JUSTICE HUMAN RIGHTS LAW CONFERENCE

20 October 2010

JUDICIAL REVIEW AND HUMAN RIGHTS UPDATE

Angus McCullough QC[1]
1 Crown Office Row

1. INTRODUCTION

This paper aims to summarise the most important judicial review cases concerning Articles 2, 3, 5, 6 and 12 of the ECHR during the last year.[2] I have also included two other cases of interest, although they cannot be categorised under any of these Articles.

2. ARTICLE 2: The right to life

The substantive Article 2 duty owed to mental patients

2.1 ***Rabone v. Pennine Care NHS Trust*** [2010] EWCA Civ 698

The substantive duty The CA have clarified the scope and application of *Savage*[3]. The HL in *Savage* had left unclear – to say the least – whether its finding that an operational '*Osman*' type duty applied to a compulsorily detained mental patient extended to a voluntary mental patient. The answer

[1] Email: angus.mccullough@1cor.com.

[2] Not least, so as to keep it within to a reasonable length, I have adopted a fairly literal interpretation of the title to this talk, generally limiting it to a survey of recent judicial review cases, and equivalent statutory reviews. I have therefore not attempted to include Strasbourg decisions, nor (with some exceptions) any domestic human rights cases outside the realm of judicial review. Human rights cases in the criminal context, have also been excluded given that that is the subject of the separate talk being given by Alex Bailin QC at this Conference.

[3] *Savage v. South Essex Partnership NHS Trust* [2008] UKHL 74, [2009] 1 AC 681.

of the CA is that it is the compulsory detention which makes all the difference. Absent detention at the hands of the state, no operational duty under Article 2 arises to a hospital patient, whether suffering from physical or mental illness [§63]. The fact that a patient (as in *Rabone*) might have been detained if events had taken a different course, is irrelevant.

The 'victim' test Jackson LJ's helpful synthesis of the principles to be derived from the Strasbourg cases as to when 'victim' status under section 7 of the HRA may be lost through the bringing of other proceedings was as follows:

> *"105. The Strasbourg cases do not all fit together neatly, which is unfortunate because citizens need clear guidance on* locus standi *before they incur the massive costs of litigation. Nevertheless, from the above review of authority, I derive the following propositions:*
> *(i) Where the applicant brings a claim in his domestic courts in respect of matters which form the basis of his Convention claim and succeeds, that success may deprive him of the status of victim under article 34.*
> *(ii) In order to ascertain whether the settlement or the award of the domestic court has that consequence, it is necessary to consider all the circumstances of the domestic litigation and to determine whether it affords effective redress for the Convention breach.*
> *(iii) In particular, it is necessary to consider (a) whether liability for the offending conduct has been either accepted by the state authority or found proved by the court and (b) the adequacy of any compensation awarded by the domestic court. If the compensation awarded falls substantially short of the pecuniary losses suffered by the applicant, that is a factor pointing against treating the domestic award as effective redress."*

On the facts of *Rabone* it was found by the CA that Mr and Mrs Rabone had lost their status as victims, as a result of their bringing and settling a civil claim (within the same proceedings as the HRA claim had been brought) on behalf of the estate of their daughter. The following factors were considered in reaching the conclusion that the claimants had obtained 'effective redress' *("in so far as the law can afford "redress" for a loss which lies beyond the reach of financial compensation"):* the Defendant's admission of breach of duty; the settlement of the civil claim on behalf of the estate for funeral expenses and general damages; The identical factual basis for the negligence claim and any claim under the

HRA; the Defendant's formal letter of apology in respect of the error; and the absence of any pecuniary loss suffered by the claimants.

2.2 ***Savage v. South Essex Partnership NHS Trust*** [2010] EWHC 865, Mackay J

Mrs Savage's claim succeeded, on its facts[4], at first instance before Mackay J. However, the CA has given the Defendant permission to appeal. If the Judge's finding that the risk to Mrs Savage was 'real and immediate' (applying the '*Osman*' test that the HL had held to be applicable), then the case will be of some significance in setting the bar for this test at a relatively attainable level. The immediacy of the risk to life on the facts of that case was much less striking than in *Rabone*, but nevertheless the Claimant succeeded in establishing a breach of the Article 2 duty. Damages of £10,000 were awarded.

