(2018) 4YHRL

The Young Human Rights Lawyer

Young Lawyers' Committee

THE YOUNG HUMAN RIGHTS LAWYER

CONTENTS

Markus Findlay, Introduction **2**

The Secret Barrister, Foreword **3**

Lucie Boase, Case Comment: *Commissioner of Police of the Metropolis v DSD & another* [2018] UKSC 11 ..... **5**

Ke Hui Foong, The Paramountcy Principle: A Closer Look at *Re M (Children)* **8**

Emma Franck-Gwinnell, Case Comment: *R (Steinfeld and Keidan) (Appellants) v Secretary of State for International Development (in substitution for the Home Secretary and the Education Secretary) (Respondent)* [2018] UKSC 32 ..... **12**

Matthew Gehlhaar, The Urgency for Reform of Northern Ireland's Abortion Laws **15**

Alexander McColl, Case Comment: R *(TP and AR) v Secretary of State for Work and Pensions* [2018] EWHC 1474 (Admin) **20**

Hannah Megan Millar, Case Comment: *In the matter of an application by the Northern Ireland Human Rights Commission for Judicial Review (Northern Ireland)* [2018] UKSC 27 .. **24**

Imogen Sadler, The Correct Protocol? Collective Expulsion and the ECHR **27**

Walker Syachalinga, Case comment: *Lungowe v Vedanta Resources Plc* [2017] EWCA Civ 1528 and *Okpabi v Royal Dutch Shell Plc* [2018] EWCA Civ 191 ..... **31**

Matthew White, Whose Mugshot is it anyway? **34**

HRLA Young Lawyers' Committee, Who We Are **40**

Introduction

Dear Reader,

It is my privilege to introduce the fourth edition of The Young Human Rights Lawyer.

I must begin by thanking all of our applicants. This year we received a record number of entries for publication, which is indicative of how the profile of the journal has grown over the years. The quality of the entries was exceptionally high and successful applicants should rightly feel proud of themselves. Fine future lawyers will certainly be among them.

I hope you will be inspired and informed by the entries that follow. As ever the journal includes a diverse range of human rights topics. This year there are articles and case comments on areas such as asylum law, welfare benefits, police investigation, and the right to civil partnerships. The collection reminds us that human rights issues arise in all areas of law and affect all types of people.

The Young Human Rights Lawyer has always aimed to provide a platform for students and those at the junior end of the legal profession by showcasing their written work. The hope is that the journal will give applicants the confidence to pursue a career in human rights despite the difficulties that are often involved. I am pleased to write that the journal had this very impact on me and two other members of this year's Young Lawyers' Committee.

This journal would not have been made possible without the tremendous efforts of my colleagues Brenda Efurhievwe, Jeremy Frost, Zehrah Hasan, Daniel Holt, Geeta Koska, Callum Lynch and Lucy Maxwell. I am also grateful to the Executive Committee led by Angela Patrick for their technical expertise during the reviewing process, in particular Sarah Askew, Kate Beattie, Emma-Louise Fenelon, Dervla Simm, and Tom Tabori.

Lastly, I thank administrator Karen Kinross for her support throughout the whole process. A special mention should also go to her predecessor Willow Oddie for her many years of service to the HRLA. Willow's contributions have been invaluable in each edition of the journal and I wish her all the best in her new role.

I end by inviting all readers to join the HRLA and perhaps even its two working committees. Aside from the journal, the organisation promotes human rights through a variety of events, two careers days, and the UK's only judicial review competition, which this year was hosted in the Royal Courts of Justice.

Thank you for reading.

Yours faithfully,

Markus Findlay
Chair, Young Lawyers' Committee of the Human Rights Lawyers Association

Foreword

It is an honour and a privilege to be invited to write the foreword for The Young Human Rights Lawyer.

As we tiptoe towards the final year of a decade by the end of which the budget of the Ministry of Justice will have been cut by 40 per cent, the predictable – and loudly predicted – consequences are breaking out; a nasty and persistent rash on the body of our justice system. While practitioners will be wearily familiar with the immediate impact upon daily practice – court centres closing in their hundreds; leaking and collapsing courtrooms; under-staffed and under-resourced public authorities; and the knock-on errors and delays – the symptoms are most acutely felt by those excluded from the justice system altogether.

The right of access to justice was hit head-on by the runaway mine train that was the Legal Aid, Sentencing and Punishment of Offenders Act 2012. The litany of misfortune has by now become grimly familiar to us all. The restrictive financial eligibility criteria for civil legal aid bears little relationship to the actual ability of an individual to meet the costs of obtaining legal advice and representation, with the result that vulnerable people with low incomes often find themselves failing the means test. Exceptional Case Funding, originally predicted by the government to be granted in between 5,000 and 7,000 cases each year, is in reality refused in all but a few hundred applications; a gaping hole in the supposed safety net to ensure a person's ability to enforce their rights.

Legal aid was removed entirely from non-asylum immigration and private family law cases, with a few narrow exceptions. Family court judges have been lining up to hand down excoriating judgments after witnessing the abhorrent spectacle of alleged victims of domestic abuse being cross-examined by their unrepresented ex-partners. Judicial review, the means by which unlawful executive action is reined in and held to account, has suffered the fate foreseen when Chris Grayling defamed it in the Daily Mail as a "left-wing promotional tool". He has his wish: legal aid grants in judicial review cases have halved since 2012. Until the Supreme Court decision in R (on the application of Unison) v Lord Chancellor [2017] UKSC 51 holding that the Employment Tribunal fee scheme was unlawful, thousands of workers and employees were for years priced out of enforcing their employment rights.

Against this background, enforcing human rights has, for vast swathes of ordinary people, become illusory. In the words of the Joint Committee on Human Rights in its report *Enforcing Human Rights* (July 2018):

> *"The reforms to legal aid introduced by LASPO have made access to justice more difficult for many, for whom it is simply unaffordable."*

Those citizens have been left with a Sophie's choice between representing themselves in contested legal proceedings, or simply waiving the enforcement of their rights.

For those choosing the path of most resistance – and we have all encountered them in court - the obvious disadvantages afflicting a litigant-in-person quickly become apparent.

Frequently they will find themselves attempting to challenge the might of the state, which will of course be ably legally represented. While judges strive to uphold the LiP's right to a fair trial, remedying the egregious inequality of arms is impossible. The false economy of depriving people of legal representation is exposed in almost every such case, with cases taking an estimated 50 per cent longer, shunting costs away from the legal aid budget but onto the spreadsheets of other departments of the Ministry of Justice, thereby imperilling the modelled "savings" and justifying yet a further round of cuts.

The sharp reduction in cases eligible for legal aid coupled with 34 per cent real-terms cuts in civil legal aid rates has resulted in an exodus of legal aid firms from the marketplace and the creation of legal aid deserts; whole areas of England and Wales where legal aid advice is simply unavailable. The plight of the aging criminal legal profession, with repeated warnings sounded over the non-viability of a career in criminal law for young graduates, summons a similarly disturbing premonition of the future for access to justice.

That this naked assault on access to justice has occurred to near-silence from the public is a tragic marker of the success of the anti-human rights rhetoric that has taken root and intractably spread through our culture; the Japanese Knotweed of populist discourse. Public misunderstanding of the fundaments of our legal system – the rule of law, judicial independence, equality, access to justice – means that there is often a cheer accompanying the latest scything of our rights.

