



The Human Rights Bulletin

"All human beings are born free and equal in dignity and human rights" - Universal Declaration of Human Rights

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The Human Rights Bulletin

covering significant human rights cases and developments at the UK, European and International levels

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JUDGMENTS

UK CASES

Article 2 – right to life

Soldiers serving abroad – jurisdiction - Article 2 investigative duty

R (Smith) v Oxfordshire Assistant Deputy Coroner
[2009] EWCA Civ 441, judgment of 18 May 2009

This case concerned the death of a British soldier in Iraq who died from hypothermia whilst carrying out duties off his army base. The two questions in the appeal were: (1) whether the ECHR protects soldiers serving abroad and (2) if so, whether the inquest into the soldier's death should be an Article 2 "Middleton" type inquest. The court answered both questions in the affirmative.

at the heart of human rights

In answer to question 1, the court held that members of the armed forces were subject to UK jurisdiction wherever they were and therefore under Article 1 the UK must secure their Convention rights, even when serving abroad. The court made the following findings in coming to this conclusion: (i) the jurisdictional scope of the HRA was held to be identical to that of the Convention; (ii) jurisdiction is essentially territorial, however there are exceptions to this general rule; (iii) a soldier in the British army is in every sense under the control of the army and there is a sufficient link between a soldier and the UK wherever his death occurs if he is acting as a soldier and not on a "frolic of his own". The court distinguished the *R (Gentle) v Prime Minister* [2008] AC 1356, HL (E) case.

With regard to question 2, the court held that the Article 2 investigative duty arose in Private Smith's case and thus a Middleton type inquest, investigating the circumstances in which he died, was required. Soldiers on active service abroad are vulnerable because they are under the control of and subject to army discipline and they cannot disobey orders therefore they are owed a duty of care at common law. The limits of the inquest were for the coroner but it was expected that questions as to whether there were any systemic failures leading to the death, whether there was a real and immediate risk of death and whether all reasonable steps were taken to prevent his death would be considered.

<http://www.bailii.org/ew/cases/EWCA/Civ/2009/441.html>

*Article 2 – right to life**Mental health - non-detained patients - Article 2 duties*

Richard Rabone and another v Pennine Care NHS Trust [2009] EWHC 1827 (QB), judgment of 23 July 2009

This case concerns the suicide of a 24-year-old girl, Melanie Rabone, who, at the time of her suicide, was on home leave from hospital where she had been admitted to be treated for severe depression, following suicide attempts. It was accepted that the doctor who decided that Melanie should be allowed home leave had acted negligently. There was a system in place at the hospital to carry out risk assessments however this was not fully complied with. The hospital conducted an internal investigation into Melanie's death and an inquest into her death recorded a verdict of suicide.

A claim was issued by Melanie's parents against the trust, both for negligence and for breach of Article 2. The negligence claim settled. In relation to the right to life claim, it was held that Melanie was not a detained patient at the time of her death and that the heightened operational duty under Article 2 to protect life and prevent suicide does not arise where a mental health patient is not detained. Any negligence, even "serious" negligence, by hospital staff involved in Melanie's treatment falls outside of Article 2 once the state has fulfilled its obligation to put in place a health care system with high professional standards that protects the lives of patients. The court went on to consider in principle whether there was a real and immediate risk to life and held that although there was a real risk it was not an immediate risk. Accordingly, there was no potential breach of an Article 2 operational duty. The court also found that there was no systemic breach of Article 2 because there was an appropriate risk assessment system in place and any failures in implementing it did not fall within the scope of Article 2. The court further held that Melanie's parents were only victims for the purpose of bringing a claim under the HRA in relation to the investigative obligation under Article 2, but not for the purposes of the substantive positive and negative Article 2 obligations because, having part-settled the claim, they could not pursue a claim under the HRA.

<http://www.bailii.org/ew/cases/EWHC/QB/2009/1827.html>

*Article 3 – right to freedom from inhuman and degrading treatment**Police – ill-treatment – scope of Article 3 investigative duty*

Daniel Morrison v The Independent Police Complaints Commission [2009] EWHC 2589 (Admin), judgment of 26 October 2009

The claimant's case was that he was arrested while driving home and during the arrest police officers pointed a gun at his face, smashed his car window, shot him three times with a Taser gun, and cut him several times on the face. The claimant said he was compliant during the arrest; the police said that he was non-compliant. A complaint was made and referred to the IPCC who decided that it should be investigated locally, by the Professional Standards Department of the Metropolitan Police. The claimant lodged a judicial review on the basis that the investigation would not be Article 3 compliant because it was not independent. The IPCC's case was that a local investigation coupled with the opportunity to appeal to the IPCC and the possibility of criminal and civil proceedings fulfilled the Article 3 obligation.

Nicol J held that the claimant clearly had an arguable case and that the case was "nowhere near the borderline" for Article 3 engagement due to the intense pain caused by the Taser and the cuts to his face and head. Although the Article 3 investigative duty requires an independent investigation, that can be achieved by a combination of a number of methods and the investigation did not need to be carried out by the IPCC. Although the local police investigation would not satisfy the investigative duty alone because of its lack of independence, this could be remedied by the possibility of appeal to the IPCC or later criminal proceedings. Civil proceedings, however, were said not to be relevant. It was immaterial if an investigation lacking in impartiality preceded the later stages unless there were irredeemable flaws in the initial investigation which tainted the stages that followed. With the police investigation not yet complete it was not yet possible to say whether there were any irredeemable flaws and it was not clear whether a criminal trial might occur. There was therefore no breach of the Article 3 investigative duty.

<http://www.bailii.org/ew/cases/EWHC/Admin/2009/2589.html>

Article 3 – prohibition of torture

Immigration – asylum seekers -in-country right of appeal – fresh representations

BA (Nigeria) v Secretary of State for the Home Department and others; PE (Cameroon) v Secretary of State for the Home Department [2009] UKSC 7, judgment of 26 November 2009

This case concerns whether s 92 (4)(a) of the Nationality, Immigration and Asylum Act 2002 (NIAA 2002), which provides for an in-country right of appeal against an immigration decision for those who made an asylum claim or human rights claim while in the UK, applies to asylum seekers who have had an initial claim refused and have submitted fresh representations that have not been accepted as a fresh asylum claim under paragraph 353 of the Immigration Rules.

The Supreme Court held (Lady Hale dissenting) that a subsequent asylum claim does not have to have been accepted as a fresh asylum claim under paragraph 353 to provide for an in-country right of appeal. Lord Hope and Lord Brown (with Lord Scott and Lord Rodger agreeing) explained that the Secretary of State has in place a system for dealing with unmeritorious repeat claims through certification under s 94 NIAA 2002 (claims which are clearly unfounded) and s 96 NIAA 2002 (claims where the applicant has dealt with, or ought to have dealt with, the issue in an earlier appeal); that system is comprehensive, therefore any claim that falls outside of the certification framework amounts to an asylum or human rights claim for the purposes of s 92(4)(a) NIAA 2002.

<http://www.bailii.org/uk/cases/UKSC/2009/7.html>

Article 3 – right to freedom from inhuman and degrading treatment

Dublin Regulation – removal of asylum-seekers – application of Article 3 to Italian immigration practices

R (EW) v Secretary of State for the Home Department [2009] EWHC 2957 (Admin), judgment of 18 November 2009

EW claimed asylum in the UK having entered via Italy. Under the Dublin II Regulation, Italy was deemed to have accepted responsibility for his claim and removal directions were set. EW sought judicial review of the Secretary of State's refusal to accept responsibility for the claim and the certification of his claim as clearly

unfounded. EW argued that (i) he would face a real risk of destitution in Italy, in breach of Article 3, and that (ii) the Secretary of State should have exercised his discretion to accept responsibility for the claim because of Italy's consistent breaches of Article 3 and EU directives in its treatment of asylum seekers.

The claimant contended that the Italian immigration system failed to facilitate the pursuit of asylum claims, to provide accommodation and financial support for asylum-seekers and to provide adequate remedies for these defaults.

Higginbottom J rejected these arguments. There was a presumption that a friendly state would comply with its international obligations and nothing in the claimant's evidence suggested that the Italian authorities regularly frustrated asylum applications. Further, since the Italian authorities undertook no positive action to deprive asylum seekers of accommodation or financial support, no Article 3 breach could occur. Even if there was a risk of an Article 3 violation in Italy, EW's case should be dealt with in the Italian courts, in which effective relief for asylum seekers was available, with, if necessary, a reference to the ECtHR.

The Secretary of State's decisions in relation to EW's asylum claim were therefore not in breach of Article 3.

<http://www.bailii.org/ew/cases/EWHC/Admin/2009/2957.html>

Article 5 – the right to liberty

Closed evidence – availability of judicial review – power to deny bail

R (on the application of Cart and others) v Upper Tribunal and others [2009] EWHC 3052 (Admin), judgment of 1 December 2009

Doughty Street barrister Charlotte Kilroy appeared as junior counsel for the second claimant

The issue common to the conjoined cases of U, XC and Mr Cart was whether the Special Immigration Appeals Commission (SIAC) and the Upper Tribunal (UT) were amenable to judicial review. A second question arose in relation to the first two claimants as to whether SIAC had breached Article 5(4) in revoking or refusing bail on the basis of entirely closed material.

U and XC were subject to deportation proceedings on national security grounds. For reasons wholly set out in closed judgments, SIAC revoked U's previous grant of bail and refused bail to XC. Both claimants sought judicial

review of SIAC's decisions.