Territorial scope of Convention, and investigative duty

2.3 ***R (Smith) v Secretary of State for Defence*** [2010] UKSC 29

The SC held (by a 6-3 majority) that the Human Rights Act does not apply on the battlefield and soldiers are not automatically entitled to inquests arising from deaths in foreign conflicts. It was not necessary in every case of a death of a serviceman abroad to carry out an investigation which examined whether there was fault on the part of the state because (a) the Human Rights Act 1998 did not apply to armed forces on foreign soil and (b) in any event, there was no such automatic right. The type of investigation required would depend on the circumstances of the case.

'Jurisdiction' within the meaning of article 1 was essentially territorial but extended in exceptional circumstances requiring special justification to other bases of jurisdiction; but the protection of article 2 does not extend to troop

[4] It will be recalled that Mrs Savage was the non-dependent adult daughter of a compulsorily detained mental patient. The mother had absconded from hospital and killed herself by jumping under a train. Mrs Savage brought a claim against the hospital under the HRA, arising out of her mother's death, alleging a breach of Article 2. No claims were brought under the Fatal Accidents Act 1976 or on behalf of the estate. The HL decided, on a preliminary issue, that a duty was owed to her under Article 2 so the case was remitted for a full hearing, which was how it came before Mackay J.

operations abroad [§58]. Technically, this aspect of the decision was *obiter* (as Private Smith was not on the battlefield but on a base to which the Government accepted that its jurisdiction extended for these purposes), but it is hard to see any lower court departing from the reasoned views of a majority of six members of the SC on this point.

Investigation: Where there was reason to suspect a substantive breach by the state of the article 2 right to life, it was established that the state of its own motion should carry out an investigation into the death which had certain features: a sufficient element of public scrutiny, conducted by an independent tribunal, involving the relatives of the deceased and which was prompt and effective [§64]. There was no automatic right to such an investigation whenever a member of the armed forces died on active service [§84]. The UK had a staged system of investigation into deaths. Some form of internal investigation would always be held into military deaths in service [§85] and a public inquest was required whenever a body was brought back to this country. This would satisfy many of the procedural requirements of article 2. If, in the course of the inquest, it became apparent that there might have been a breach by the state of its positive article 2 obligations, this should, insofar as possible, be investigated and the result reflected in the coroner's verdict, so as to satisfy the procedural requirements of article 2.

The limits of the investigative duty

2.4 ***Walch v. Secretary of State for Justi**ce* [2010] EWHC 2203 (Admin) Langstaff J

The investigative duty under Article 2 did not extend to create a duty to conduct a public inquiry into a prisoner's self-harming while in custody. *R (JL) SSHD* [2008] UKHL 68 established that the investigative duty could arise in the case of a near-death with life threatening and permanent injuries, but that did not encompass the present case. In any event there were alternative means by which to achieve an investigation, such as civil proceedings, the internal complaints procedure, or a complaint to the Prisons Ombudsman. (Note: although a fully reasoned judgment was given, this was only a decision refusing permission to apply for judicial review.)

Funding of representation at inquests

2.5 ***R (Humberstone) v. Legal Services Commission*** [2010] EWHC 760 (Admin), Hickinbottom J

A duty to investigate a death arose under Article 2, even in the absence of evidence of any wrongdoing on the part of the State. The trend in the case law suggests that the State may have an obligation to ensure that an effective investigation is conducted into any death in which there may be doubt as to the circumstances of the death. [§52] However, what amounts to an effective investigation will depend on the circumstances: it does not necessarily require there to be an inquest, or (if an inquest is performed) representation at that inquest. [§56-57].

