhus Convention claims, under CPR 45.1 and PD 45, para 5.1. To read in a gloss, excepting public authorities from the protection, would be to undermine legal certainty.

(2) Immigration

27. Many of the key immigration cases in the past year also concerned access to justice – in particular the effectiveness of appeals under the detained fast track ("DFT") and the new laws requiring more and more immigration appeals to be brought from outside the UK.

(a) DFT

28. In the last year there has been a concerted and largely successful attack by Detention Action, an NGO, on the detained fast track system ("DFT"). The DFT is a system for the quick processing of asylum applications. Initially, it provided for the detention of asylum seekers for a relatively short period while the SSHD took a decision on whether to refuse them asylum. That policy was upheld by the House of Lords and ECtHR in *R (Saadi) v SSHD* [2002] UKHL 41 and *Saadi v UK* [2008] 47 EHRR 17. The DFT was then extended to cover detention during appeals.

29. In a judicial review, Detention Action challenged the lawfulness of the DFT generally on the basis that it created an unacceptable risk of unfairness for asylum seekers because of the abbreviated timetables. On 9 July 2014, Ouseley J handed down judgment in *R (Detention Action) v SSHD* [2014] EWHC 2245 (Admin). He rejected most of the complaints about the DFT but held that there was an unacceptable risk of unfairness in one respect (§196) – i.e. "*in too high a proportion of cases and in particular for those which might be sensitive, the conscientious lawyer does not have time to properly what might need doing*" prior to the asylum interview. This first judgment did not specify what relief would be given.

30. The SSHD responded quickly and indicated, at the relief hearing on 17 July 2014, that asylum seekers detained under the DFT would, thereafter, be given 4 clear

working days between the allocation of a lawyer and the asylum interview. In light of this change, Ouseley J granted no relief other than a declaration that the system, as it was operated on 9 July 2014, created an unacceptable risk of unfairness [2014] EWHC 2525 (Admin).

31. Detention Action appealed against Ouseley J's order and the Court of Appeal dismissed the appeal. They held that Ouseley J's order was within the wide discretion he had as to relief. The Court of Appeal declined to examine whether the changes made since the judgment of 9 July 2014 were sufficient to cure the unlawfulness identified in that judgment (§25).

32. Detention Action then brought about a second wave of litigation - a more focussed attack on The Fast Track Rules 2014 ("FTR"), which were laid down purportedly under s.22 of the Tribunals, Courts and Enforcement Act 2007 ("the 2007 Act"). The FTR only give appellants 7 days to prepare any appeal against a refusal of asylum. The Court of Appeal held that this was too tight a timetable and created an unacceptable risk of unfairness (§37). The power for an appellant to apply to come out of the DFT was insufficient to cure this unfairness because the power could not be exercised in time to be effective. Appellants' applications to come out of the DFT were first considered at the appeal hearing itself. Appellants were therefore put in a very difficult position - in order to pursue an application to come out of the DFT, they had to identify weaknesses in the case they would have to present if the application were rejected.

33. In the course of reaching its decision, the Court of Appeal gave limited weight to the fact that the Rules had been approved by the Tribunal Procedure Committee ("TPC") after consultation because the TPC and many of those consulted had expressed concerns about the fairness of the time limits. The TPC only supported the FTR after being told by the Lord Chancellor that he might overrule them if they didn't.

(b) Appeals from outside the UK

34. There have been several cases concerning appeal rights in immigration law.

35. Some of these cases arose in the wake of a widespread fraud uncovered by Panorama. Large numbers of people obtained English language test certificates by fraud in testing centres run on behalf of ETS, a US-based educational organisation. ETS used voice recordings to identify who had cheated and the SSHD decided to remove all of those identified who had used their ETS tests. She removed them on the basis of section 10 of the Immigration and Asylum Act 1999, giving them only an out of country right of appeal. Many of those subject to such decisions protested that they had not cheated. In two expedited judgments, the Court of Appeal held that Parliament's intention, that the remedy be an out of country appeal, had to be respected. As a result, the courts should decline to consider judicial review challenges against removal unless they turned on 'jurisdictional facts' (such as whether the person to be removed was British) or abusive manipulation of the system by the SSHD, not in cases where the appeal turned on whether someone had cheated or not (*R (Sood) v SSHD* [2015] EWCA Civ 831 and *R (Mehmood) v SSHD* [2015] EWCA Civ 744).