But amidst this counsel of despair burns a light. Notwithstanding the blustery conditions, every day of the year young human rights lawyers zip up their trolley-cases, turn a cheek to public rancour and fight without fear or favour in the service of individual rights. And not only in court on behalf of clients; their advocacy echoes outside in the wider world. While practice affords little time for the campaign trail, immutable laws of physics are broken as young advocates somehow find capacity to publicly argue against threats to our rights; to bang the drum for access to justice; to battle myths and improve public legal education, and in so doing inject much-needed understanding and respect for first principles into public debate. That they often do so alongside the incredible pro bono work undertaken in the field, both at home and abroad, makes me proud to be a member of the English and Welsh Bar, and truly humbled by their accomplishments.

And the public should draw comfort from the fact that, whatever course governmental policy and tabloid hostility may take, whatever restrictions may be whipped up and wrapped tighter around access to justice, as long as there are independent lawyers with a working voice box and a Google map to the nearest court centre, the individual in need has a chance. Much more help is required – their goodwill simply cannot fill all the gaps – but their perseverance deserves the public credit that they rarely receive. They do not ask for it, nor if it were offered would they likely accept it, but it is merited. Every word.

They – you – are why I remain hopeful.

The Secret Barrister

Case Comment:

Commissioner of Police of the Metropolis v DSD & another [2018] UKSC 11

For victims of serious crime, the Supreme Court decision in *Commissioner of Police for the Metropolis v DSD and Another* [2018] UKSC 11 is a significant one. The case considered the extent to which Article 3 of the European Convention on Human Rights (ECHR) imposes a positive obligation on states to investigate reported crimes perpetrated by private individuals. It was found that such an obligation does exist: if the police fail to fulfil their obligation to carry out effective investigations into credible allegations of ill-treatment, the victims of the ill-treatment are entitled to claim compensation. For civil liberties practitioners, the judgment –which was eventually handed down nearly a year after the appeal by the Metropolitan Police (MPS) was heard– is a welcome one, serving as it does to further validate the result of the successful challenge brought against MPS in 2014,[1] as well as the dismissal of MPS's appeal to the Court of Appeal in 2015.[2]

Summary of the facts

The case concerns claims brought by DSD and NBV, two of the victims of John Worboys, known as the 'black cab rapist'. Worboys' modus operandi was to invite lone young women into his cab, ply them with sedative-laced champagne on the pretext of celebrating a lottery win, before sexually assaulting or raping them. DSD and NBV made reports to the police of being attacked by Worboys in 2003 and 2007 respectively, but were failed by the investigation into their complaints which followed. As a consequence of the Metropolitan Police's failings, Worboys was able to continue attacking women until he was finally arrested in 2008. Of the over 100 victims Worboys is thought to have had, 29 were attacked after the investigation into NBV's allegations was carried out.

Supreme Court Decision

The case concerns the obligations of the police towards individuals in relation to their investigations into serious crimes. The Supreme Court ruled that under Article 3 ECHR, there is a positive operational duty owed by the police towards individual victims to conduct effective investigations into allegations of ill-treatment which amount to a violation of Article 3.

Article 3, which prohibits torture, and inhuman or degrading treatment or punishment, also places upon the State a positive obligation to take certain measures to protect its citizens from such treatment. There are two aspects to that obligation: a 'systems duty', to have in place a system of laws and procedures to govern and regulate that treatment, and an 'operations duty' in any particular case, to effectively investigate allegations of crimes involving treatment (such as that perpetrated by Worboys against DSD and NBV) which is prohibited under Article 3, and to take appropriate action thereafter. By failing to carry

[1] *DSD & Anor v The Commissioner of Police for the Metropolis* [2014] EWHC 436 (QB).
[2] *The Commissioner of Police of the Metropolis v DSD and NBV & Ors* [2015] EWCA Civ 646.

out an effective investigation into their complaints, the police were found to have breached the positive operational duty owed to DSD and NBV under Article 3.

Analysis

Prior to the 2018 judgment, the position that the police must discharge their operational duty to investigate when there has been an arguable breach of Article 3 by the state or its agents was clear. However, that this duty could also arise in respect of inhuman or degrading treatment perpetuated by a private citizen had not been authoritatively confirmed in the UK courts. In this respect the case breaks new ground. Furthermore, although case law[3] has established that an operational duty can arise in order to prevent such conduct, the duty established in this case is that of carrying out an investigation after the relevant treatment had occurred.

A claim under common law was not pursued by DSD and NBV owing to the position which has held relatively firm since *Hill v Chief Constable of West Yorkshire*[4] (on which, see *Robinson v Chief Constable for West Yorkshire Police*).[5] *Hill* placed policy objections above imposing a duty of care on the police under negligence. Indeed, MPS sought to deploy this line of reasoning in their appeal, arguing that for public policy reasons, the common law and the positive operational duty owed under the Human Rights Act (HRA) 1998 should be concordant. Using the so-called 'floodgates' argument, MPS argued that the police need to be free to fulfil their primary crime-fighting function, and that diverting resources to litigation would leave the service beleaguered. Lord Kerr's response to this was clear:

> *The recognition that really serious operational failures by police in the investigation of offences can give rise to a breach of article 3 cannot realistically be said to herald an avalanche of claims for every retrospectively detected error in police investigations of minor crime* [53].

For practitioners, *DSD* has meant reviving those cases which stalled awaiting the outcome of the ruling, as well as anticipating new enquiries arising out of the ensuing publicity. Whether an incoming tide of fresh cases will materialise however is questionable, for as Lord Kerr said "…only obvious and significant shortcomings in the conduct of the police and prosecutorial investigation will give rise to the possibility of a claim" [72].

Both the Court of Appeal and the Supreme Court have been clear that the investigative obligation under Article 3 only applies where an extremely high threshold is met, and that in cases which just meet that threshold, there is a significant margin of appreciation as to what the state must do to comply with the Article 3 duty.

DSD is to be welcomed: it brings clarity to those pursuing claims against the police, and lays down principles which will serve to protect both the rights of those who have been

[3] *Osman v United Kingdom* [1998] 29 EHRR 245 and *Van Colle v United Kingdom* [2013] 56 EHRR 23.
[4] *Hill v Chief Constable of West Yorkshire* [1988] 1 AC 53.
[5] *Robinson v Chief Constable for West Yorkshire Police* [2018] UKSC 4.

failed by flawed investigations, and also wider society at large through a police service which operates effectively and investigates serious crimes proactively.

Lucie Boase

The Paramountcy Principle: A Closer Look at *Re M (Children)*

When relationships between parents break down, the family court must decide when and how children can have contact with their parents. The judge must secure the children's welfare, even if it involves interference with the parents' rights under the European Convention of Human Rights (ECHR). This tension between welfare and rights has bothered family law academics for two decades,[1] and a recent case renews interest in this discussion. This article begins with a case summary, illustrating why the paramountcy principle is incompatible with the ECHR. It then takes a closer look at 'deviant' parents and how family courts should treat these parents.

Re M (Children)

The father, who is transgender, applied for contact with her children. The mother and children are members of an ultra-Orthodox religious community. At first instance, Peter Jackson J ordered no direct contact as "there is a real risk…that these children and their mother would be rejected by the community".[2] He granted indirect contact instead.

Upon the father's appeal, the Court of Appeal remitted the case to the High Court. Sir James Munby P delivered the judgment and reiterated two important principles regarding a judge's function, namely that:

(1) He is to act as the judicial reasonable parent, judging the child's welfare using modern standards of reasonable men and women. The reasonable man or woman is receptive to change, tolerant, and slow to condemn.
(2) He has a positive duty to promote contact. He needs to consider all possible alternatives, and contact should only be stopped if it will not benefit the child.[3]

The Court gave four reasons for disagreeing with Peter Jackson J and opined that the judge:

(1) failed to ask several pertinent questions as the judicial reasonable parent. He should have challenged the parents' decisions to raise the children according to the ways of this religious community.
(2) did not directly address the human rights and discrimination issues that arose.
(3) did not sufficiently explain why indirect contact is feasible, given that direct contact poses a risk.
(4) gave up too easily. The judge could have deferred the final decision pending the outcome of further work by organisations such as the GesherEU Support Network.