Mr Cart had unsuccessfully challenged, before the First Tier Tribunal, a variation to a child maintenance assessment to which he was subject. The UT granted him permission to appeal on three of the four grounds he had pleaded. Mr Cart sought judicial review of the UT's refusal to permit him to appeal on the fourth ground.

The relevant statutory provisions designated SIAC as a "superior court of record". An identical formula existed in relation to the UT. The court rejected the defendants' arguments that this label alone rendered each tribunal immune from judicial review. The rule of law precludes parliament from ousting the jurisdiction of the High Court by implication or by the use of a deeming provision as in the present case.

All courts of limited jurisdiction (leaving aside the Court of Appeal and Supreme Court) are amenable to judicial review, save where a court's status is so closely equivalent to the High Court that judicial review is inappropriate. On the basis that SIAC, like its counterpart the Asylum and Immigration Tribunal, cannot be considered equivalent to the High Court, it is reviewable. By contrast, because of its authoritative nature and position within the new tribunals structure, the UT is to be seen as an *alter ego* of the High Court. It is therefore not reviewable for an error of law although it may be amenable to judicial review where it strays outside its statutory jurisdiction or where there is a wholly exceptional collapse of fair procedure.

As to the detention issue, Article 5(4) required that an individual be provided with a core irreducible minimum of information to enable him to effectively challenge the allegations against him. This standard applied in the present case and it had not been satisfied: the SIAC decisions were therefore unlawful.

<http://www.bailii.org/ew/cases/EWHC/Admin/2009/3052.html>

Article 5 – right to liberty and security

Control orders – terrorist activity – necessity of maintaining non-derogating control order

Secretary of State for the Home Department v Saadi [2009] EWHC 3390 (QB), judgment of 21 December 2009

Doughty Street barristers [Timothy Otty QC](#) and [John RWD Jones](#) appeared for the defendant

On 3 April 2008, Mr Saadi was placed under a non-derogating control order, renewed on 31 March 2009. He sought to challenge the order on the grounds that (i) the Secretary of State's assessment of his degree of past involvement in terrorism was flawed, and that (ii) the imposition of the order was not necessary to protect the public from terrorist-related activity.

Mr Saadi, a Libyan national, arrived in the UK in March 2002. In subsequent deportation proceedings, SIAC concluded that Mr Saadi represented a threat to national security but that his deportation to Libya would violate Article 3. This decision was confirmed on appeal.

In separate Italian criminal proceedings taking place in Mr Saadi's absence, Mr Saadi was acquitted of associating with others for a terrorist purpose. This ruling was reversed by the Italian Court of Appeal.

In the present proceedings, Wilkie J held that there were reasonable grounds for believing that Mr Saadi had been involved in terrorism. Despite doubts as to the reliability of certain evidence relied upon by the Italian Court of Appeal, there was a reasonable suspicion that Mr Saadi had attended a terrorist training camp in Afghanistan and had co-operated with the terrorist-related activities of a group in Milan.

However, there was no necessity for the control order to remain in force. Mr Saadi had not participated in extremist activity since his arrival in the UK. Given that his contacts with terrorist groups would have substantially diminished because of the control order and the possibility of subsequent surveillance by the authorities, the order was not necessary to protect the public from terrorism and would be revoked.

<http://www.bailii.org/ew/cases/EWHC/Admin/2009/3390.html>

Article 5 – right to liberty and security *Article 6 – right to a fair trial*

Control orders – non-derogating control orders – revocation – retrospective or prospective effect – compensation – Articles 5 and 6

SSHD v AF; SSHD v AE [2010] EWHC 42 (Admin), judgment of 18 January 2010

Doughty Street barrister [Timothy Otty QC](#) appeared for respondent AF.

Controlee AF contended that where the disclosure requirements endorsed in *AF (No 3)* [2009] 3 WLR 74 resulted in the Secretary of State withdrawing material upon which he

intended to rely and where the corollary was that there was no sustainable case for a control order, such order should be quashed retrospectively rather than revoked prospectively. Further, contended AF, the same disclosure requirements did not apply to claims for compensation arising out of the imposition of a control order. In such circumstances a successful controlee should be entitled to recover the legal costs attributable to the proceedings in which his order was quashed.

Silber J upheld all three of AF's contentions. Relying upon wide-ranging dicta from Baroness Hale in *MB & AF* [2008] 1 AC 440 to first principles espoused by Lord Reid in *Ridge v Baldwin* [1964] AC 40 HL he reasoned that the Convention had to be supported and enforceable by sanctions and that the duty of the court lay in ensuring that that was so and in avoiding Convention rights becoming something of a blunted instrument.

On the second issue, it was held that it would be unjust if the Secretary of State could defeat a claim for compensation simply by filing a "closed" Particulars of Defence – in practice it was likely to cloak him in immunity from civil suits and to deprive controlees of a remedy to which they were entitled. So holding, the High Court thus facilitated the process of ex-controlees bringing claims for compensation for false imprisonment as well as for breaches of Articles 5 and 6. There was no reason to depart from the usual rule that costs follow the event, and a controlee who successfully challenged the imposition of a control order is entitled to recover the costs occasioned thereby.

<http://www.bailii.org/ew/cases/EWHC/Admin/2010/42.html>

Article 6 – right to a fair trial

Proper construction of s 65(2)(a) of RIPA 2000 and the right to a fair trial

R (on the application of A) v B [2009] UKSC 12, judgment of 9 December 2009

Doughty Street barristers Gavin Millar QC and Guy Vassall-Adams appeared for A

The appellant, A, was a former member of the Security Service and B was its Director of Establishments. A required B's consent in order to publish a book about his work. B withheld his consent and the appellant began proceedings in the High Court to challenge that decision, claiming Article 10 was breached. B argued that s 65(2)(a) of the Regulation of Investigatory Powers Act 2000 (RIPA) provided that the Investigatory Powers Tribunal (IPT) was the "only appropriate tribunal" in relation to proceedings under s 7(1)(a) of the HRA 1998 brought

against the intelligence services. Accordingly, the High Court did not have jurisdiction to entertain A's Article 10 claim.

A advanced two principal arguments. First, that s 65(2)(a) of RIPA excludes the s 7(1)(a) HRA jurisdiction of any other tribunal, but not of the courts. Secondly, that even if s 65(2)(a) were construed as conferring exclusive s 7(1)(a) jurisdiction on the IPT, it does so only in respect of proceedings against the intelligence services arising out of the exercise of one of the investigatory powers regulated by RIPA.

Justice intervened in the appeal in support of the claimant's submissions. They urged the court to adopt as narrow a construction of section 65 as possible, first, so as not to exclude the jurisdiction of the ordinary courts and, secondly, to avoid a construction which they submitted will inevitably give rise to breaches of other Convention rights, most notably the article 6 right to a fair hearing.

The Supreme Court unanimously dismissed A's appeal. In relation to A's first principal argument, Brown LJ noted that the language of s 7(2) of the HRA and the use of the word "only" before "appropriate tribunal" in s 65(2)(a) indicated that it was unlikely that Parliament had intended to allow a complainant to choose for himself whether to bring proceedings in court or before the IPT. Further, there were no other tribunals with s 7(1)(a) jurisdiction over the categories of claim listed in s 65(3) of RIPA.

As regards A's second principal argument, this would require reading into s 65(3)(a) (which contains the phrase, "proceedings against any of the intelligence services") words which simply were not there. Additionally, there were other provisions in RIPA which were more obviously directed to complaints of abuse of the intelligence services' regulatory power which made it impossible to adopt A's construction.

Forcing the appellant's Article 10 challenge into the jurisdiction of the tribunal would not inevitably result in breaches of Article 6. It has long been recognised, both domestically and by Strasbourg, that claims against the intelligence services raised special problems and cannot be dealt with in the same way as other claims. To rule that the IPT procedures were necessarily incompatible with Article 6(1), the Court would be going further than Strasbourg jurisprudence. It was not prepared to do so here. Even if the IPT's rules are incompatible with Article 6(1), the remedy lies in their modification, not in an artificially limited construction of the IPT's jurisdiction.

<http://www.bailii.org/uk/cases/UKSC/2009/12.html>

*Article 6 – right to a fair trial**Closed material - imposition of control orders*

Secretary of State for the Home Department v AF and another [2009] UKHL 28, judgment of 10 June 2009

Doughty Street barrister Timothy Otty QC appeared for AF and Doughty Street barrister Paul Bowen appeared as a Special Advocate for AN.

Control orders were imposed by the Secretary of State on three suspected terrorists, AF, AN and AE. The orders relating to AF and AN were subsequently held to be unlawful on the grounds that the controlees had been denied a fair hearing by virtue of the Secretary of State's reliance on closed material. AE's order was confirmed by the first-instance court where it was held that, despite the paucity of open material, the closed proceedings had been free from substantial injustice. The Court of Appeal, by a majority, upheld all three orders. It held that Article 6 required that the controlee not be exposed to significant injustice, but that there was no minimum of information which was required to be disclosed in all cases (or, alternatively, any such minimum could be "very little indeed").

In the House of Lords, it was common ground that any control order procedures had to comply with Article 6(1). Their Lordships applied the analysis of Article 5(4) in the case of *A v UK* to their interpretation of the civil limb of Article 6(1) in the present case.