36. Now changes brought about by the Immigration Act 2014 have taken effect, reducing still further the number of appellants who can appeal from within the UK. There is now a power to certify human rights appeals so that they must be brought from outside the UK, where the SSHD is satisfied that this would not breach their Convention rights and there would not be a real risk of irreversible harm – s. 94B of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"). The purpose of section 94B is to require Article 8 appeals against deportation to be brought from outside the UK.

37. Just last week there was an important judgment by the Court of Appeal on s.94B – *R (Kiairie and Byndloss) v SSHD* [2015] EWCA Civ 1020. The Court of Appeal held that an out of country appeal provided sufficient procedural protections to satisfy Article 8. However, it was necessary to consider in each case whether removal, pending an appeal, would violate Article 8. In deportation cases, that seems unlikely as the Court of Appeal in *Kiairie* recognised that there was a strong public interest in deporting foreign national criminals prior to their appeal, where possible and the interference with family and private life will only be in the short term.

38. This decision may encourage the government to go further and require even more categories of appeal to be brought from outside the UK – e.g. Article 8 appeals against administrative removal.

(3) Consultation

39. In *R (Sumpter) v SSWP* [2015] EWCA Civ 1033 the Court of Appeal considered what happens when a consultation is re-run after the relevant Regulations have been laid before Parliament. The Appellant argued that it was too late to rescue any unfairness from the initial consultation. The Court of Appeal rejected that argument.

40. The background was a consultation as to replacing disability living allowance with personal independence payment. The initial consultation was in the words of the judges 'mind-bogglingly opaque' and misled consultees as to a key change that was going to be made. The consultees only became aware of this when the government gave its response to the consultation and laid Regulations before Parliament. The claimant brought a claim for judicial review. The Defendant chose not to defend the original consultation but launched a new one.

41. The claimant argued that this was too late and 'the dice were unfairly loaded' by that stage. The court rejected that. It held that, in the absence of evidence (or submissions) that the Defendant had a closed mind as to the new consultation, the process as a whole was fair. It was possible to 'rescue' regulations drafted after a flawed consultation by beginning a new consultation.

42. This case, and the *London Criminal Courts Solicitors Association case* referred to above, can be contrasted with *West Berkshire DC v Dept of Communities & Local Govt* [2015] EWHC 2222 (Admin) where the claimants won on all fronts in their challenge to a decision by the Defendant Minister to change national housing policy by way of a statement in the House of Commons. Holdgate J held that the new policy breached the *Padfield* principle because it was inconsistent with the statutory framework (§136).

43. Holdgate J also held that the consultation had been unlawful. Holdgate J went into the technical detail of the consultation and found that the proposals in the

consultation had been insufficiently clear (§153); and the government response was 'contrary to the evidence', suggesting that the Secretary of State had not 'conscientiously' taken into account the points made by consultees (§158). Holdgate J also found a breach of the Public Sector Equality Duty ("PSED"). He was wary of placing reliance on an Equality Impact Assessment ("EIA") carried out after the policy was formed, saying there was a difference between '*reaching a decision having started with a blank sheet of paper and the validation of a decision already taken*' (§193). He drew an analogy to the situation where a decision maker gives additional reasons after a challenge has been brought (§194). He concluded that the exercise was not carried out with a 'sufficiently open mind' (§197(iv)).

(4) Extra-territoriality

44. In *Al – Saadoon v SSHD* [2015] EWHC 715 (Admin) Leggat J determined various preliminary issues in various claims arising out of the British military involvement in Iraq between 2003 and 2009 The parties agreed that the relevant principles were to be found in *Al-Skeini v UK* [2011] 53 EHRR 589. *Al-Skeini* was a Grand Chamber case where the ECtHR took a much broader approach than the House of Lords had to the question of when acts outside the UK would fall within the UK's jurisdiction.) It was agreed that persons held in British custody fell within the UK's jurisdiction but there were differences between the parties as to how the Al-Skeini principles should apply to other situations.