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[1] See, for example, Jonathan Herring, 'The Human Rights Act and the welfare principle in family law – conflicting or complementary?' (1999) 11(3) CFLQ 223 and Shazia Choudhry and Helen Fenwick, 'Taking the Rights of Parents and Children Seriously: Confronting the Welfare Principle under the Human Rights Act' (2005) 25(3) OJLS 453.
[2] *J v B and others* [2017] EWFC 4, [2017] All ER (D) 108 (Jan) [177].
[3] *Re M (Children)* [2017] EWCA Civ 2164 [60] – [61].

The Court also discussed the Equality Act 2010 provisions with regard to potential breaches by the children's schools and religious community, as well as Articles 14 and 9 of the ECHR. This discussion is beyond the scope of this article, which will focus on how family courts should address discrimination issues in disputes involving children.

The paramountcy principle and the ECHR

When making a child arrangements order, judges apply the paramountcy principle. The paramountcy principle, from Section 1(1) of the Children Act 1989, dictates that when a court determines any question with respect to a child's upbringing, the child's welfare is the court's paramount consideration. This requirement of 'paramountcy' has been interpreted such that the child's welfare 'rules upon or determines the course to be followed'.[4] Parents' interests are only relevant insofar as they bear on the welfare of the child.[5]

On the other hand, Section 6(1) of the Human Rights Act 1998 (HRA) provides that the court, as a public authority, is under duty to act in a way compatible with the ECHR rights. In a private law dispute involving children, any order limiting contact or granting residence to one party inevitably affects the other party's Article 8 right to family life. There is a duty to consider the rights infringed and whether the interference is necessary. The judge therefore faces a dilemma. The paramountcy principle requires him to consider only the child's interest. Yet the HRA dictates a duty to consider both parents' ECHR interests. When faced with a child arrangements proposal that is in the child's best interests yet violates one parent's ECHR rights, how should a judge respond? Despite this glaring tension, several judges in domestic courts have asserted that this difference in approaches is merely semantic.[6] Others suggest the paramountcy principle is recognised in the jurisprudence of the European Court of Human Rights.[7]

Re M (Children) illustrates that the domestic courts' view is misguided. Besides the father's Article 8 right as a transgender person, the judge must also consider the mother's and children's Article 9 right to manifest their religion. This balancing exercise between ECHR rights is itself tricky. Add the paramountcy principle to the mix and the judge faces a tumultuous task.

The decision by Peter Jackson J exemplifies this. While recognising that the religious community adopted practices amounting to "unlawful discrimination against and victimisation of the father and children", the judge still denied direct contact because it was in the children's best interests not to be subject to ostracization.[8] The Court of Appeal found this outcome "surprising and disturbing" and urged the lower court to scrutinise the possible discrimination faced by the father due to her transgender status.[9] The Court

[4] *J v C* [1970] AC 668, 710.
[5] *Re P* (Contact: Supervision) [1996] 2 FLR 314, 328.
[6] *Re KD (A Minor) (Ward: Terminating Access)* [1988] AC 806, 825.
[7] *Payne v Payne* [2001] EWCA Civ 166 [38].
[8] *J v B*, n2, [178].
[9] *Re M,* n3, [99], [115].

concluded that having more contact with the father is in the children's best interests, provided it can be achieved.[10] It appears that the Court is skirting the issue by including this proviso. The formidable hurdle that the judge must overcome is what to do when contact cannot be achieved: if the children continue to face discrimination for having contact with their father, should and can the judge ignore the paramountcy principle to safeguard the father's Article 8 right?

How should judges respond?

How, then, should family court judges respond to these conflicting rights? As a retired High Court judge stated, judges have been significantly involved in absorbing and reflecting both change and wide diversity in society.[11] It is wrong to speak of agreed values in society, because they largely do not exist. When a parent raises her children according to practices that are unlawfully discriminatory, should judges allow this? Alternatively, when a parent adopts an unconventional lifestyle that may be disruptive for young children, should judges limit their contact with the children?

Helen Reece discussed how family courts treat 'deviant' parents in her recent article.[12] She defined 'deviant' parents as disvalued people and disvalued behaviour that provoke hostile reactions, instead of mere statistical deviation from the norm.[13] Common examples are homosexual parents[14] and parents from the Orthodox Jewish community.[15] Reece argued that judges usually presume it is in the child's best interest to live with the 'non-'deviant'' parent. She challenged this presumption because arguments against 'deviant' parents are circular. It is commonly argued that their 'deviant' behaviour upsets the other party.[16] However, 'deviant' behaviour is, by definition, upsetting to the majority.[17] Reece also rejected the argument that approving a 'deviant' lifestyle may unduly limit the child's ability to make future decisions.[18] She proposed that a 'deviant' childhood may provide a more open future, as the 'deviant' child may develop to be more tolerant of unconventional values and behaviours in society.[19]

In *Re M (Children)*, it may be argued that both parents are 'deviant' parents. It is therefore vital that judges exercise caution when considering any harm caused by each 'deviant' parent. A judge should put aside any bias against these non-conformist lifestyles and realise that the cards are stacked against 'deviant' parents precisely because they are different from the majority. They should consider the proposition that 'deviant' lifestyles

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[10] ibid [11], [138].
[11] Sir Mark Hedley, *The Modern Judge – Power, Responsibility and Society's Expectations* (LexisNexis 2016) 12.
[12] Helen Reece, 'Was there, is there and should there be a presumption against deviant parents?' (2017) 29(1) CFLQ 9.
[13] ibid 10.
[14] *C v C (A Minor) (Custody: Appeal)* [1991] 1 FLR 223.
[15] *Re G (Education: Religious Upbringing)* [2012] EWCA Civ 1233, [2013] 1 FLR 677.
[16] See, for example, Re W [1999] 1 FLR 869, 873.
[17] Reece, n12, 19 – 20.
[18] ibid 16.
[19] ibid 17.

may educate children to be more tolerant of diverging practices in society, which, in fact, may be an enhancement to their welfare.

Conclusion

Re M (Children) once again casts light on the tension between the paramountcy principle and the ECHR. The Court of Appeal directed that the family court judge should address the discrimination issues arising due to the father's transgender status, but did not explain how this is possible given the paramountcy of the children's welfare. As society becomes more diverse, 'deviancy' is slowly becoming the norm and the judge's task will only become more arduous.

Ke Hui Foong

Case Comment: *R (Steinfeld and Keidan) (Appellants) v Secretary of State for International Development (in substitution for the Home Secretary and the Education Secretary) (Respondent)* **[2018] UKSC 32**

Background and facts

Judgment in *R (Steinfeld and Keidan) v Secretary of State for International Development*[1] was handed down by the Supreme Court in June 2018.

The Civil Partnership Act 2004 (CPA) made rights and benefits typically associated with marriage available to couples through civil partnerships. This Act limited civil partnership to "two people of the same sex",[2] and expressly excluded couples not of the same sex from being able to register as civil partners.[3]

The Marriage (Same Sex Couples) Act 2013 (MSSCA) came into force in March 2014. Since then, same sex couples have been able to marry or enter into a civil partnership. The CPA was not amended or repealed when the 2013 legislation was enacted, and thus different sex couples can marry, but not enter into a civil partnership.