The relevant test was therefore whether each controlee had been given sufficient information about the allegations against him to enable him to give effective instructions in relation to those allegations. Where the open material consisted solely of general assertions and the closed material was relied on solely or to a decisive degree, Article 6 would not be satisfied. This standard had not been met in the present cases, each of which was therefore remitted for further consideration.

<http://www.baillii.org/uk/cases/UKHL/2009/28.html>

*Article 6 – right to a fair trial**Control order hearings as a determination of civil rights - Article 6*

R v BC and BB ex p Secretary of State for the Home Department [2009] EWHC 2927 (Admin), judgment of 11 November 2009

Doughty Street barristers Judith Farbey and Stephen Cragg appeared as Special Advocates

BB and BC were made subject to control orders which were revoked and replaced with orders with fewer restrictions following the decision in *SSHD v AF (No 3)* [2009] UKHL 28, which held that Article 6 applied to control order proceedings and that disclosure of the reasons for the control order was necessary to comply with Article 6. The issue in the present appeal was whether Article 6 applied even though the new orders were less restrictive than the previous order. In particular, they did not contain provisions allowing search and seizure. However, they did contain residence obligations and other restrictions on the controlee's movements and associations, and ability to travel abroad. It was also recognised that the controlee would be viewed as a suspected terrorist in the eyes of others.

The court held that Article 6 did apply because the proceedings were determinative of BB and BC's civil rights and that the application of Article 6 was not limited to any particular nature of the requirements of a control order. In coming to this decision, the court commented that a private right which is directly interfered with by a public body is likely to lead to the application of Article 6 and that control orders are specifically intended to restrict the rights of those subjected to them, thus engaging Article 6. The judgment strongly suggests that all Convention rights can be regarded as civil rights under domestic law since the HRA.

The court held that following *SSHD v AF (No 3)*, the controlee must be told enough to enable him to meet the case against him and what is sufficient will depend on the facts of a given case. Such disclosure is an irreducible minimum required under Article 6 and does not depend on the nature of the restrictions in the control order. The appointment of a special advocate will not necessarily produce the required degree of fairness as the special advocate can only be of use if he is able to make an effective challenge to the important material and he can only do that if the controlee knows enough to give the necessary instructions.

Permission was given for the Secretary of State to appeal.

<http://www.baillii.org/ew/cases/EWHC/Admin/2009/2927.html>

*Article 6 – right to a fair trial**Article 8 – Right to respect for family and private life**Control orders – non-derogating control orders – reasonableness of grounds for suspicion; continuing necessity to protect public*

Secretary of State for the Home Department v AM [2009] EWHC 3053 (Admin), judgment of 21 December 2009

Doughty Street barrister Timothy Otty QC appeared for the defendant

A control order was first imposed on AM, a British national, on 21 June 2007. The order was renewed by the Secretary of State for the Home Department (SSHD) in June 2008 and again in June 2009. The proceedings constituted a review of the order pursuant to s 3(10) of the Prevention of Terrorism Act 2005 (PTA).

The SSHD had decided that there were reasonable grounds for suspecting that AM is or had been involved in terrorist related activity; and that it was necessary, for purposes connected with protecting members of the public from a risk of terrorism, to make a control order imposing obligations on him.

Nine statements were made on behalf of the SSHD. The sixth, eighth and final statements were subject to confidentiality undertakings which required that they were dealt with *in camera*. The open statements included the Security Service assessment that AM was a member of a sleeper cell; that he had been involved in a transatlantic airlines plot that had been disrupted; and that he remained willing to conduct an attack. AM submitted nine witness statements. He denied, *inter alia*, ever having been involved in any form of terrorism related activity and resented the stigma attached to him by virtue of the control order and the interference with his life which it caused. He alleged, *inter alia*, that the Security Services had contacted him on several occasions. They had offered him money in exchange for information and had said to him that if he did not speak to them, they would be taking legal action against him.

AM's submissions included the following: (i) that the court cannot find as a fact that there was any reasonable suspicion that AM had been involved in terrorism related activity as at 2007 or today; (ii) that the control order should be quashed on JR grounds; (iii) that the control order must be varied, there being no open evidence or allegations capable of supporting the case that certain obligations were a necessary interference with his Article 8 rights; and (iv) that the control order should not be upheld

without further disclosure, whether on standard public interest grounds or compliance with Article 6. AM requires such disclosure in order that he may effectively challenge the obligations imposed on him. Wilkie J rejected the Article 6 argument, stating that the statements of the case against AM set out clearly the allegations which are at the crux of the case against him and provide sufficient detail to enable AM to give effective instructions to enable his case to be put by his advocates. He held that there was an overwhelming case that there are reasonable grounds for suspecting that AM has been involved in terrorism-related activity and would continue to be so if he had the opportunity. It was therefore necessary for the purposes connected with protecting members of the public from a risk of terrorism to subject AM to a control order. However, certain of the obligations contained within the control order were not necessary and should be varied.

<http://www.bailii.org/ew/cases/EWHC/Admin/2009/3053.html>

*Article 6 – right to a fair trial**Domestic procedural safeguards – hearsay evidence – “sole and decisive”*

R v Horncastle and others [2009] UKSC 14, judgment of 9 December 2009:

The principal issue was whether Article 6 prevents the admission of hearsay evidence in the form of a written statement where a witness is unwilling (due to fear) or unable (because, for example, they have died) to give live evidence if such evidence is the sole or decisive evidence against the defendant. In the case of *Al-Khawaja and Tahery v UK* (2009) 49 EHRR 1, the ECtHR held that admission of hearsay evidence that is sole or decisive will breach Article 6(1) (entitlement to a fair hearing) and Article 6(3)(d) (the right to examine or have examined witnesses against him).

The Supreme Court unanimously upheld the Court of Appeal decision and refused to follow the ECtHR, holding that although s 2(1) HRA 1998 requires courts to “take into account” decisions of Strasbourg which will normally result in English Courts applying principles established by the ECtHR, there will be occasions where the court considers whether Strasbourg sufficiently appreciates or accommodates particular aspects of the domestic process and it is open to the English courts not to follow Strasbourg where necessary. Their Lordships said that the ECtHR had not given full reasons for the “sole or decisive” rule and that the real issue under the Convention is whether the trial as a whole is fair or unfair; if the trial is not unfair then Article 6 will not be breached even if the specified aspects of a fair trial in Article 6(3) are not complied with. The Supreme

Court also held that this principle applies equally whether considering anonymous witnesses or hearsay evidence.

The important considerations are whether there is justification for the witness not giving live evidence and whether the evidence has been shown to be reliable. The Supreme Court emphasised that English law provides a thorough statutory regime to determine the admissibility of hearsay evidence that contains adequate safeguards to ensure that unreliable evidence resulting in an unfair trial is not admitted; where sole or decisive hearsay evidence is properly admitted under English law then the trial will not be unfair and therefore will not breach Article 6. In the factual circumstances under consideration, despite the defendants not having had the opportunity to confront the witnesses, the trials had been fair therefore the appeal was dismissed.

The UK has applied for *Al-Khawaja and Tahery v UK* to be considered by the ECtHR Grand Chamber under Article 43(1). The decision of the Grand Chamber on whether to accept the application was adjourned pending the decision in *R v Horncastle*.

<http://www.bailii.org/uk/cases/UKSC/2009/14.html>

Article 6 – right to a fair trial

Public Interest Immunity - use of a closed material procedure

Al Rawi and Others v Security Service, Secret Intelligence Service and Others [2009] EWHC 2959 (QB), judgment of 18 November 2009

Doughty Street barristers Timothy Otty QC and Richard Hermer QC appeared for the first, second and fourth claimants

The claimants were former detainees who had been held by foreign states at various locations, including Guantanamo Bay. They had brought various claims against the defendant organs of the state, including for false imprisonment and breaches of the HRA 1998. This was a trial of a preliminary issue.

The defendants argued that a closed material procedure should be adopted involving the use of special advocates. The claimants and the interveners contended that this would be inconsistent with established principles of Public Interest Immunity (PII).

The issues to be determined were whether: (i) the authorities justified the use of the closed material procedure;

(ii) the rules on PII precluded the procedure's use; (iii) the procedure was precluded by the Civil Practice Rules (CPR) or the Crown Proceedings Act 1947; and (iv) the procedure was an impermissible form of judicial innovation.

Silber J held in favour of the defendants. (i) There was nothing in the relevant case law to indicate that the closed material procedure could not be applied to civil claims for damages or that its use was limited to only certain categories of cases. It was therefore lawful and proper for a court to order that a closed material procedure could be adopted in a civil claim for damages. (ii) The closed material procedure was not inconsistent with established law relating to PII. Case law showed that the special advocate procedure was an acceptable way of dealing with sensitive material in exceptional cases. (iii) There was nothing in the CPR or the 1947 Act which prevented or precluded the adoption of the closed material procedure in a case where there was a civil claim for damages if the other conditions for its use were satisfied. (iv) The contention that it was not permissible to use the procedure because it constituted a form of judicial innovation was to be rejected.