45. Leggatt J held:

(1) that a contracting party to the ECHR had extraterritorial jurisdiction wherever state agents had "*authority and control*" over an individual. Where an act involved the use of coercive physical force over an individual, the affected individual was brought within the state's jurisdiction wherever in the world the exercise of such power took place. That included where an individual was: (1) in the custody of non-British forces where the UK retained control over how the individual was treated or whether they were released; (2) shot by a British soldier; or (3) received medical treatment from British soldiers but was never taken into custody. However, it did not include cases where individuals were killed: (1) after being accidentally hit by British military vehicles; or (2) in a US-led operation in which the UK had only provided planning and logistical support.

(2) There was no duty on the UK, under art.3 ECHR, to investigate an allegation that the UK had breached its 'non-refoulement' obligation under Article 3 (i.e. that the UK had handed over an individual to another state even though it knew they would face a real risk of Article 3 mis-treatment) unless the UK was complicit in the subsequent ill-treatment.

(3) No investigative duty arose under Article 2 unless there was an arguable substantive breach of Article 2. This finding is, at first blush, inconsistent with the conclusion in *Letts*, to which Leggatt J was not referred. However, the apparent inconsistency can be explained by §284 of Leggatt J's judgment, where he explains that, on proper analysis, deaths in custody and other cases where there is an 'automatic' duty to investigate are situations which automatically create a reasonable suspicion of a substantive breach unless dispelled by an impartial investigation.

(4) There was no investigative duty implicit in Art.5 save where there was an arguable claim that a person had been the subject of "*enforced disappearance*".

46. *R (Hottak) v SSFCO* [2015] EWHC 1953 (Admin) concerned claims, brought under the Equality Act 2010 by Afghan nationals who had served as interpreters for the UK in Afghanistan. They argued that the policy in relation to them was less favourable than the equivalent policy in relation to Iraq.

47. The most interesting issue in the case was whether the Equality Act applied even though the claimants' employment was outside the UK. The divisional court held that the Equality Act should have the same territorial scope as other statutory employment rights, such as the right not to be unfairly dismissed. Applying that approach, the claimants' claims of discrimination were outside the territorial scope of the Equality Act – they were employed in a foreign country to work exclusively in that foreign country (§44).

48. Interestingly, the divisional court took a different approach to the PSED challenge. The PSED was within scope because the policy was formed in the UK (§60). There was a breach of the PSED because no EIA had been carried out until after the policy had been formulated. Even so, the court declined to quash the policy because (a) that would have an adverse impact on those who might benefit from it and (b)

work done after the policy had come into effect would have satisfied the PSED (§62).

(5) Information Rights

49. The key case of 2015 was *R (Evans) v Attorney-General* [2015] UKSC 21. This arose out of a request, by a journalist, for the letters between Prince Charles and certain government departments ("the letters" A.K.A. 'the black spider memos'). The information in these letters was, in part, environmental. The departments tried to resist the disclosure of the information and were successful before the Information Commissioner. However, Mr Evans brought an appeal, which was transferred to the Upper Tribunal ("the UT"), and Mr Evans won his appeal. The UT substituted an enforcement notice requiring disclosure of the letters. The departments did not appeal.

50. Instead, the Attorney-General exercised his power to veto disclosure under s.53(2) of the Freedom of Information Act 2000 ("FOIA") (which also applies to environmental information by virtue of regulation 18(6) of the Environmental Information Regulations 2004 ("EIR")). Mr Evans brought a judicial review of this veto decision. He lost at first instance, won on appeal and permission was granted to appeal to the Supreme Court where it was heard in front of 7 judges.

51. This was the first case to give guidance on when the veto power may be exercised. The power in s.53(2) allows an accountable person (a Cabinet minister or the Attorney General) to quash an enforcement notice by giving a certificate stating that he has formed the opinion '*on reasonable grounds*' that there was no failure to comply with the requirements of FOIA.