This case concerns a different sex couple who wish to enter into a legally recognised relationship, but have a conscientious objection to marriage. The appellants sought a declaration under section 4 of the Human Rights Act 1998 that the CPA, in so far as sections 1 and 3 of the Act preclude a different sex couple from entering into a civil partnership, infringes Article 14 (the prohibition of discrimination), taken with Article 8 (the right to respect for private life), rights under the European Convention on Human Rights (ECHR).

The issue in this appeal was whether the unequal treatment could be temporarily justified in order to give Parliament time to conduct research in order to decide the future of the system of civil partnerships; i.e. whether they should be abolished or whether their availability should be extended to different sex couples.

Judgment

The Court allowed the couple's appeal and made a declaration that the sections of the CPA, to the extent that they precluded different sex couples from entering into civil partnerships, are incompatible with Article 14 of the ECHR when taken in conjunction with Article 8 of the same Convention.

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[1] [2018] UKSC 32.
[2] CPA 2004, section 1(1).
[3] ibid., s3(1).

Discriminatory treatment on the basis of a protected ground (here: sexual orientation) must be justified according to the *Bank Mellat* proportionality test:[4] whether there is a legitimate aim that is sufficiently important to justify limiting a right, whether the measure is rationally connected to the aim, whether a less intrusive measure could have been used, and whether the limitation of the right is disproportionate to the likely benefit.

Where there is inequality based on sexual orientation, the court must apply strict scrutiny. There must be "particularly convincing and weighty reasons" to justify the different treatment.[5]

Lord Kerr gave the judgment of a unanimous court, in which he held that the purpose of the discrimination was to "wait and see", to evaluate what should be done to change the law.[6] The government accepted that the discriminatory difference in policy could not been justified, but what it sought "was tolerance of the discrimination while it sorts out how to deal with it".[7] This was not a legitimate aim, and therefore the discrimination was not, and could not be, justified.[8]

Further, he explained that even if the aim had been deemed legitimate, the means could have been less intrusive (i.e. the aim could have been pursued with no discriminatory impact).[9]

Commentary

The declaration of incompatibility puts the government under pressure to reform the law to make it non-discriminatory, although, as was mentioned in *Nicklinson*,[10] a declaration of incompatibility does not oblige the government or Parliament to do anything.

Lord Kerr pointed out that, in *Nicklinson*, the majority declined to issue a declaration of incompatibility because Parliament was "on the point" of considering a Bill on the same issue. It would be "premature" for the court to make a declaration of incompatibility.

Lord Kerr noted that the Bill concerning civil partnerships currently making its way through Parliament "does not herald any imminent change in the law to remove the admitted inequality of treatment",[11] and that *Bellinger v Bellinger* stated that where the court finds an incompatibility, it should "formally record that the present state of statute law is incompatible with the Convention".[12] The dictum from this case is welcome, in that

[4] [2013] UKSC 39 [20], [75].
[5] *EB v France* (2008) 47 EHRR 21, [91]; *Karner v Austria* (2003) 38 EHRR 24, [37].
[6] See n1, [43]-[46].
[7] ibid.
[8] ibid.
[9] ibid., [48]-[51].
[10] *R (Nicklinson) v Ministry of Justice (CNK Alliance Ltd intervening)* [2015] AC 657, [343].
[11] See n1, [58].
[12] [2003] 2 AC 467, [55].

it discussed and provided clarification on when the court ought to use its power to issue a declaration of incompatibility.

The Court plainly rejected the Government's argument that the decision to wait to allow Parliament to conduct research and consider changing the law on civil partnerships should have a "wide margin of appreciation", as sometimes granted by the European Court of Human Rights (ECtHR). The Court emphasized that the ECtHR uses the margin of appreciation as a tool to acknowledge that a) on some issues relating to the extent of rights, there is not unanimity between member states and b) that member states are often in a better place to be able to assess whether a restriction of rights is necessary in that state. Thus, national courts must determine whether a rights infringement is justified. This cannot be avoided by pointing out that, at the level of the ECtHR, a margin of appreciation is afforded to member states on certain issues.[13]

Having already recognised that same sex couples should be permitted to marry but having over 63,000 same sex couples in registered civil partnerships, it is unlikely that the government will introduce a proposal to abolish the system of civil partnerships.

Many couples in today's society feel that the religious and traditionally paternalistic values of marriage are outdated, and wish to gain access to rights traditionally available through marriage by another means without those associations. Therefore, it is likely that the government will elect to keep the civil partnership system, but extend it to different sex couples.

Emma Franck-Gwinnell

[13] See n1, [27]-[29].

The Urgency for Reform of Northern Ireland's Abortion Laws

On 25th May 2018, the Republic of Ireland voted by national referendum to repeal the 8th Amendment to the Irish Constitution[1] which protected foetal rights, therefore prohibiting abortion under almost all circumstances.[2] The Irish President signed the 36th Amendment to the Irish Constitution repealing the 8th Amendment.[3] The referendum reignited debate regarding Northern Irish abortion laws which also prohibit abortion. Sinn Féin now supports liberalising abortion in Northern Ireland to ensure matching Irish identities across the Irish border,[4] while a group of MPs have called for a Parliamentary vote or referendum on liberalising Northern Irish abortion laws.[5]

This paper examines the restrictions on access to abortion in Northern Ireland. It then argues that the Abortion Act 1967 should be extended to Northern Ireland to reduce costs, a form of gender discrimination, for women who require abortions and protect the right to private and family life. However, a long-term objective of abortion law reform should be to move from abortion being a prima facie crime in the UK to a limited right to protect women's bodily autonomy from the risk of doctors refusing to provide information due to conscientious objections.

Restrictions on Access to Abortion in Northern Ireland

The Abortion Act 1967 allows access to abortion for women in England, Wales, and Scotland provided two medical practitioners have the opinion that: the pregnancy has not exceeded 24 weeks and the continuance of pregnancy would pose a risk, greater than if terminated, to the physical or mental health of the pregnant woman or any existing children of her family (often referred to as the "social ground");[6] or if termination is necessary to avoid risk to life or grave permanent injury to the physical or mental health of the pregnant woman.[7] The Abortion Act, however, does not apply to Northern Ireland where abortion remains a crime unless necessary to preserve the life of the woman, or if there is a risk of permanent or long-term serious harm to the woman's mental or physical

[1] Bunreacht na hÉireann, Art 40.3.3.
[2] BBC News, 'Irish Abortion Referendum: Ireland Overturns Abortion Ban' *BBC News* (London, 26 May 2018) https://www.bbc.co.uk/news/world-europe-44256152, accessed 24 June 2018.
[3] Houses of the Oireachtas, 'Thirty-sixth Amendment of the Constitution Act 2018' *Tithe an Oireachtais* (18 September 2018) https://www.oireachtas.ie/en/bills/bill/2018/29/, accessed 27 November 2018.
[4] Press Association, 'Sinn Féin votes to liberalise abortion law in Northern Ireland' *The Guardian* (London, 16 June 2018) https://www.theguardian.com/uk-news/2018/jun/16/sinn-fein-votes-to-liberalise-abortion-law-in-northern-ireland, accessed 24 June 2018.
[5] Heather Stewart, 'MPs call on May to decriminalise abortion in Northern Ireland' *The Guardian* (London, 3 June 2018) https://www.theguardian.com/uk-news/2018/jun/03/mps-call-on-may-to-decriminalise-abortion-in-northern-ireland, accessed 25 June 2018.
[6] Elizabeth Wicks, *Human Rights and Healthcare* (Oxford Hart 2007) 195.
[7] Abortion Act 1967, s 1(1).

health.[8] This follows the interpretation of Sections 58-59 of the Offences Against the Person Act 1861 in *Bourne*.[9] Abortions in Northern Ireland must be carried out within nine weeks and four days of gestation, or the pregnant woman must travel to Great Britain for an abortion.[10] Such time limits are problematic as it may be unclear during the early stages if the continuance of the pregnancy poses serious risks.