The case is also authority for the following propositions: (i) complexity is not a pre-requisite to a duty to fund participation at an inquest; (ii) the views of a coroner in relation to funding of a party require special consideration; (iii) The Lord Chancellor's Guidance, which is set out in the Funding Code, was endorsed by the Judge as appearing to be "*soundly based upon the Strasbourg and domestic jurisprudence of Article 2*".

Notwithstanding the Claimant's success in the unusual facts of *Humberstone*, it is likely that a duty to fund a party to an inquest will remain exceptional: see the later case of *R (Patel) v. Lord Chancellor* [2010] EWHC 2220 (Admin) in which the Divisional Court dismissed the judicial review claim of the widow of one of the 7/7 bombers, arising from the Lord Chancellor's refusal to fund her representation at the inquest into the deaths of the victims of the bombings.

3. ARTICLE 3: Inhuman and degrading treatment

A range of cases – as ever, mostly arising in the context of immigration, extradition, and prisons - have been decided in the last year, but most are fact-specific, and few have given rise to particularly significant developments of principle.

Article 3 as a ground for anonymity

3.1 ***SSHD v. AP (No.2)*** [2010] UKSC 26

The SC granted anonymity to a person subject to a control order, in part because to refuse anonymity could risk an infringement of his rights under Article 3. He was living in a town with "considerable community tensions" where there was "organised racist activity". The case is an early example of an anonymity order being granted since the slightly earlier decision of the SC *In re Guardian News and Media Ltd* [2010] UKSC 1, following which the Courts have been scrutinising applications for anonymity of parties with much more rigour.

Article 3 threshold

3.2 ***R (P) v. SSHD*** [2010] EWHC 1087

A childless asylum seeker from India might suffer awkwardness and distress in her community, and exclusion from social events by reason of her infertility, but that did not amount to degrading treatment under Article 3.

4. ARTICLE 5: Right to Liberty

Article 5 and the Mental Capacity Act 2005

4.1 ***G v. E (By his litigation friend the Official Solicitor) and others*** [2010] EWCA Civ 822

In relation to deprivation of liberty cases involving persons lacking capacity, the CA found that the Court of Protection had correctly ruled that Article 5 did not create threshold conditions which had to be satisfied before it was open to the court to consider what was in the individual's best interests in

exercising its powers under the Mental Capacity Act 2005. The 2005 Act was held to embrace the principles set out in Article 5, and the Article 5 safeguards were reflected in the 2005 Act regime.

Control orders: relevance of Article 8 factors to Article 5

4.2 ***SSHD v. AP*** [2010] UKSC 24

A condition in a control order that interfered with the controlled person's Article 8 right to respect for his private and family life, but was justified under Article 8(2), could nevertheless be a decisive factor in creating a deprivation of liberty in breach of Article 5. As had been held by the HL in *Secretary of State for the Home Department v JJ* [2008] 1 AC 385, deprivation of liberty might take a variety of forms other than classic detention in prison or strict arrest. The court's task was to consider the concrete situation of the particular individual and, taking account of a whole range of criteria including the type, duration, effects and manner of implementation of the measures in question, to assess their impact on him in the context of the life he might otherwise have been living.

Damages for breach of Article 5

4.3 ***R (Pennington) v. Parole Board*** [2010] EWHC 78 (Admin), Judge Pelling QC

Guidance was give as to the correct approach to assessing damages for a violation of Article 5. ECHR decisions, rather than the domestic scales for false imprisonment, provided the appropriate reference point.

5. ARTICLE 6: Right to a fair trial

Secret evidence

Most of the significant cases have been in the fallout from the HL decision in *AF (No.3)* [2009] UKHL 28 in which it had been held (with varying degrees of enthusiasm) that in control order proceedings, Article 6 required the

controlled person to be told enough of the case against him to enable him to give effective instructions to his special advocate.

5.1 ***R (SSHD) v. BC*** [2009] EWHC 2927 (Admin), Collins J

Article 6 was held to apply to so-called "light touch" control orders, imposing less restrictive obligations than the usual control orders that were under consideration in *AF (No. 3).* There remained an irreducible minimum of disclosure, and that minimum applied even where it was suggested that the restrictions imposed were light or not severe.