52. The Attorney General's appeal was dismissed by 5 to 2. Lord Neuberger gave the first judgment. Lord Kerr and Lord Reed agreed with him so he represents the majority of the majority.[4] Lord Neuberger held that the wording of s.53(2) was not

[4] Lord Mance and Lady Hale agreed with the result but for different reasons. Lord Neuberger's judgment is to be preferred, where there are differences, as he spoke for the majority of the majority. See Kambadzi xx where the Supreme Court followed the judgment of Lord Dyson in Lumba xx because he spoke for the majority of the majority.

sufficiently "crystal clear" to allow a minister to override a decision of the court simply because they disagreed with it (§§58-59). Vetoing the disclosure of environmental information in such circumstances would also violate the requirement, in Article 6(2) of Directive 2003/4/EC, of access to a tribunal whose decisions are 'final' (§§102-103).

53. This begs the question: 'when can s.53(2) be used?' The answer, Lord Neuberger said, was when facts or matters come to light, which could not be used on an appeal, e.g. because they were not before the lower court or because an appeal is prevented by the second appeals rule (§§75-77). Neither possibility seems likely to arise often in practice – the window to exercise the power of veto is only 20 days and information rights appeals seldom reach the Court of Appeal.

54. In obiter dicta, Lord Neuberger referred to the fact that it was 'common ground' between the parties that the Information Commissioner and tribunals had to assess the correctness of a public authority's refusal to disclose information at the time of the refusal, rather than at the time when the Commissioner or tribunal was considering the matter. This issue was, until then at least, the subject of some controversy – see e.g. *APPGER v IC and FCO* [2015] UKUT 0377 (AAC) at [45], Coppell on *Information Rights* and my article for the Freedom of Information Journal.[5] Lord Neuberger's dicta were sufficient to persuade the UT in *APPGER* that the material time for considering the correctness of a refusal was the time of that refusal not the time of any appeal.

55. Even after *Evans* and *APPGER*, there is continuing uncertainty about:

(1) whether the material time was the date of the <u>first</u> refusal or the date of the <u>final</u> refusal after an internal review; and

(2) In what circumstances and to what extent material post-dating the refusal may be taken into account. Lord Neuberger said they were relevant 'in so far as they throw light on the grounds now given for refusal?' (§73). The UT in *APPGER* did not interpret this as an invitation to apply hindsight – they said public authorities should not have to defend a 'moving target'. However, it is still unclear in what

[5] The public interest – an unorthodox view (Freedom of Information Journal Volume 9, Issue 6, July/August 2013)

circumstances and to what purposes evidence post-dating the refusal may be used in an appeal.

56. *Ranger v House of Lords Appointments Commission* [2015] EWHC 45 (QB) was another information rights case of interest. The Claimant had applied for a peerage unsuccessfully. He asked for the letters written about him – a subject access request. He was refused because, although the information was his personal data, it fell within the exemption at §3 of Schedule 7 to the DPA, which provided a blanket protection against the provision of any information on 'the conferring by the Crown of any honour or dignity'. He argued that this was not compliant with Article 13 of the Data Protection Directive 95/46/EU ("the Directive") as it was not proportionate. He lost. Knowles J held that the blanket prohibition was proportionate because: '*If the fullest information is to be provided, there needs where possible to be clarity from the start about whether confidentiality will be respected or not.*'

57. The oddity about this case is why it was fought in this way at all. If Dr Ranger had asked someone else to request the letters, they would have fallen under FOIA, rather than the DPA. By that route, he would have had a much better chance of obtaining the information he wanted. Section 37 of FOIA only provides a qualified exemption for information relating to the conferral of honours – such information must still be disclosed under FOIA where disclosure is in the public interest. It will be interesting to see whether the logic of Knowles J's judgment in the *Ranger* case will be applied in the context of section 37 of FOIA, or indeed in other contexts – e.g. whether evidence provided in a closed session must remain in closed unless and until the party giving the evidence consents to its disclosure in open.

(6) Prison, parole and policing

58. Perhaps the most striking decision in this context was the judgment of the Supreme Court in *R (Haney, Kaiyam et al) v SSJ* [2014] UKSC 66, where the Supreme Court declined to follow the judgment of the ECtHR in *James v UK* [2013] 56 EHRR 12.