Human Rights Arguments for Reforming Northern Irish Abortion Laws

In Northern Ireland, abortion is still prohibited in cases of rape, incest and fatal foetal abnormality. The Supreme Court has previously found that, if it had jurisdiction to review the policy, the prohibition of abortions in such circumstances would be found incompatible with Articles 3 (freedom from torture) and 8 (right to private and family life) of the European Convention on Human Rights (ECHR).[11] This reflects a wider consensus among human rights documents including the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (the Maputo Protocol), Article 14 which explicitly sets out a right to abortion in cases of rape or incest, or where the pregnancy endangers health of the woman or the life of the woman or foetus.[12] Furthermore, preventing access to abortion in cases of fatal foetal abnormalities violates Article 7 (freedom from torture), Article 17 (freedom from interference with privacy and family), and Article 24 (protection of children) of the International Covenant on Civil and Political Rights (ICCPR) as the foetus cannot survive outside the womb.[13]

The overall problem with the current restrictions on access to abortion is that it does not reflect the reality that Northern Irish women have abortions, whether in Northern Ireland or another part of the UK. The current limitations only make pregnant women's lives unnecessarily harder. In 2016/17, there were 20 abortions and 13 terminations of pregnancy in Northern Ireland.[14] In comparison, 919 women from Northern Ireland had abortions in England and Wales in 2017, increasing from 724 in 2016.[15] This may be

[8] Department of Health, Social Services and Public Safety, 'Guidance for Health and Social Care Professionals on Termination of Pregnancy in Northern Ireland' *Department of Health* (24 March 2016) https://www.health-ni.gov.uk/sites/default/files/publications/dhssps/guidance-termination-pregnancy.pdf, accessed 19 June 2018.
[9] *R v Bourne* [1939] KB 687.
[10] 'Abortion Care' National Unplanned Pregnancy Advisory Service (2017) https://www.nupas.co.uk/abortion/#tab-id-5, accessed 28 June 2018.
[11] *Re Northern Ireland Human Rights Commission's Application for Judicial Review* [2018] UKSC 27, [2018] HRLR 14 [262], [326].
[12] Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (adopted 11 July 2003, entered into force 25 November 2005) (Maputo Protocol) Art 14(2)(C).
[13] UN Human Rights Committee, '*Karen Noelia Llantoy Huamán v Peru*' Communication No 1153/2003 (initial submission 13 November 2002, views adopted 24 October 2005).
[14] Sean Mallon, 'Northern Ireland Termination of Pregnancy Statistics' *Department of Health* (24 January 2018) https://www.health-ni.gov.uk/sites/default/files/publications/health/hs-termination-of-pregnancy-stats-16-17.pdf, accessed 20 June 2018.
[15] BBC News, 'Abortion in Northern Ireland Explained' *BBC News* (London, 7 June 2018) https://www.bbc.co.uk/news/uk-northern-ireland-44400093, accessed 20 June 2018.

partially due to a government policy introduced in July 2017 for the NHS to pay for Northern Irish women having abortions in England.[16] Although this policy is welcome progress for improving access to safe abortions, it remains merely policy. Accordingly, NHS funding could be easily revoked, as the Supreme Court has previously ruled that not paying for the treatment of Northern Irish women in England does not amount to discrimination under ECHR Article 14.[17] Such a change would leave Northern Irish women seeking abortions with costs ranging from £470 for early medical abortions[18] (the abortion pills)[19] to £1750 for surgical abortions after 19 weeks gestation.[20] The Republic of Ireland's prohibition of abortion was found to violate ICCPR Article 24 because requiring pregnant women to travel to receive an abortion in cases of fatal foetal abnormalities was a form of socio-economic and gender discrimination.[21] This suggests the current policies regarding Northern Irish women may also violate Article 24, especially since travel expenses are only paid for women with an annual income below £15,300.[22] A more effective solution would be to extend the Abortion Act 1967 to Northern Ireland, thereby removing the need to travel. The Royal College of Obstetricians and Gynaecologists (RCOG) guidelines state that nurses can administer drugs used for medical abortions,[23] therefore training in the process would not be difficult and would overall save resources by reducing travel expenses.

Extending the Abortion Act 1967 to Northern Ireland would also protect the right to bodily autonomy, ensuring women's right to self-determination.[24] Many anti-abortion groups argue the Westminster Government policy is an undemocratic intervention into Northern Ireland.[25] The right to self-determination is protected under the shared Article 1 of the ICCPR and the International Covenant on Economic, Social and Cultural Rights

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[16] Department of Health and Social Care, 'Central booking system for NI women seeking an abortion in England' *Gov.uk* (6 March 2018) https://www.gov.uk/government/news/central-booking-system-for-ni-women-seeking-an-abortion-in-england, accessed 28 June 2018.
[17] *R (on the application of A (A Child)) v Secretary of State for Health* [2017] UKSC 41, [2017] 1 WLR 2492.
[18] British Pregnancy Advisory Service, 'Prices' (2015) https://www.bpas.org/abortion-care/considering-abortion/prices/, accessed 28 June 2018.
[19] NHS Choices, 'Abortion: What happens' *NHS* (17 August 2016) https://www.nhs.uk/conditions/abortion/what-happens/, accessed 26 June 2018.
[20] 'A guide to costs' Marie Stopes UK (2018) https://www.mariestopes.org.uk/abortion-services/fees/, accessed 28 June 2018.
[21] UN Human Rights Committee, '*Amanda Mellat v Ireland*' Communication No 2324/2013 (communicated 11 November 2013, views adopted 31 March 2016).
[22] BBC News, 'Abortion: 'Hardship' travel grant for NI women' *BBC News* (London, 23 October 2017) https://www.bbc.co.uk/news/uk-northern-ireland-41724695, accessed 28 June 2018.
[23] RCOG, 'The Care of Women Requesting Induced Abortion: Evidence-based Clinical Guideline Number 7' (November 2011) https://www.rcog.org.uk/globalassets/documents/guidelines/abortion-guideline_web_1.pdf, accessed 27 June 2018.
[24] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, art 1.
[25] n22.

(ICESCR).[26] Klabbers defines "internal self-determination" as political participation in order for peoples within existing states to determine their own futures.[27] This supports the argument that decisions regarding access to abortion should be made by the Northern Irish Assembly, including the decision in 2016 not to expand access in cases of fatal foetal abnormalities.[28] However, this is problematic as there has been no government in Stormont for over a year.[29] Given that nearly 80% of the Northern Irish population support legalising abortion in cases of rape and incest and 73% in cases of fatal foetal abnormality,[30] the decision to reduce the cost of access to abortion for Northern Irish women appears to respect the public's right to self-determination in absence of the Assembly.