<http://www.bailii.org/ew/cases/EWHC/QB/2009/2959.html>

Article 6 – right to a fair trial

Definition of "child" – Children Act 1989, s 20(1) - age dispute – role of the court in determining status

R (A) (FC) v London Borough of Croydon; R (M) v London Borough of Lambeth [2009] UKSC 8, judgment of 26 November 2009

Doughty Street barrister Ian Wise appeared as junior counsel for appellant A

In this case the Supreme Court considered the issue of age dispute cases, and whether for the purposes of s 20(1) of the Children Act 1989 (which entitles a child who is in need and who meets certain criteria to accommodation within a local authority's area) the finding that a person is a child is a question to be determined by the local authority or the court. The court unanimously held (Lady Hale delivering the lead judgment) that it is to be determined by the court, the alternative submission that it is a question for the Secretary of State reviewable by the courts on *Wednesbury* grounds being rejected. In coming to this conclusion the court explained that the s 20(1) duty is owed to any person who is in fact a child. The question of whether

a person is a child is one of fact and is defined objectively in the Act; it may be a difficult question to answer but there is a right or a wrong answer, therefore it is a matter for the court to decide and does not require any professional value judgment as do the other criteria in s 20.

The court also gave consideration to whether s 20(1) gives rise to a "civil right" for the purpose of Article 6(1) of the Convention, though no findings were made. Lady Hale cautiously suggested s 20(1) might give rise to a civil right, but that the current process of the local authority making a reviewable decision about whether a s 20 duty arises would satisfy Article 6. Lord Hope was of the view that s 20(1) did not give rise to a civil right. Lord Scott, Lord Neuberger and Lord Walker were each in agreement with Lady Hale (Lord Walker preferring to leave the "civil right" question open).

<http://www.bailii.org/uk/cases/UKSC/2009/8.html>

Article 8 – right to respect for private and family life

Immigration Rules – family member applications – third party maintenance

Ahmed Mahad (previously referred to as AM) (Ethiopia) v Entry Clearance Officer [2009] UKSC 16, judgment of 16 December 2009

This case concerns interpretation of provisions of the Immigration Rules for family members seeking leave to enter the UK to join other family members (sponsors) already settled here. Rule 281 (spouses), Rule 297 (children), Rule 317 (other dependant relatives) were considered. Each Rule provides that the applicant (and where appropriate any dependants) must be maintained adequately without recourse to public funds.

The Supreme Court unanimously held that for each Rule the funds for maintenance did not have to be from the sponsor's own resources and that it was acceptable for the applicant to rely on third party support. In respect of Rule 297, which requires that a child be maintained by their parents or relative they are seeking to join, it was found that this was a child protection measure and the maintenance requirements should be construed in the same manner as the other rules under consideration.

The Supreme Court said that it does not make sense to preclude financial support provided to the sponsor by close friends or relatives, but allow the sponsor to rely on a salary provided by an employer (whether the employment was gained through the generosity or a friend or relative or the open market). The court accepted that

unenforceable third party promises may generally be more precarious and more difficult to verify than other sources of income, but this is not invariably the case and assessment of its reliability depends on the circumstances. There is no warrant for the view that third party support occupies a particular category of uncertainty. It is open to Entry Clearance Officers to ask a third party offering long-term support to become a joint sponsor and to give a Rule 35 undertaking to underwrite his commitment.

<http://www.bailii.org/uk/cases/UKSC/2009/16.html>

Article 8 – right to family and private life

Enhanced criminal record checks – right to respect for private life

R (L) v Commissioner of Police of the Metropolis [2009] UKSC 3, judgment of 29 October 2009

Doughty Street barrister [Stephen Cragg](#) appeared for the claimant

The claimant was employed by an agency which placed staff in schools. Her employment was ended when the agency received an enhanced criminal record check (ECRC) from the Chief Constable stating that she had been put on the child protection register because of allegations that she had neglected her son. She alleged that the disclosure of this information breached her Article 8 rights.

The Supreme Court held that Article 8 was applicable. The previous convictions which may appear on an ECRC, although handed down in open court, are recorded and stored privately and are therefore part of an individual's private life. Information about cautions and criminal and non-criminal allegations, which take place in private, also engages the Article.

The statutory scheme relating to ECRCs was not, however, incompatible with Article 8. The legislation allows for a balancing act, in selecting the information to be disclosed, between an individual's private life rights and the need to protect vulnerable people from exposure to potentially dangerous individuals. Provided that this balance is carefully struck, that there is no presumption of disclosure and that applicants can make representations in cases where doubt exists as to where the balance lies, the interference will be justified under Article 8(2). In the present case, the balance had been correctly struck and the ECRC would not be quashed.

<http://www.bailii.org/uk/cases/UKSC/2009/3.html>

*Article 9 - freedom of thought, conscience and religion
Article 2 of Protocol 1 - right to education*

Discrimination - Employment Equality (Religion or Belief) Regulations 2003 - grounds of philosophical belief - belief in climate change - relevance of authorities on Article 9 and Article 2 of Protocol 1

Nicholson v Grainger PLC, EAT, judgment of 3 November 2009

The appellant employer, Grainger PLC, appealed against the decision of an Employment Tribunal (ET) that the respondent employee, Mr Nicholson, was entitled to pursue a claim under the Employment Equality (Religion or Belief) Regulations 2003. The respondent had been made redundant by the appellant. He claimed that his dismissal was unfair and that he had been discriminated against because of his belief about climate change. He asserted that this belief was not merely an opinion, but a "philosophical belief" within reg 2(1)(b).

The issue for the Employment Appeal Tribunal (EAT) to determine was: (i) how far, if at all, the belief said to qualify for protection under the Regulations was required to be similar to religious belief; (ii) what limits, if any, should be placed on the words "philosophical belief"; and (iii) whether the authorities in relation to Article 9 and Article 2 of Protocol 1 of the Convention were of relevance.

The appeal was dismissed by Burton J. He considered the jurisprudence on Article 9 and Article 2 of Protocol 1 of the Convention to be extremely helpful in this relatively uncharted territory and held that the definition of "philosophical belief" included the following: the belief must be genuinely held; it must be a belief and not an opinion or viewpoint based on the present state of information available; it must be a belief as to a weighty and substantial aspect of human life and behaviour; it must attain a certain level of cogency, cohesion and importance; and it must be worthy of respect in a democratic society, not be incompatible with human dignity and not conflict with the fundamental rights of others.

It was common ground that the definition of "philosophical belief" had to be limited. Despite the removal of the word "similar" from reg 2(1)(b) by s 77(1) of the Equality Act 2006, it was necessary to have a similar status or cogency to a religious belief. However, it was no bar to protection if the belief was not shared by others or if the belief did not constitute or allude to a fully-fledged system of thought.

If a person could establish that he held a philosophical

belief based on science, as opposed, for example, to religion, there was no reason it should not be protected by the Regulations.

In the instant case, the employment judge had concluded that Mr Nicholson's belief amounted to a philosophical belief without cross-examination. Accordingly, the decision of the ET was upheld on the terms that the respondent's asserted belief was capable of being a belief for the purposes of the Regulation, and at any full hearing, he would still need to be cross-examined to determine whether the belief was genuine. He would also need to adduce evidence to persuade the tribunal that his dismissal was on the grounds of his belief.

http://www.bailii.org/uk/cases/UK/EAT/2009/0219_09_0311.html

*Article 9 - freedom of thought, conscience and religion
Article 2 of Protocol 1 - right to education*

Racial discrimination - ethnic groups - schools admissions policy

R (E) v Governing Body of JFS and the Admissions Appeal Panel of JFS and Others [2009] UKSC 15, judgment of 16 December 2009

The claimant's son, M, had applied to be admitted to JFS, a Jewish school. JFS's policy was to admit only children who were recognised as Jewish by the Office of the Chief Rabbi (OCR). The OCR recognised as Jewish any person whose mother, at the time of the child's birth, was Jewish by descent or by conversion in accordance with Orthodox Jewish principles. M was rejected because his mother's conversion to Judaism was not approved by Orthodox teaching. M's father challenged the JFS admissions policy as discriminatory on racial grounds.

The Supreme Court found, by a majority of 5-4, that the policy was directly discriminatory. Racial discrimination under the Race Relations Act 1976 includes cases in which one person treats another less favourably than he would treat others on the grounds of that person's ethnic origins. "Grounds" in this context means "the factual criteria applied by the discriminator in reaching his decision" rather than the "motive for making the decision". Thus, the fact that JFS's policy had a purely religious motive would not preclude it from being discriminatory if it engaged criteria based on ethnicity.

The test applied by the JFS policy was based on descent in that the key consideration related not to the child himself, but to characteristics relating to his matrilineal ancestors. These characteristics were ethnically based (in ac-

cordance with the definition of ethnicity specified in *Mandla v Dowell Lee* [1983] 2 AC 548) even in relation to matrilineal ancestors who were converts since the evidence showed that such women were considered ethnically Jewish on conversion. Furthermore, most cases related not to converts but to children whose matrilineal ancestors were considered Jewish purely on the basis of their descent. Therefore, because the JFS's stated policy was to treat children such as M disadvantageously in comparison with children who had a Jewish matrilineal ancestor, it was a policy which directly discriminated on racial grounds.

The minority rejected the direct discrimination claim on the basis that M had been discriminated on religious, not ethnic, grounds. JFS had applied Orthodox Jewish law to M's case and had not considered his mother's ethnicity. Had M's mother converted according to Orthodox teaching, her son could have been admitted.

<http://www.bailii.org/uk/cases/UKSC/2009/15.html>

PRIVY COUNCIL

Article 6 – right to a fair trial

Article 8 – right to family and private life

Witness – disclosure of criminal record – respect for private life – balance to be struck

Her Majesty's Advocate v Murtagh [2009] UKPC 35 Privy Council, judgment of 3 August 2009

The principal issue in this case, a reference from the Scottish High Court, was whether the Crown was obliged to disclose to the defence all previous convictions and outstanding charges of a prosecution witness, or whether it was bound to disclose only those which weakened the Crown's case or strengthened the defence case.