59. *James* arose out of the scheme for 'imprisonment for public protection' ("IPP") introduced in April 2005. This scheme required indeterminate sentences for certain kinds of offenders, whereby they could only be released when they satisfied the

Parole Board they were no longer a risk. The problem with this scheme was that it was introduced without there being sufficient resources for IPP prisoners, like Mr James, to be able to access courses that might demonstrate that they had reduced their risk. The House of Lords held that this 'public law failure' did not render Mr James's imprisonment unlawful, under Article 5 of the ECHR - *R (Walker) v Secretary of State for Justice (Parole Board intervening)* [2010] 1 AC 553, HL(E). The ECtHR disagreed and found that Mr James's imprisonment did violate Art. 5 because his detention was 'arbitrary' – he was being imprisoned 'for public protection' without a real opportunity to rehabilitate.

60. In *Haney & Kaiyam*, the Supreme Court declined to follow *James v UK*. They said it was based on an '*over-expanded and inappropriate reading of the words "unlawful"*. The most substantial problem with *James v UK* was that the ECtHR's logic would compel the release of dangerous prisoners simply because they had not been given access to appropriate courses (§34).

61. However, the Supreme Court did not go back to the position the House of Lords had taken in *Walker*. Instead, they agreed with the ECtHR that the UK was under an obligation to provide IPP prisoners with an opportunity to rehabilitate. However, this obligation was not an express duty to be found under Article 5.1 or 5.4 – it was an 'ancillary' duty implicit in the overall scheme of Article 5. As a result, IPP prisoners should only be entitled to low levels of damages for 'anxiety and frustration' analogous to the awards given for delay contrary to Article 5(4), not the larger sums of damages awarded by the ECtHR for breaches of Article 5(1). Moreover, this duty did not require the state to provide any particular course or courses, even if those courses were recommended (see §§92-93 per Lord Hughes, Lord Neuberger, Lord Toulson and Lord Hodge).

62. This judgment was then followed by the Court of Appeal in *R (Gilbert) v SSJ* [2015] EWCA Civ 802. *Gilbert* concerned a decision by the SSJ to reject a recommendation by the Parole Board for the claimant prisoner's transfer to open conditions. Mr Gilbert was an IPP prisoner who returned late from temporary leave because he had missed the last train. He was sent to closed conditions. His case was referred to the Parole Board. By the time of the hearing before the Parole Board, there were

two published policies by the SSJ which appeared to pull in different directions – directions to the Parole Board which said that prisoners should not normally be released without a period in open conditions and an 'absconder policy' whereby one incident of failing to return from temporary leave would, in general, exclude a prisoner from open conditions.

63. The Court of Appeal held that there was no inconsistency between the two policies. Further, they applied *Kaiyam* and held that the ancillary *James* duty to give IPP prisoners the opportunity to rehabilitate did not require the SSJ to depart from the absconder policy or to transfer a prisoner to open conditions simply because the Parole Board had recommended such a transfer. Mr Gilbert would still have sufficient opportunity to demonstrate rehabilitation even if he were not in open conditions.

64. *R (Demetrio) v IPCC* [2015] EWHC 593 (Admin) arose out of an investigation by the Independent Police Complaints Commission ("IPCC") into an allegation that a Police Constable had put his hands around the claimant's neck as if to strangle him. The IPCC conducted an investigation. The IPCC's investigator concluded, in their report, that there was no case to answer. As a result, the Metropolitan Police Commissioner ("the MPC") considered that there should be no disciplinary action relating to that allegation and the IPCC agreed. 14 months after that report, the IPCC decided to reopen the investigation.

65. There were two joined judicial reviews. One was brought by the MPC, challenging the IPCC's decision to reopen the investigation on the grounds that it was 'functus officio'. The second was brought by Mr Demetrio, challenging the conclusions of the first IPCC report on the basis that they were irrational. The IPCC did not defend this second challenge but the MPC did.