The Underlying Issue with UK Abortion Laws

Despite this goal of extending the Abortion Act 1967 to Northern Ireland, the Act has issues from a human rights perspective as it leaves abortion in an effective legal limbo. In particular, in Great Britain the difficulty is that there is no right to abortion, only defences against the crime of procuring an abortion.[31] All four defences under section 1(1) require an "opinion, formed in good faith" of two medical practitioners.[32] The most commonly used defence is section 1(1)(a), often referred to as the "social ground" for abortion (due to the medical profession's broad interpretation).[33] Every year since 2007, of the approximately 190,000 abortions each year in England and Wales 98-99% were under the statutory ground of s 1(1)(a).[34]

However, abortion remains a prima facie crime under UK law, not a right, so doctors ultimately control access to abortion. Doctors can exercise their right to conscientious objection and not participate, including not providing information, thus leaving the pregnant woman to find cooperative doctors.[35] This likely would worst affect women

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[26] International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR), art 1.
[27] Jan Klabbers, 'The right to be taken seriously: Self-determination in international law' (2006) 28 Human Rights Quarterly 186, 204.
[28] BBC News, 'Abortion: MLAs vote against legislation in fatal foetal abnormality cases' *BBC News* (11 February 2016) https://www.bbc.co.uk/news/uk-northern-ireland-35546399, accessed 29 June 2018.
[29] [29] Iain McDowell, 'Stormont deadlock: Need-to-know guide' *BBC News* (5 February 2018) https://www.bbc.co.uk/news/uk-northern-ireland-politics-41723268, accessed 29 June 2018.
[30] Henry McDonald, 'Most of Northern Ireland strongly backs abortion law reform, survey finds' *The Guardian* (London, 16 June 2017) https://www.theguardian.com/world/2017/jun/16/northern-ireland-strongly-backs-abortion-law-reform-survey, accessed 26 June 2018.
[31] Offences Against the Person Act 1861, s 58-59.
[32] n7, s 1(1).
[33] n6, 195.
[34] Department of Health and Social Care, 'Abortion Statistics for England and Wales: 2017' *Gov.uk* (7 June 2018) https://www.gov.uk/government/statistics/abortion-statistics-for-england-and-wales-2017, accessed 27 June 2018.
[35] n7, s 4.

from rural areas due to fewer local medical practitioners.[36] Possible disparity in treatment is contrary to the commitment to eliminate discrimination against rural women under the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), including provisions for healthcare and family planning.[37] Additionally, the potential prevention of access to information regarding eligibility for an abortion goes against *Tysiac v Poland*; if abortion is permitted in a state party to the ECHR then information on eligibility and access should be available.[38]

Not every policy restricting access to abortion is an infringement on the right to privacy.[39] However, the issue with the current law is that there is no explicit right to abortion in cases of fatal foetal abnormalities, rape or incest (instead being included within protection of the life and health of the woman). As Wicks argues, so long as abortion remains a prima facie crime in all cases, women cannot have full bodily autonomy, therefore limiting their ability to exercise their right to self-determination,[40] hence why RCOG supports decriminalisation of abortion.[41]

Conclusion

The near complete prohibition on abortion in Northern Ireland violates the rights to freedom from torture, freedom from discrimination, and the right to privacy. The current government scheme to pay for abortions in England for Northern Irish women is a positive step, however the Abortion Act 1967 should be extended to Northern Ireland to avoid future socio-economic discrimination. Ultimately, the UK should move away from abortion being a criminal offence and recognise it as a right, in order to ensure women's bodily autonomy.

Matthew Gehlhaar

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[36] Emily Jackson, *Regulating Reproduction: Law, Technology and Autonomy* (Oxford Hart 2001) 86.
[37] Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW) art 14(2)(b).
[38] *Tysiac v Poland* (2007) 45 EHRR 42.
[39] *Bruggemann and Scheuten v Federal Republic of Germany* (1981) 3 EHRR 244.
[40] n6, 197.
[41] RCOG, 'RCOG backs decriminalisation of abortion' (22 September 2017) https://www.rcog.org.uk/en/news/rcog-backs-decriminalisation-of-abortion/, accessed 29 June 2018.

Case Comment: *R (TP and AR) v Secretary of State for Work and Pensions* (SSWP) [2018] EWHC 1474 (Admin)

Background

Universal Credit (UC) was introduced by the coalition government's Welfare Reform Act 2012 as part of a package of reforms designed to completely overhaul the provision of social security entitlement and administration. The government declared its key objectives to be to simplify the benefits system, make it fairer, incentivise work, and to reduce costs.[1]

The idea was to replace a number of benefits which had previously been claimed separately with a single benefit which took account of all the needs of a particular claimant. Among the benefits which were merged were income-related Employment and Support Allowance (ESA), which is claimed by those who are unable to work due to disability or health condition, and Housing Benefit (HB), which assists those on a low income with their rent payments.[2] The criticism of UC was immediate[3] and has only amplified as the implementation of UC has been rolled out across the country.

In the case of TP and AR, both were in receipt of ESA and HB. Because of the severity of their respective circumstances (terminal non-Hodgkin lymphoma in the case of TP and serious mental health issues in the case of AR) they were also entitled to Severe Disability Premium (SDP) and Enhanced Disability Premium (EDP).[4] These are top-ups which are paid to those with the most serious conditions. The SDP and EDP are not paid under UC, and there are no similar premiums in their place.

UC has been rolled out gradually across the UK. Certain 'triggers' have been used to ensure that people are moved onto the benefit. One of these triggers is a HB claimant moving address from one local authority to another.[5] TP and AR both moved to new local authority areas and were therefore 'migrated' to UC. Because they were no longer entitled to SDP and EDP, they each saw their income decrease by around £170 per month.[6] They applied to the High Court for judicial review.

Issues

The court was asked to decide on three issues:

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[1] Department for Work and Pensions, 'Universal Credit: welfare that works' (White Paper, Cm 7957, 2010), ch 1.
[2] ibid., para 2.3.
[3] See for example: The Children's Society, 'Holes in the safety net: The impact of Universal Credit on disabled people and their families' (Report, October 2012).
[4] *R (TP and AR) v Secretary of State for Work and Pensions* [2018] EWHC 1474 (Admin) [43].
[5] ibid., [44]-[45].
[6] ibid., [5]-[6].

(1) Does the absence in the UC system of a premium similar to SDP and EDP constitute unlawful discrimination contrary to Article 14 read with Article 1 of the First Protocol to the ECHR (A1P1)? [7]
(2) Does the absence in the UC system of 'transitional protection' within the implementation of UC amount to unlawful discrimination contrary to Article 14 read with A1P1?
(3) Did the SSWP fail to have due regard to section 149 ('the public sector equality duty') of the Equality Act 2010 when making the Regulations which implemented UC?

Argument and Judgment

Issue (1)
The Claimants put forward two arguments. Firstly, that UC introduces unjustified differential treatment of people with severe disabilities who live with a carer (who will receive Carer's Allowance) and those who do not. Under the previous system, this disparity was made up through SDP and EDP.[8] Secondly, they argued that UC creates differential treatment (in terms of A1P1) by providing the same amount of money to those with severe disabilities and those with less severe disabilities because different cases were being treated in the same way.[9]

Regarding the first argument, Lewis J found that the differential treatment was objectively justified as a proportionate means of allocating public resources. [10] On the second argument, the court found that there was no differential treatment, only a change in treatment. Any differential treatment would also have been objectively justified.[11]

Issue (2)
The Claimants argued that the process of gradually phasing in UC using the trigger of applying for HB when moving to a different local authority area created two groups: (1) those with severe disabilities who move within their local authority area and could stay on ESA (thus continuing to receive SDP and EDP), and (2) those who moved outside it and triggered a transition to UC (and receive less money).[12] The Claimants argued that as no 'transitional protection' (extra money to account for the shortfall) had been put in place for the latter group, this constituted unjustified differential treatment. The SSWP argued that this differential treatment was objectively justified.[13]

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[7] A1P1 protects the peaceful enjoyment of possessions and the right not to be unlawfully deprived of possessions. The European Court of Human Rights has interpreted this as meaning that where a state creates a system of welfare benefits, it must do so in a way which is compatible with Article 14 (i.e. without discrimination). See: *Stec v United Kingdom* (2006) 43 EHRR 47 [53].
[8] *R (TP and AR)* n4 [50]-[51].
[9] ibid., [52].
[10] ibid., [64].
[11] ibid., [71]-[73].
[12] ibid., [75].
[13] ibid., [79].