The accused argued that the failure to disclose all convictions and outstanding charges breached Articles 6(1) and 6(3)(d) by deviating from the principle of equality of arms and preventing the accused from deciding for himself which parts of the witness's criminal record could be used at trial.

The Privy Council's analysis centred on whether a broader disclosure duty would breach a witness's rights under Article 8. Drawing on ECtHR jurisprudence, it held that Article 8(1) was engaged even though convictions and sentences are announced in open court since records of previous convictions are not publicly available. Article 8(2) required that a balance be struck between an

accused's right to a fair trial and the witness's right to respect for his private life. Where disclosure of the information relating to the witness did not strengthen the defence case or weaken the prosecution case, and had the potential to embarrass the witness, the witness's Article 8 rights should prevail. Otherwise, the interference with Article 8(1) would have no legitimate purpose.

It was the Crown's role to decide initially as to which convictions and charges should be disclosed. Its approach should be to disclose all previous convictions and outstanding charges unless disclosure would be both embarrassing to the witness and immaterial to the case, whereupon the information should be placed *ex parte* before the court for it to decide on disclosure. Similar considerations arose in relation to warnings or other alternatives to prosecution.

<http://www.bailii.org/uk/cases/UKPC/2009/36.html>

ECHR CASES

Article 2 – right to life

Military operations – scope of ECHR jurisdiction – Article 2 – substantive and investigative obligations

Kallis and Androulla Panayi v Turkey (Application No. 45388/99) judgment of 27 October 2009

This claim concerned a Cyprus National Guard soldier, Mr Panayi, who was shot and killed by Turkish-Cypriot soldiers when he entered the UN buffer zone in Nicosia which separates Greek-Cypriot territory from Turkish controlled territory. Although Mr Panayi was not killed on territory controlled by the Turkish forces, it was held that Turkey had jurisdiction over the acts complained of because Northern Cyprus is under the effective control of Turkey and Mr Panayi was entering the territory under Turkey's control and was shot by Turkish soldiers.

The court found that there was both a substantive and procedural violation of Article 2. Mr Panayi was in army uniform but unarmed. The court found that suspicion that Mr Panayi may have been armed when no weapon was visible was not enough to justify lethal force under Article 2(2) in the circumstances, particularly since he was alone and outnumbered by Turkish-Cypriot soldiers who were in complete control of the area and no warning shots were fired. The Turkish troops shot in the direction of UN soldiers who tried to assist Mr Panayi after he had been shot, allegedly in order to protect the UN troops from the threat Mr Panayi was said to pose to them. The Court

held that preventing immediate assistance, even though there was no evidence to show that such assistance could have contributed to saving Mr Panayi's life, was incompatible with the obligation to protect life in Article 2 (1).

The court relied on the UN Force and Firearms Principles in its judgment. Turkey was also found to have breached their investigative duty because the only investigation was by conducted by the same body, (the military authorities) who were implicated in the events. The court awarded 35,000 Euros to each of the applicants (Mr Panayi's parents).

<http://www.bailii.org/eu/cases/ECHR/2009/1662.html>

Article 2 - right to life

Article 4 - freedom from slavery

Article 5 - the right to liberty

Right to life - failure to conduct an effective investigation into a death - duty to provide protection against trafficking and exploitation - prohibition of slavery and forced labour - acquiescence in the arbitrary detention of an individual and the right to liberty and security

Rantsev v Cyprus and Russia (Application No. 25965/04), judgment of 7 January 2010

The applicant, Mr Nikolay Mikhaylovich Rantsev, a Russian national, complained, *inter alia*, under Articles 2, 4 and 5 about the lack of sufficient investigation into the death of his daughter, Ms Rantseva, by the Cypriot police and the failure of the Cypriot authorities to take steps to punish those responsible for his daughter's death and ill-treatment. He also complained under Articles 2 and 4 about the failure of the Russian authorities to investigate his daughter's alleged trafficking and subsequent death and to take steps to protect her from the risk of trafficking.

The ECtHR held that there had been no violation of the Cypriot authorities' positive obligation to protect Ms Rantseva's right to life under Article 2. The particular chain of events leading to Ms Rantseva's death could not have been foreseeable to the police authorities. However, there was a procedural violation of Article 2 as regards the failure of the Cypriot authorities to conduct an effective investigation into Ms Rantseva's death. There was no such violation by the Russian authorities.

On Article 4, the ECtHR held that trafficking, within the meaning of Article 3(a) of the Palermo Protocol and Article 4(a) of the Anti-Trafficking Convention, falls within the scope of Article 4 of the ECHR. The regime of artiste

visas in Cyprus did not afford Ms Rantseva practical and effective protection against trafficking and exploitation. This amounted to a violation of Article 4. Further, there were multiple failures of the Cypriot police authorities. These deficiencies, in circumstances which gave rise to a credible suspicion that Ms Rantseva might have been trafficked or exploited, resulted in a failure by the Cypriot authorities to take measures to protect her. Accordingly, there had been a violation of Article 4 in this respect also.

The Russian authorities had not failed to ensure Ms Rantseva's practical and effective protection. The circumstances of this case did not give rise to a positive obligation on the part of the Russian authorities to take operational measures to protect Ms Rantseva. There had been no violation of Article 4 by the Russian authorities in this regard. However, the Russian authorities clearly had an obligation to investigate the possibility that individual agents or networks operating in Russia were involved in the trafficking of Ms Rantseva to Cyprus. No such investigation had been undertaken. Accordingly, there was a violation of Article 4 by the Russian authorities of their procedural obligation under that Article to investigate the alleged trafficking.

The detention of Ms Rantseva at a Cypriot police station and her subsequent transfer and confinement to an apartment amounted to a deprivation of liberty within the meaning of Article 5. Without the active cooperation of Cypriot police, the deprivation of liberty could not have occurred. Accordingly, the national authorities had acquiesced in Ms Rantseva's loss of liberty. Ms Rantseva's detention was both arbitrary and unlawful. Accordingly, there had been a violation of Article 5 § 1.

<http://www.bailii.org/eu/cases/ECHR/2010/22.html>

Article 3 - right to freedom from inhuman and degrading treatment

Article 5 - the right to liberty

Article 46 - jurisdiction of the court

Prisons - inhuman and degrading treatment - overcrowding

Orchowski v Poland (Application No. 17885/04), judgment of 22 October 2009

In this case the court held that there was a breach of Article 5 due to the applicant being held in overcrowded prison conditions. For most of the applicant's sentence he was held in cells of under 3 square me-

tres, often with numerous other inmates and having to spend most of the day in his cell. It was also noted that the applicant frequently had to shower with large groups of other prisoners (up to 24) and had to eat his meals in the cramped conditions of his cell. Finally, the applicant was moved constantly between cells and prisons.

Although Poland's Constitutional Court had found the conditions in Poland's overcrowded prisons unlawful, the applicant continued to suffer from the alleged breaches and as a result of the Constitutional Court's judgment, the best remedy he was likely to receive was compensatory damages, which does not suffice where a violation is ongoing.

Under a separate section of the judgment on Article 46 (concerning implementation of the decision) the court recognised that the issue of overcrowding of detention facilities is a widespread and persistent problem in Poland over many years, from 2000 until at least mid-2008 that was slowly being addressed. The court made a finding that such overcrowding was a practice incompatible with the Convention. The issue was linked to another structural problem violating Article 5(3), being the excessive length of pre-trial detention, which was examined in the recent case of *Kauczor v. Poland*, (Application No. 45219/06) judgment of, 3 February 2009. It was also emphasised that although it may require significant resources to remedy the problem, a lack of resources cannot justify prison conditions that breach Article 3 and if the state is unable to make prison conditions comply with Article 3 then they must abandon their strict penal policy or put in place a system of alternative means of punishment.

Article 3 – right to freedom from inhuman and degrading treatment

Article 8 – right to family and private life

Deportation orders – likelihood of being subject to inhuman treatment including torture

Daoudi v France (Application No. 19576/08), Grand Chamber judgment of 3 December 2009

The applicant, Mr Kamel Daoudi, is an Algerian national living in France who was born in 1974. At the time of the decision he was subject to a compulsory residence order in the Creuse *département* (France). He arrived in France in 1979 with his parents, and acquired French nationality in 2001. Between 1999 and 2001 he allegedly developed ties with radical Islamist groups.

Mr Daoudi was arrested during a counter-terrorism operation. He was charged with conspiring to prepare an

act of terrorism and with using a forged document. He was subsequently stripped of his French nationality. The Paris *tribunal de grande instance* found him guilty as charged and sentenced him to nine years' imprisonment. The *tribunal* also ordered Mr Daoudi's permanent exclusion from French territory. The Paris Court of Appeal upheld the judgment, but reduced his sentence.

The applicant lodged an application to have the order permanently excluding him from French territory set aside. On the date of his release, the applicant was taken to an administrative detention centre and immediately applied for asylum, lodged an application for judicial review of the administrative decision stipulating Algeria as the country to which he was to be deported and requested suspension of the court order. On the same date, he also lodged a request with the ECtHR under Rule 39 of the Rules of Court (interim measures). The ECtHR indicated to the French Government that it would be advisable not to deport the applicant to Algeria pending the proceedings before the Court. Four days later he was made the subject of a compulsory residence order in the Creuse *département*. The applicant's domestic applications and appeals were subsequently dismissed.