66. The MPC lost in both actions. The Court took a common sense approach to the 'functus' doctrine. Although there was no express power to allow the IPCC to ask for a second investigator's report, when the first was deficient, it would not further

the functions of the IPCC or public confidence if the IPCC were 'stuck with' a deficient report. Further, the IPCC should have the power to reopen an investigation. It would be cumbersome and unsatisfactory if the IPCC had to apply for a quashing order from the Administrative Court before it could do so. It remains to be seen whether such a practical approach to the 'functus' doctrine will be applied to other contexts.

67. The case also provides an interesting practical example of the application of the irrationality test. The court described 'irrationality' as 'reasoning so flawed it robs the decision of its logic'. The main example of irrationality highlighted was the investigator's conclusion that Mr Demetrio had not been strangled. The investigator made no reference to the fact that there was a transcript of a conversation where an unidentified officer admitted he had strangled Mr Demetrio. Although this was described as irrationality in the judgment, it could have been seen as a failure to have regard to a material consideration – i.e. a piece of evidence so important that it could not reasonably be overlooked.

68. In *R (Black) v SSJ* [2015] 1 WLR 3963 Singh J considered a judicial review of a prison governor's refusal to install a telephone line whereby prisoners could complain anonymously about smoking in prisons. The interesting point which arose in this case was whether the Health Act 2006 ("the 2006 Act"), which makes provisions restricting smoking in public places, applied to state prisons. Singh J examined a long history of authorities to the effect that the Crown is not bound by legislation unless the Crown is expressly named or it is a 'necessary implication' of the legislation.

69. As Singh J noted, the issue was of far more importance than the facts of the case. If the SSJ had won on the main issue, a large number of public buildings and spaces would have been exempt from the requirements of the 2006 Act – not just state prisons but courts and central government offices.

70. Singh J held that the 2006 Act did bind the Crown as otherwise the 'beneficent purpose' of the 2006 Act would be frustrated. In reaching this conclusion, Singh J went into great detail about the background of the 2006 Act, deriving support from

White Papers, Explanatory Notes to the 2006 Act and even international conventions (§§55-67).

71. By contrast, Singh J disregarded the fact that it was clear, from the government response to the House of Commons Health Committee's first report, that the Government had expected the 2006 Act not to bind the Crown. Singh J said that the aim of statutory construction was to ascertain the intention of Parliament rather than the understanding of the executive (§75). In his words, the objective 'intention of Parliament' was not to be confused with the 'intentions of ministers' (§76).

72. In *Gaughran v Chief Constable of Northern Ireland* [2015] UKSC 29, the Supreme Court heard another case on DNA retention by the police. The applicant was convicted of driving with excess alcohol, a recordable offence. As a result, it was the policy of the Northern Irish police to retain his DNA indefinitely.

73. The Claimant argued that this was disproportionate and relied on the ECtHR's judgment in *S & Marper v UK* [2008] 48 EHRR. In that judgment, the ECtHR had disagreed with the House of Lords and held the 'blanket' retention of the DNA of acquitted suspects violated their rights under Article 8.

74. The majority of the Supreme Court distinguished *S & Marper* on the basis that it did not concern persons who had been convicted. They held that the blanket retention of the DNA of persons convicted of recordable offences was proportionate and within the margin of appreciation.

75. There is an intriguing passage in Lord Clarke's judgment where he treated these two questions as distinct – he said at §47 that, having concluded the retention policy was '*within the margin of appreciation accorded by the [ECtHR], the Northern Irish court must decide for itself whether it infringes a Convention right.*' In ECtHR case law the phrase 'within the margin of appreciation' is synonymous with 'proportionate'. However, Lord Clarke held out the possibility that a national court might find a provision or policy to breach a Convention right even though it was within a state's margin of appreciation – in other words that national courts might hold public authorities to a stricter account than the ECtHR does. This is not a new idea – Lord Neuberger said something similar in *R (Nicklinson) v Ministry of Justice* [2015] AC 657 at [75]). However, Lord Neuberger said domestic courts should be 'very

cautious' before finding that a measure within a member state's margin of appreciation breached a Convention right and there is no example, of which I am aware, where a domestic court has taken such a bold step.

RORY DUNLOP

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