The court agreed that there was differential treatment between the two groups. The legitimate aim being pursued was the implementation of UC nationally, which justified a phased introduction due to the scale of the task.[14] However, the government's failure to provide transitional protection to those who were to lose money was "manifestly without reasonable foundation and fail[ed] to strike a fair balance [between the interests of the individual and the interests of the community]".[15] This was because the SSWP was unable to justify requiring a potentially vulnerable group to assume the entirety of the difference in income in order to bring UC's implementation. Reasoning by analogy to the case of *Matthieson*[16], Lewis J held that those in the latter group had a status under Article 14 and the Claimants therefore succeeded on this ground.[17]

Issue (3)
The court was asked to reconsider the grant of permission to put forward the section 139 argument, however this was refused as unarguable. The material before the court indicated that the SSWP had sufficiently considered his duty under section 149.[18]

Commentary

This case highlights that in its efforts to simplify the welfare benefits system through UC, the government has so far manifestly failed. Welfare benefits have become an exceptionally complex area, and have in many cases created perverse results such as those faced by TP and AR. It is particularly notable that AR moved area in order to avoid losing money to the 'bedroom tax'.[19]

The High Court in this case stopped short of criticising the substance of UC, in line with a long tradition in judicial restraint vis-à-vis social policy resulting from parliamentary debate and executive decision-making. However, it did make a declaration with regards to the way UC has been implemented, demonstrating the important role judicial review can play in campaigning on social policy.

This case was also another clear reminder of the continuing importance of the Human Rights Act 1998. As is clear from the failure of the Claimant's third ground under the Equality Act, the HRA remains a powerful tool, and often one of the only avenues of challenge to the government.

For disability and social rights activists, although this judgment will be welcome, it will be remembered that the impact of transitioning to UC is one small aspect of a wide array

[14] ibid., [80].
[15] ibid., [88].
[16] *Mathieson v Secretary of State for Work and Pensions* [2015] 1 W.L.R. 3250.
[17] *R (TP and AR)*, n4, [90]-[91].
[18] ibid., [112].
[19] See generally: Department for Work and Pensions, 'Evaluation of Removal of the Spare Room Subsidy' (Interim Report, July 2014).

of problems with the UC system and disability benefits, despite the government's stated commitment "to ensuring that no-one loses as a direct result of these reforms".[20]

Alexander McColl

[20] n1, para 2.13.

Case comment: ***In the matter of an application by the Northern Ireland Human Rights Commission for Judicial Review (Northern Ireland)*** **[2018] UKSC 27**

Background

Following the successful referendum campaign in the Republic of Ireland to repeal the Eighth Amendment, all eyes have turned to Northern Ireland's restrictive abortion laws.

Sections 58 and 59 of the Offences Against the Person Act 1861 and s.25(1) of the Criminal Justice Act (Northern Ireland) 1945 criminalise abortion in Northern Ireland. However, it is not a crime to receive or supply an abortion where it is done in good faith for the purpose of preserving the life of the mother.[1] This has been interpreted to include where the continuance of the pregnancy will make the woman a "physical or mental wreck".[2]

The Northern Ireland Human Rights Commission (NIHRC) challenged the compatibility of this legislation with the European Convention on Human Rights (ECHR) insofar as that law prohibits abortion in cases of (a) serious malformation of the foetus, (b) pregnancy as a result of rape, and/or (c) pregnancy as a result of incest.

In 2015, Horner J made a declaration under s.4 of the Human Rights Act 1998 (HRA) to the effect that ss. 58 and 59 of the 1861 Act were incompatible with Article 8 ECHR. On appeal in 2017, the Northern Ireland Court of Appeal quashed the declaration. NIHRC appealed.

Judgment

By a majority of 4 to 3, the Supreme Court dismissed the appeal:

a) Standing:

   a. A majority (Lord Mance, Lord Reed, Lady Black and Lord Lloyd-Jones) concluded that NIHRC did not have standing as the proceedings were not instituted by identifying any unlawful act or any actual or potential victim of it.[3] Consequently, the court did not have jurisdiction to make a declaration of incompatibility under s.4 HRA.

   b. A minority (Lady Hale, Lord Kerr and Lord Wilson) held that the NIHRC had standing.[4]

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[1] Criminal Justice Act (Northern Ireland) 1945, s 25(1).
[2] *R v Bourne* [1939] 1 KB 687; *Family Planning Association of Northern Ireland v Minister for Health, Social Services and Public Safety* [2004] NICA 37.
[3] *In the matter of an application by the Northern Ireland Human Rights Commission for Judicial Review (Northern Ireland)* [2018] UKSC 27 [73].
[4] Ibid. [17] & [183-184].

b) Compatibility with Article 8;

   a. A majority (Lady Hale, Lord Mance, Lord Kerr and Lord Wilson) considered that the current law is disproportionate and incompatible with Article 8 ECHR insofar as that law prohibits abortion in cases of (a) fatal (but not serious) foetal abnormality, (b) pregnancy as a result of rape and (c) pregnancy as a result of incest.[5] Lady Black joined the majority on (a).[6]

   b. A minority (Lord Reed, Lady Black on (b) and (c) and Lord Lloyd-Jones) considered that it was not possible to conclude in the present proceedings that the current law is disproportionate or incompatible with Article 8.

c) Compatibility with Article 3;

   a. A majority (Lord Mance, Lord Reed, Lady Black and Lord Lloyd-Jones) concluded that the current law is not incompatible with Article 3 ECHR.

   b. A minority (Lord Kerr and Lord Wilson) considered that the current law is incompatible with Article 3.[7]

   c. Lady Hale did not consider it necessary to decide on incompatibility in relation to Article 3 in light of her decision on Article 8.[8]

Commentary

This judgment comes at a time of deadlock over the issue of abortion in Northern Ireland. The Northern Ireland Assembly, which has devolved responsibility for this area of the law, has been suspended since January 2017. Two days before the judgment, MPs at Westminster debated decriminalisation of abortion in Northern Ireland. However, the Conservative Government's Confidence and Supply Agreement with the pro-life DUP has complicated the possibility of reform.

In light of this, the Supreme Court's divided judgment adds to an already complicated picture. Despite finding that the NIHRC did not have standing, the Court went on to send a clear signal that as the law stands it is incompatible with the ECHR. Some of the strongest words in the judgment are those of Lord Mance, who called for "radical reconsideration" of the "intrinsically disproportionate" present legislative position.[9]

However, as the appeal was dismissed, any discussion of the compatibility of Northern Ireland's abortion laws with the ECHR is strictly *obiter dicta*. Whilst the Court's

[5] ibid. [31] [133] and [331].
[6] ibid. [368].
[7] ibid. [235].
[8] ibid. [34].
[9] ibid. [135].

condemnation of the situation for women in Northern Ireland has been hailed as giving impetus to the call for change,[10] Lord Kerr reminds us that the impact of the denial of standing to the NIHRC should not be "shied away from".[11]

Lady Hale described the issue of standing as an "arid question" as there was "no doubt" that NIHRC could have found women who are or would be victims of the law.[12] It is then surprising that the majority denied the NIHRC standing because it had not identified any unlawful act with any victim or potential victim. Lord Mance considered the rationale for the restrictions imposed by the legislation was to ensure NIHRC did not have the capacity to pursue what would amount to "an unconstrained *actio popularis*" regarding the compatibility of primary legislation with ECHR rights.[13]

Lord Kerr highlighted three unfortunate consequences of the majority's literal interpretation of the legislation. First, it denies the body specifically empowered to defend human rights in Northern Ireland of one of the most obvious means of doing so. Second, it introduces a discrepancy between the powers available to the Equality and Human Rights Commission and NIHRC. Finally, it makes a significant inroad into the practicality and effectiveness of the rights of pregnant girls and women in Northern Ireland.[14]

The purpose of NIHRC raising this case in its own name was to "prevent any woman or girl from having to face the burden of doing so".[15] It should have been obvious to the majority that NIHRC's case was not an *actio popularis*. This was not an academic challenge brought against obsolete legislation, but legislation that has a direct and ongoing impact on women's lives in Northern Ireland.[16] Following the Court's decision and paralysis in Westminster, one of the individuals cited in evidence by NIHRC will now bear the burden of bringing her "harrowing"[17] case before the High Court in Belfast.[18] This is the very situation that NIHRC was trying to avoid.