Mr Daoudi alleged that if the deportation order were to be implemented, he would be exposed to a risk of inhuman and degrading treatment prohibited by Article 3. He also held that since he had arrived in France at the age of 5 and had no ties to Algeria, his deportation would amount to a disproportionate interference with his Article 8 rights.

The ECtHR held that it was a known fact that the Algerian authorities knew of the applicant's identity and of the serious crimes of which he had been convicted. It was clear that in Algeria persons involved in terrorist acts were arrested and detained by the Department for Information and Security (DRS) without a clearly established legal basis, essentially for the purposes of being interrogated or obtaining information, and not with a purely judicial aim.

Credible sources established that persons held in such circumstances could be subjected to ill-treatment, including torture. No evidence had been produced by the government to refute these assertions. For those reasons, and having regard to the applicant's background, it was likely that, were the applicant to be deported to Algeria, he would become a target for the DRS. Accordingly, if the decision to deport the applicant to Algeria were implemented, it would amount to a violation of Article 3.

Having regard to the above finding, the Court did not consider it necessary to decide whether, if deported, Mr Daoudi's right to respect for his private and family life would be violated.

*Article 6 – right to a fair trial**Interim injunctions - civil rights – lack of impartiality*

Micallef v Malta (Application No. 17056/06), Grand Chamber judgment of 3 November 2009

Mr F, a neighbour of Mrs M, obtained an interim injunction, in Mrs M's absence, to prevent her from hanging her washing out to dry above his courtyard. Mrs M successfully appealed the injunction on the ground that her right to a fair hearing had been breached. This decision was itself overturned by an appeal court presided over by the Chief Justice, who was a brother of Mr F's lawyer in the first-instance challenge to the injunction, and an uncle of Mr F's lawyer in the appeal proceedings.

Mrs M subsequently died and her brother brought proceedings before the ECtHR, claiming that his sister's Article 6 rights had been violated because of the Chief Justice's lack of impartiality.

In finding for the applicant, the Grand Chamber expressly departed from previous case-law on Article 6. It held that, because of delays in domestic proceedings, an injunction will often be tantamount to a decision on the merits of a claim which has effect for a substantial period of time. Therefore, where an interim measure effectively determines a civil right or obligation, Article 6 will generally apply. However, there may be exceptional cases, where (because, for instance, there is a need for rapid decision-making) certain Article 6 safeguards may not be required, although such protections as the independence and impartiality of the tribunal are indispensable.

Article 6 was therefore applicable and had been violated because the close family ties between the Chief Justice and Mr F's lawyers raised objectively justified concerns as to the tribunal's impartiality.

<http://www.bailii.org/eu/cases/ECHR/2009/1571.html>

*Article 8 – right to family and private life**Police powers - stop and search - right to respect for private life*

Gillan and Quinton v The United Kingdom (Application No. 4158/05), judgment of 12 January 2010

Doughty Street barrister Alex Gask lodged the application for Mr Gillan and Ms Quinton

Under sections 44 and 45 of the Terrorism Act 2000, a

senior police officer can authorise, where s/he considers such an authorisation to be "expedient" to prevent a terrorist act, constables within a specified area to stop and search any individual for terrorism-related articles. Under the 2000 Act, such an authorisation must be reported to the Secretary of State, who can cancel it, and the powers have to be exercised in accordance with the relevant Code of Practice.

On 9 September 2003, the applicants were searched under these powers near to an arms fair taking place in the Excel Centre in East London. They argued that the searches had violated Articles 5, 8, 10 and 11. In the domestic litigation, the High Court, Court of Appeal and House of Lords found no breaches of the Convention.

In relation to Article 8, the court held that the use of coercive powers to search through potentially personal belongings interfered with individuals' private lives. Further, although the powers were underpinned by legislation, they were not in accordance with the law. In order to authorise these powers, the senior police officer did not need to consider an authorisation to be necessary, merely "expedient". There was a lack of temporal and geographical constraint on authorisations, which could be renewed after 28 days and could extend over entire police areas. Once authorised, a constable had a broad discretion in conducting a search: he did not even have to suspect the presence of terrorism-related articles. No arrests for a terrorist offence had yet resulted from such a search. Given the limited scope of a judicial review or action for damages in such cases, the powers provided insufficient protection from arbitrary interference, were therefore not in accordance with the law and breached Article 8. Given this finding, the court considered it unnecessary to consider the other alleged violations.

<http://www.bailii.org/eu/cases/ECHR/2010/28.html>

*Article 8 – right to family and private life**Migration – settled migrants – deportation – proportionality*

Omojudi v The United Kingdom (Application No. 1820/08), judgment of 24 November 2009

In this case the applicant complained that deportation from the UK had breached his Article 8 family and private life rights.

The applicant lived in the UK for over 25 years and had entered the UK lawfully, but was only granted in-

definite leave to remain (ILR) in 2005. The applicant's wife had ILR. Their three children were British citizens, the two youngest were minors, while the oldest child was over 18 but continued to live in the family home with his two-year-old daughter.

Prior to the grant of ILR, the applicant was convicted of theft and conspiracy to defraud and other offences and sentenced to four years' imprisonment. Following the grant of ILR, the applicant was convicted of sexual assault. The applicant was then convicted of a driving offence in 2007. A decision to deport was made on 31 March 2007. He lost his appeal against deportation and was deported to Nigeria.

The Court found that deportation breached Article 8 on the basis that the interference with the applicant's right to family and private life was disproportionate because: he was not a habitual offender; he was granted ILR despite a history of offending, thus the only relevant offences were those committed after the grant; the sexual assault was not the most serious of such offences; the applicant and his wife had made attempts to regularise their immigration status; their family life began prior to his first criminal offence when they had leave to remain in the UK and their ties to the UK were much stronger than their ties to Nigeria; their children were British citizens and the two youngest children would have significant difficulties if forced to relocate to Nigeria, whilst the oldest child could not relocate to Nigeria due to his young child and was dependent on the applicant and his wife to help look after his daughter; and because the applicant could not apply to revoke the deportation order for 10 years.

The applicant was awarded 3,000 Euros damages for distress and anxiety caused by his deportation and separation from his family.

<http://www.bailii.org/eu/cases/ECHR/2009/1942.html>

Article 8 – right to family and private life

Migration – settled migrants – deportation – proportionality

A.W. Khan v The United Kingdom (Application No. 47486/06), judgment of 12 January 2010

A deportation order was made against Mr Khan following a conviction for importation of class A drugs. Mr Khan was in his mid-thirties and had lived in the UK with his family since he was three years old. He continued to reside with his mother and brothers, all of whom had health problems and who depended on him. Mr Khan also had a girlfriend and young daughter, with whom he had daily

contact. Mr Khan argued that his deportation breached his Article 8 rights and the court agreed.

It was held that Mr Khan had a private life in the UK as a settled migrant and that his relationship with his daughter constituted family life. The interference was held to be disproportionate because of Mr Khan's ties to the UK and his behaviour following the offence. Although the ECtHR emphasised that the index offence was very serious, it was recognised that he had not committed any serious previous offences and there was a significant period of good conduct following the offence. That Mr Khan had lived in the UK for most of his life, that his mother and brothers were partially dependant on him, and that he had a stable relationship with his girlfriend and daughter also weighed in his favour. His girlfriend could not be expected to relocate to Pakistan because she was a British citizen, did not speak the language and had no family or friends there. The court also noted that it would be ten years until Mr Khan would be eligible to have his deportation order revoked. The court emphasised that because the relationship between Mr Khan and his girlfriend had begun after his importation conviction, no decisive weight could be placed on his family life, however considering all of the factors, it was held that Article 8 would be breached if Mr Khan was deported.

<http://www.bailii.org/eu/cases/ECHR/2010/27.html>

Article 9 - freedom of thought, conscience and religion *Article 2 of Protocol 1 – right to education*

Freedom of religion – schools – respect for religious pluralism

Lautsi v Italy (Application No. 30814/06), judgment of 3 November 2009

The applicant contended that the compulsory display of crucifixes in Italian classrooms breached her right to raise her two children in accordance with her secular beliefs and was thus in violation of Article 2 of Protocol 1 read with Article 9.

The court held that Article 2 of Protocol 1 is aimed at safeguarding pluralism and social inclusion in a state's educational system. Within this context, a failure to respect the religious and philosophical convictions of parents (which may include atheism) is prohibited by the Article.

The state must therefore avoid, even indirectly, imposing beliefs on children, who may otherwise feel pressurised as a result of the perception that they were being edu-

cated in a particular religious environment. The crucifix is a predominantly Christian symbol and its presence in classrooms could be disturbing for pupils of other faiths or no faith. Where the state has an established religion, it has a special duty to protect the religious freedom of others, particularly those in a religious minority.

The display of a religious symbol associated (in the Italian context) with Catholicism cannot support educational pluralism, which is central to the preservation of a democratic society as mandated by the Convention. The presence of the crucifix in locations associated with public authorities, such as schools, is in breach of the state's duty of neutrality in its public functions and of parents' right to educate their children in accordance with their convictions. A violation of Article 2 of Protocol 1 was therefore found and the applicant was awarded 5,000 Euros for non-pecuniary damage.