5.2 ***Home Office v. Tariq*** [2010] EWCA Civ 462

5.3 ***Bank Mellat v. HM Treasury*** [2010] EWCA Civ 483

5.4 ***Al Rawi and others v.***

None of this trio of cases, decided by the CA within 24 hours of each other, was in fact a JR case. Nevertheless, they are worth noting here as indicating the important role of Article 6 in pushing back against the otherwise expanding creep of closed proceedings in a wide range of contexts.

(i) *Tariq* was a discrimination claim brought in the Employment Tribunal against the Home Office. The Home Office sought to rely on secret material pursuant to the closed material procedure for national security cases prescribed in the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004. It was held that *AF No. 3* and Article 6 applied so as to modify the procedure, but that this procedure was not otherwise inherently unlawful by reference to EU law or Article 6.

(ii) In *Bank Mellat,* a similar conclusion was reached in relation to the freezing of a foreign bank's assets. The closed procedures in CPR Part 79 (i.e. the same procedures as are applicable to the control order regime) were applied through a Financial Restrictions Order made pursuant to schedule 7 to the Counter-Terrorism Act 2008. However, in the light of *AF (No.3)* these procedures were required to be read as

modified so as to give the "core irreducible minimum" of disclosure required to achieve compliance with Article 6.

(iii) *Al Rawi* is the long-running civil claim, by which British residents who had been detained in Guantanamo Bay are seeking damages against the UK Government for its alleged complicity in their illegal detention, rendition, and mistreatment. The CA overturned Silber J's ruling that a 'closed evidence procedure' (equivalent to that set out in Part 79 of the CPR, such as is applied in control order proceedings) could be adopted in the absence of any statutory authority in relation to secret evidence: there was no scope to adopt a procedure in civil proceedings other than conventional public interest immunity.

> *"The primary reason for our conclusion is that, by acceding to the defendants' argument, the court, while purportedly developing the common law, would in fact be undermining one of its most fundamental principles."* [§12]

5.5 ***A (A Child) v. Chief Constable of Dorset Police*** [2010] EWHC 1748 (Admin), Blake J

This was a judicial review case, in which the principles identified by the CA in the private law context of *Al Rawi* were applied in the public law sphere (albeit including a damages claim against the police). The context is slightly convoluted. The Claimant was a 16 year old who had brought a claim for judicial review against the police, based on an alleged breach of Article 5, in which he sought declaratory relief and damages. The application being considered by Blake J was brought by an interested party, who sought to prevent disclosure of material by the police to the Claimant as it was said that this included information that was confidential to the interested party and would be in breach of the interested party's Article 8 rights. Essentially, applying *Al Rawi*, it was found that there was no basis on which to deprive the Claimant of disclosure of information relevant to the issues in the case.

5.6 ***W (Algeria) and 7 Others v Secretary of State for the Home Department*** [2010] EWCA Civ 898

It was confirmed that Article 6, and the HL decision in *AF (No. 3),* did not extend to proceedings before the Special Immigration Appeals Commission. Accordingly, the statutory procedure before SIAC applies, unmitigated by Article 6.

Right to asylum in EU Law does not import Article 6 rights

5.7 ***MK (Iran) v. SSHD*** [2010] EWCA Civ 115

Directive 2004/83, which recognised for the first time the right to asylum as part of EU law rather than simply as an obligation under the Convention relating to the Status of Refugees 1951 (United Nations), did not alter the jurisprudence of the ECtHR that asylum decisions did not fall within Article 6(1) and a foreign national had no right under Convention law to claim for damages for the delay in processing his asylum application.