<http://www.bailii.org/eu/cases/ECHR/2009/1901.html>

Article 10 – freedom of expression

Journalists - freedom of expression -- freedom of movement

Gsell v Switzerland (Application No. 12675/05), judgment of 8 October 2009

The applicant, Mario Gsell, was a Swiss journalist. In 2001 he was on his way to an event staged by anti-globalisation organisations at the WEF in Davos. The police subjected the passengers of the bus in which he was travelling to an identity check. Mr Gsell showed his press card to the police but was still prohibited from entering Davos on security grounds and in anticipation of an unauthorised demonstration.

The applicant lodged a complaint with the cantonal government. The complaint was declared inadmissible on the ground that it had been submitted out of time, but the cantonal government nevertheless held as to the merits, that the application of the so-called general police clause enshrined in the Federal Constitution, which could be invoked by the authorities to deal with “emergency situations” in the absence of other legal means of averting a “clear and present danger”, had not been disproportionate.

Mr Gsell complained to the European Court of Human Rights, *inter alia*, that his prohibition from entering Davos breached his Article 10 right.

The ECtHR held that the measure at issue had amounted to interference with Mr Gsell's right to freedom of expres-

sion as he had been travelling to Davos with the intention of writing an article. According to case law of the Swiss Federal Court, the general police clause could not be used in foreseeable and recurring situations. In the instant case the scale of the demonstrations had not been unforeseeable and authorities were not entitled to use the general police clause in order to prohibit the applicant from entering Davos. The interference by the authorities with the applicant's freedom of expression had not been prescribed by law and had therefore been a breach of Article 10.

<http://www.bailii.org/eu/cases/ECHR/2009/1465.html>

Article 10 – freedom of expression

Journalists – confidential information - disclosure orders

Financial Times Ltd and others v the United Kingdom (Application No. 821/03), judgment of 15 December 2009

This case originated in an application against the UK by four newspapers and a news agency: Financial Times Ltd; Independent News & Media Ltd; Guardian Newspapers Ltd; Times Newspapers Ltd; and Reuters Group PLC. The applicants were ordered by the High Court to disclose to Interbrew a leaked document that had come into their possession about a takeover bid. It was said that the disclosure could lead to the identification of the source of the leak.

Before the ECtHR, the applicants alleged, *inter alia*, (i) that the High Court order violated their right to freedom of expression and their right to respect for their home and correspondence; and (ii) that the civil proceedings in which Interbrew had claimed damages against the source of the leaked documents and sought to prevent further leaks, was unfair and a breach of their right to a fair hearing under Article 6 § 1.

The ECtHR held that the order constituted an interference with the applicants' right to freedom of expression. In order to establish the necessity of the disclosure for the purposes of Article 10, it was not sufficient for a party seeking disclosure to show merely that, without disclosure, it would be unable to exercise the legal right or avert the threatened wrong on which it based its claim.

In the present case, Interbrew's interests in eliminating, by proceedings against X, the threat of damage through future dissemination of confidential information and in obtaining damages for past breaches of confi-

dence were insufficient to outweigh the public interest in the protection of journalists' sources. There had therefore been a violation of Article 10.

Given the above findings, the Court considered it was not necessary to examine the applicants' complaints under Article 6 § 1 and Article 8 separately.

<http://www.bailii.org/eu/cases/ECHR/2009/2065.html>

Article 12 – right to marry
Article 14 – freedom from discrimination
Article 1 of Protocol 1 – peaceful enjoyment of possessions

Right to marry – recognition of Roma marriage – legal effects of marriage

Muñoz Díaz v Spain (Application No. 49151/07), judgment of 8 December 2009

In 2000, the applicant, a Rom of Spanish nationality, applied for a survivor's pension following the death of her husband, MD, whom she had married in a Roma marriage ceremony. The application was rejected because she had not married under Spanish law. The applicant's case before the ECtHR relied upon alleged violations of her Article 14 rights, read together with Article 1 of Protocol 1 and Article 12.

In relation to the Article 1 of Protocol 1 claim, the ECtHR found that the applicant had believed in good faith that her marriage produced all the legal effects of a marriage recognised in Spanish law. This was supported by the well-established nature of Roma traditions and the fact that the applicant had been recognised as MD's spouse in various official state documents. Given that a survivor's pension had been awarded in other cases where an applicant had believed in the existence of a marriage that was in fact void, the failure to grant a pension in this case constituted a discriminatory difference in treatment, particularly in the light of the Roma community's status as a vulnerable minority. A violation of Article 14, read with Article 1 of Protocol 1, was therefore established.

As regards the Article 12 claim, the Court noted that civil marriage in Spain had been open to all since 1981. In respect of such procedures, the Roma community was treated identically to any other ethnic group. There was therefore no violation under this head.

<http://www.bailii.org/eu/cases/ECHR/2009/2017.html>

European Court of Justice

Article 6 – right to a fair trial
Article 8 – right to respect for private and family life
Article 13 – right to an effective remedy
Article 1 of Protocol 1 – right to peaceful enjoyment of possessions

Faraj Hassan v Council of the European Union and European Commission (C-399/06 P) and Chafiq Ayadi v Council of the European Union (C-403/06 P), judgment of 3 December 2009

Doughty Street barrister John RWD Jones appeared on behalf of Mr Hassan. Doughty Street barrister Simon Cox appeared on behalf of Mr Ayadi.

Mr Hassan and Mr Ayadi sought to have set aside the judgments of the Court of First Instance which had dismissed the actions brought by the appellants for annulment of Council Regulation (EC) No 881/2002 of 27 May 2002 in so far as it concerned them. The regulation was designed to give effect to a resolution adopted by the UN Security Council under Chapter VII of the Charter of the UN. It imposed restrictive measures, including the freezing of funds, against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban.

Mr Hassan had two grounds of appeal: (i) that the Court of First Instance had erred in law in its examination of the pleas he raised before it in that it did not determine directly whether the Security Council offered protection equivalent to that offered by the Convention, especially Articles 6, 8 and 13 thereof and by Article 1 of Protocol 1 of the same Convention; and (ii) that the court had erred in law in considering that restriction of the use of property was not relevant with regard to the actual substance of the right to property.

Mr Ayadi also submitted two grounds of appeal: (i) that the Court of First Instance had erred in law in finding that the Community judicature may evaluate the lawfulness of a Community measure giving effect to a resolution of the Security Council only with regard to *jus cogens* and in not holding that it could annul such a measure in order to guarantee the protection of the fundamental rights recognised by the legal order of the UN; and (ii) that the Court had erred in law in not holding that the parts of the contested regulation which are under challenge constitute a breach of his fundamental rights.

The court held that it is apparent from the case of *Kadi v Council of the European Union* (C-402/05 P) [2009] 1 AC

1225 that the Community judicature must, in accordance with the powers conferred on it by the Treaty, ensure the review of the lawfulness of all Community acts forming an integral part of the general principles of Community law. This includes review of Community measures which, like the contested regulation, are designed to give effect to the resolutions adopted by the Security Council under Chapter VII.

The contested regulation, in so far as it concerns the appellants, was adopted without any guarantee being given as to the communication of the evidence adduced against them or as to their being heard in that connection, so that it must be found that the regulation was adopted according to a procedure in which the appellants' right of defence and right to an effective legal remedy were not observed. This had the further consequence that the principle of effective judicial protection was infringed.

In the circumstances of these cases, the imposition of restrictive measures laid down by the contested regulation in respect of the appellants constitutes an unjustified restriction of their right to property. It follows that the contested regulation, so far as it concerns the appellants, must be annulled.

<http://www.doughtystreet.co.uk/files/CJEU%20091203.pdf>

INTERNATIONAL CASES

Right to Life
Right to a Fair Trial
Right to Humane Treatment

DaCosta Cadogan v Barbados, Inter-American Court of Human Rights, judgment of 24 September 2009: the mandatory death penalty and the prohibition against the arbitrary deprivation of life; the failure to inform an accused of his right to obtain a psychiatric evaluation and the right to a fair trial; the failure of a state-appointed counsel to pursue a particular defence and the right to a fair trial.

Doughty Street barristers Alison Gerry and Ruth Brander acted as representatives of Mr DaCosta Cadogan.

The case concerned an application submitted to the Court by the Inter-American Commission on Human Rights against the state of Barbados. In its application, the Commission requested that the Court declare Barbados responsible for imposing the mandatory death penalty on Mr Tyrone DaCosta Cadogan "absent any considerations of the specific circumstances of the crime, and without any consideration for mitigating factors."

The Commission alleged that Mr DaCosta Cadogan had been sentenced to death by hanging pursuant to Barbados's Offences Against the Persons Act 1994, which prescribed capital punishment as the mandatory punishment for the crime of murder. Further, a "savings clause" in the state's Constitution provides that domestic courts cannot declare the mandatory death sentence to be invalid even though it violates fundamental rights protected under Barbados's Constitution and the American Convention on Human Rights. Consequently, the Commission requested that the Court declare the state responsible for violations of Articles 4(1) and 4(2) (Right to Life); 5(1) and 5(2) (Right to Humane Treatment); and 8 (Right to a Fair Trial) of the American Convention, in relation to Article 1(1) (Obligation to Respect Rights) and Article 2 (Domestic Legal Effects thereof), to the detriment of Mr DaCosta Cadogan.

The representatives of Mr DaCosta Cadogan asked the Court to declare the violation of the same rights alleged by the Commission. They also claimed that the state's failure to cause a comprehensive psychiatric examination of Mr DaCosta Cadogan to be undertaken and made available for the purposes of the trial breached his right to a fair trial protected under Art 8 of the American Convention and is cruel and inhuman, contrary to Articles 5(1) and 5(2) of that Convention.

The Court observed that the present case did not submit before it new issues regarding the imposition of mandatory death sentencing in Barbados, except for the allegations concerning Articles 5 and 8 of the American Convention. It had analysed the issue in *Boyce et al v Barbados*, Judgment of 20 November 2007, Series C No 169.

The Court held that because the 1994 Act submits all persons charged with murder to a judicial process in which the participation and degree of culpability of the accused and the individual circumstances of the crimes are not considered, the application of the aforementioned law to Mr DaCosta Cadogan violated the prohibition against the arbitrary deprivation of life and failed to limit the application of the death penalty to the most serious crimes, in contravention of Article 4(1) and 4(2) of the American Convention.

The allegations regarding a violation of Article 5 of the American Convention due to the mandatory imposition of a death sentence properly fall under the framework of Article 4.

To the extent that s 26 of the Constitution of Barbados prevents judicial scrutiny over s 2 of the 1994 Act, which in turn violates the right not to be arbitrarily de-

prived of life, the Court finds that the state has failed to abide by its obligations under Article 2 of the American Convention, in relation to Articles 1(1), 4(1) and 4(2) and 25(1) thereof.

Regarding the alleged breach of Mr DaCosta Cadogan's Article 8 right to a fair trial, this was the first time that the court considered the issue of whether the mere availability of a psychiatric evaluation upon the request of the accused or the trial judge was sufficient to guarantee his right to a fair trial. There was evidence that he had been drinking excessive amounts of alcohol on the day of the murder and that he had the intention of carrying out a robbery in order to obtain money to purchase more alcohol. Despite this, the state failed to inform Mr DaCosta Cadogan or his attorney of his right to obtain such an evaluation. This failure may have resulted in the exclusion of evidence relevant to the preparation of his defence. The state's omission constituted a violation of Mr DaCosta Cadogan's right to a fair trial under Article 8(1), 8(2)(c) and 8(2)(f) of the American Convention, in relation to Article 1(1) thereof.

The failure of Mr DaCosta Cadogan's state-appointed trial counsel to pursue a defence of diminished responsibility and his decision to choose instead another available defence did not amount to gross incompetence. Consequently, his failure to request an independent psychiatric assessment did not amount to a violation of his client's right to a fair trial. The state is therefore not responsible for a violation of Article 8(2)(e) of the American Convention.

HUMAN RIGHTS DEVELOPMENTS

Lisbon Treaty enters into force

Following the ratification on 13 November 2009 of the Lisbon Treaty by the Czech Republic, the last remaining member state to ratify, the treaty entered into force on 1 December 2009. With the stated aim of enhancing the efficiency, democratic legitimacy and coherence of the EU, the treaty contains wide-ranging reforms to the Union. These include increased use of qualified majority voting, the enhanced involvement of the European Parliament in passing legislation, the eradication of the pillar system and the creation of a President of the European Council and High Representative of the Union for Foreign Affairs and Security Policy. The Charter of Fundamental Rights has also been made binding in EU law and now constitutes a central mechanism for the enforcement of human rights in the Union.

http://europa.eu/lisbon_treaty/index_en.htm

Russia ratifies Protocol 14 to the European Convention on Human Rights

On 15 January 2010, the Russian Federation ratified Protocol No 14 of the European Convention on Human Rights, paving the way for the more efficient functioning of the Strasbourg court.

Protocol No 14 was designed to allow the court to expedite the processing of the huge backlog of cases before the court by allowing single judges to make admissibility decisions and committees of three judges to hear cases where they are the subject of well-established case law. It also provides for new mechanisms to enforce judgments, allowing the Committee of Ministers to refer a case back to the court where a state has not implemented the judgment of the court.

Russia had stalled these reforms for several years by refusing to sign the protocol, which required ratification by all member states prior to coming into force.

Significantly Article 17 of the Protocol enables the EU to ratify the ECHR. The Lisbon Treaty permits the EU to do this and is expressly mentioned in Article 6(2) TEU. Unanimity is required of all EU Member States, but the prospect of EU's accession to the ECHR is not a long way off.

The entry into force of the Protocol is an important practical step towards better enforcement of human rights protection and demonstrates the commitment of the Council of Europe member states to such enforcement.

<http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=861082&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>

Russia ratifies the revised European Social Charter

On 16 October 2009, Russia ratified the revised European Social Charter. The charter protects rights in the areas of: housing, health, education, employment, legal and social protection, free movement of persons and non-discrimination. Under the charter, state parties are required to submit yearly reports indicating what steps they have taken toward implementation. Forty-two of the 47 member states of the Council of Europe have now ratified the charter.

<https://wcd.coe.int/ViewDoc.jsp?id=1522629&Site=DC>

Mandatory death sentence abolished in Barbados

In May 2009, Freundel Stuart, the Deputy Prime Minister and Attorney General of Barbados, announced that the mandatory death sentence will be abolished in the country. The announcement follows the ruling of the Inter-American Court of Human Rights in *Boyce et al v Barbados* on 20 November 2007, that the availability of commutation by the executive did not dilute the requirement of having a just and proportionate punishment decided by an independent tribunal.

Doughty Street barristers [Edward Fitzgerald QC](#), [Keir Starmer QC](#), [Ruth Brander](#) and [Alison Gerry](#); and Doughty Street associate tenant [Douglas Mendes SC](#) worked with the Death Penalty Project's Parvais Jabbar and Saul Lehrfreund in preparing submissions on behalf of the representatives in the *Boyce* case.

The death penalty is still in force in the Eastern Caribbean Supreme Court and in Trinidad and Tobago, but Mr Lehrfreund and Mr Jabbar described Barbados's decision to abolish the death penalty as a "groundbreaking" move that should set an example to other Caribbean states.

http://www.caribbeannews.com/legal/legal.php?news_id=16772&start=0&category_id=43

Death sentences commuted in Kenya

On 3 August 2009, Kenya's President Kibaki announced his decision to commute all death sentences in the country. He plans to abolish the death sentence altogether pending an investigation into its deterrent effect.

President Kibaki's decision follows litigation brought by Doughty Street barrister [Joe Middleton](#) along with the Death Penalty Project and colleagues in Kenya to challenge the constitutionality of the mandatory death penalty in the country.

No-one on death row in Kenya has actually been executed for 22 years. However, the move wipes out at a stroke one fifth of all the death row inmates in the world. President Kibaki cited the "mental anguish, suffering, psychological trauma, and anxiety" of the 4,000 prisoners currently on death row as one of the key factors in his decision.

http://www.usatoday.com/news/world/2009-09-15-deathpenalty_N.htm

Thorbjørn Jagland elected Secretary-General of the Council of Europe

On 1 October 2009, Thorbjørn Jagland was sworn in as Secretary-General of the Council of Europe for a five-year term. The Parliamentary Assembly of the Council of Europe elected Mr Jagland on 29 September 2009. Mr Jagland, a Labour politician, is a former President of the Norwegian Parliament (*Storting*) and has served as both Prime Minister and Foreign Minister of Norway.

http://www.coe.int/t/dc/files/events/2009_election_sg/default_EN.asp?

UNGA endorses Goldstone report

On 5 November 2009, the United Nations General Assembly, by a recorded vote of 114 in favour to 18 against, with 44 abstentions, adopted a resolution giving Israel and the Palestinian side three months to undertake independent, credible investigations into the serious violations of international humanitarian and human rights law reportedly committed during the Gaza conflict in late December 2008 and early January 2009.

By its decision, the General Assembly endorsed the report of the UN's Human Rights Council on its twelfth special session, which had considered, in October 2009, the output of the United Nations Fact Finding Mission on the Gaza Conflict. That Mission was led by South African Jurist Richard Goldstone, and its report, widely known as the "Goldstone Report", concluded that there was evidence to indicate that Israel and Palestinian armed groups had committed actions amounting to war crimes, and possibly crimes against humanity.

<http://www.un.org/News/Press/docs/2009/ga10883.doc.htm>
<http://www2.ohchr.org/english/bodies/hrcouncil/specialsession/9/FactFindingMission.htm>

Amendment to ICC Act 2001 allows for prosecution of war crimes committed anywhere in the world

Under s 70 of the Coroners and Justice Act 2009, which was enacted on 12 November 2009, the International Criminal Court Act 2001 has been amended to provide for the prosecution of the offences of genocide, crimes against humanity and war crimes committed since 1 January 1991 anywhere in the world where the alleged perpetrator is British, a British resident or subject to UK service jurisdiction. The provisions

would now apply, therefore, to the Rwanda genocide and the conflict in the former Yugoslavia. However, they have not yet been brought into force by the Secretary of State as required by s 182(5) of the 2009 Act.

<http://www.justice.gov.uk/news/newsrelease261009c.htm>

Report on Rights and Responsibilities published by Ministry of Justice

On 16 December 2009, the Ministry of Justice published a study authored by four academics associated with the University of Oxford. The study considers whether responsibilities could be incorporated into the existing human rights framework of the United Kingdom without jeopardising fundamental human rights safeguards. The report also identifies the potential problems with drawing a direct association between rights and responsibilities, and explores how existing national and international laws guard against rights becoming contingent on responsibilities.

<http://www.justice.gov.uk/publications/rights-responsibilities-research.htm>

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