6. ARTICLE 12: Right to marry

Forced Marriages and the marriage visa age

6.1 ***R (Quila) v. SSHD*** [2009] EWHC 3189 (Admin), Burnett J

This case concerned a challenge to the raising of the minimum age (from 18 to 21) to obtain a marriage visa – or sponsor someone to obtain a marriage visa. This change was implemented as part of the Government's efforts to combat forced marriages. Before Burnett J, the case was argued and decided on the basis of Article 8; the young couple having married in the UK, but unable to live together in the UK after the Chilean husband's application for leave to remain in the UK (following expiry of his student visa) was refused. The refusal was solely on the basis of that his British wife was still 17 at the date of the visa application (so she would in fact have been too young even under the previous version of the rule). However, in the appeal before the Court of Appeal (starting tomorrow) it is to be argued – although not by the Claimant in

Quila[5], that the Immigration Rule and policy constitutes a breach of Article 12 as well as Articles 8 and 14).

7. The EU Charter of Fundamental Rights

7.1 ***R (S) v. SSHD, Amnesty International and the AIRE Centre intervening*** [2010] EWHC 705 (Admin), Cranston J

At first instance, Cranston J held that the SSHD had to take into account an individual's rights under the Charter of Fundamental Rights of the European Union, but none of those rights were directly enforceable against the SSHD, and a transfer (of the Claimant to Greece) under the Dublin Regulation could not be challenged on the basis that it was incompatible with them. An appeal to the CA was reportedly successful on the issue of the direct enforceability of the EU Charter rights, but no judgment is yet available. If that is correct, the range of rights available to be relied upon, based on the Charter, will be considerably broadened.

8. Gay rights and asylum

8.1 ***HJ (Iran) v Secretary of State for the Home Department*** [2010] UKSC 31

The SC held that the government's "Anne Frank" policy of sending back gay refugees to their home countries where they feared persecution was contrary to their rights under the Refugee Convention. Strictly speaking, this was not a Human Rights case, as it was decided purely under the Refugee Convention. HJ and HT are both homosexual men and had been persecuted in their home countries – Iran and Cameroon respectively – after their sexual orientation had been discovered. The CA had dismissed the men's appeals on the basis that the consequences for the men would be "reasonably tolerable". Lord Rodger (who along with the rest of the SC rejected the test of 'reasonable tolerability and allowed the appeal) stated:

[5] The AIRE Centre (as interveners), and the Claimants in a joined case of *Bibi,* both seek to contend that the rule is contrary to Article 12 rights.

> *"In short, what is protected is the applicant's right to live freely and openly as a gay man. That involves a wide spectrum of conduct, going well beyond conduct designed to attract sexual partners and maintain relationships with them. To illustrate the point with trivial stereotypical examples from British society: just as male heterosexuals are free to enjoy themselves playing rugby, drinking beer and talking about girls with their mates, so male homosexuals are to be free to enjoy themselves going to Kylie concerts, drinking exotically coloured cocktails and talking about boys with their straight female mates. Mutatis mutandis - and in many cases the adaptations would obviously be great - the same must apply to other societies. In other words, gay men are to be as free as their straight equivalents in the society concerned to live their lives in the way that is natural to them as gay men, without the fear of persecution.*

However, "simple discriminatory treatment" on grounds of sexual orientation does not give rise to protection under the Convention. Nor does the risk of family or societal disapproval, even trenchantly expressed. Nevertheless, persecution does not cease to be persecution for the purposes of the Convention because those persecuted can eliminate the harm by taking avoiding action. It remains to be seen whether the principle extends to the open expression of political opinion, the CA in *TM (Zimbabwe) and others v SSHD* [2010] EWCA Civ 916 having declined to decide the issue while nonetheless sketching out the field of argument (Elias LJ at [31-42]).

Angus McCullough QC

15 October 2010

With the declaration of interest that I am an editor of it, I would encourage anyone interested in the subject to visit the UK Human Rights Blog, which is run by members of 1 Crown Office Row: www.ukhumanrightsblog.com. It is part of the Guardian Legal Network and "*aims to provide a free, comprehensive and balanced legal update service. Our intention is not to campaign on any particular issue, but rather to present both sides of the argument on issues which are often highly controversial*." You can sign up for free email updates on human rights cases and relevant news items.