Hannah Megan Millar

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[10] Owen Bowcott, 'Northern Ireland abortion law clashes with human rights, judges say' (7 June 2018) https://www.theguardian.com/world/2018/jun/07/supreme-court-dismisses-bid-to-overturn-northern-ireland-abortion-laws, accessed 18 June 2018.
[11] *Application by the Northern Ireland Human Rights Commission*, n3 [197].
[12] ibid. [11].
[13] ibid. [61].
[14] ibid. [197].
[15] Northern Ireland Human Rights Commission, 'Northern Ireland Termination Law Breaches Women and Girls' Human Rights' (7 June 2018) http://www.nihrc.org/news/detail/northern-ireland-termination-law-breaches-women-and-girls-human-rights, accessed 30 June 2018.
[16] *Application by the Northern Ireland Human Rights Commission*, n3 [194].
[17] ibid. [85].
[18] BBC News, 'Belfast woman to challenge NI abortion law' (7 June 2018). https://www.bbc.co.uk/news/uk-northern-ireland-44402908, accessed 17 June 2018.

The Correct Protocol? Collective Expulsion and the ECHR

On 14th August 2014, a group of sub-Saharan migrants left the migrant camp of Gurugu Mountain in Morocco, heading for the border at a Spanish enclave, Melilla. Here they attempted to climb three fences which marked the border of the Spanish territory with Morocco. They later described stones being thrown at them by Moroccan border guards as they did so. One of the migrants became stuck on the top of the third fence for several hours without assistance, until he was helped down by Spanish authorities.[1] They were refused medical care by the Spanish border guards, and immediately handcuffed and driven back almost 300km to Morocco, victims of 'pushback': a policy under which migrants are summarily deported to the country from which they have come.
Two of the migrants subsequently brought claims against the Spanish Government for breaches of the European Convention on Human Rights (ECHR), namely; Article 3 (right to prevention from torture), Article 13 (right to an effective remedy) and Article 4 Protocol 4 (A4P4), which states that:

'The collective expulsion of aliens is prohibited'

It is upon this right, and the impact it may have in the context of the current 'migrant crisis', that this article will focus.

Collective Expulsion and Article 4 Protocol 4

A4P4 is not a widely known or used section of the ECHR. This is partially the case in this country because whilst Protocol 4 was signed by the UK in 1963, it has not been ratified. The UK argues that Articles 2 and 3 of Protocol 4, which provide for a right to freely move within a country once lawfully there and the right for an individual to enter, are not compatible with British nationality law concerning certain classes of British national (generally residents of certain Overseas Territories), who do not have the right to live within the UK.[2]
A4P4 was originally drafted in 1963 and the explanatory notes state that it was written to formally prohibit "collective expulsions of aliens of the kind which was a matter of recent history".[3] The concept of 'collective expulsion' was subsequently clarified in the case *Henning Becker v Denmark*[4] in 1975 as*:*

'any measure of the competent authority compelling aliens as a group to leave the country, except where such a measure is taken after and on the basis of a reasonable and objective examination of the particular cases of each individual alien of the group'.

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[1] *ND and NT v Spain*, Applications nos. 8675/15 and 8697/15 (ECHR, 3 October 2017) [12].
[2] Hansard HL vol 706 col WA170 (15 Jan 2009).
[3] Research and Library division of the ECtHR, 'Guide on Article , Protocol 4 of the European Convention of Human Rights' (Council of Europe/European Court of Human Rights, 30 April 2018) https://www.echr.coe.int/Documents/Guide_Art_4_Protocol_4_ENG.pdf, accessed 1st June 2018.
[4] Application no. 7011/75 (ECHR 3 October 1975) [166].

The test, therefore, for a breach is whether:

1. 'Aliens' have been forcibly expelled from a country;
2. If an expulsion took place, there was no examination of their individual circumstances.

Part 2 is crucial as it ensures that the rights of asylum seekers are protected. When countries do not allow migrants due process, these vulnerable individuals could have their claims slip through the net, and the contracting parties will have ignored their obligations under international law.

Article 4 Protocol 4 and the Migrant Crisis

The migrant crisis, roughly defined as a period circa. 2015 onwards during which hundreds of thousands of migrants have crossed the Mediterranean, often in treacherous conditions, to seek a new life in Europe, has proven a turning point in the evolution of A4P4. Cases such as *ND* have offered the opportunity for the European Court of Human Rights (ECtHR) to clarify aspects of A4P4 and what may constitute a breach.

Pre-migrant crisis, *Hirsi Jamaa and Others v. Italy*[5] set the groundwork for *ND*, as did *Sharifi and Others v. Italy and Greece*.[6] *Hirsi* concerned a group of migrants who had attempted to cross the Mediterranean by boat in 2012, and were intercepted by the Italian coastguard and kept in detention without examination of their circumstances before being forced to return to Libya.

Sharifi concerned a group of migrants which came to Italy from Greece, and were sent back to Greece by the Italian authorities without having undergone any process or checks at all, citing the EU's Dublin II Regulation[7] under which non-EU migrants should be processed in the country which they enter the EU as justification. In both cases, breaches were found.

However, neither cases addressed how A4P4 might apply in the case of a land-border, as in both *Hirsi* and *Sharifi* the applicants had arrived by sea. In addition, in both cases the applicants had (however briefly) been on the respondents' soil. *ND*, therefore offered an opportunity to tighten and consolidate the ECtHR's jurisprudence on jurisdiction, and elaborate on the circumstances in which A4P4 might be breached.

Submissions in ND

The case came before the Third Section of the ECtHR. Although the applicants conceded their allegation concerning a breach of Article 3, they persisted in their submissions on the basis of the breaches of A4P4 and Article 13.

[5] Application no. 27765/09 (ECHR 2012).
[6] Application no 16643/09 (ECHR, 21 October 2014).
[7] Regulation No. 343/2003

The Spanish government in response submitted that:

1. There could be no breaches of the ECHR as the applicants had not crossed the third fence and therefore had not been on Spanish territory. Article 1 of the ECHR stated that 'the High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in the [ECHR]'. As the applicants were not within 'their jurisdiction', there was no obligation for the Spanish government to secure their Convention rights;
2. By the same reasoning, the applicants could not have been subject to an expulsion. They could not have been expelled from Spanish territory as they were not within it;
3. Even if the court did not accept 1) and 2), there could have been no 'collective expulsion' as the there was no link i.e. of race, between the migrants which made them a 'collective group';
4. Spain as a sovereign country had the right to defend its own border and prevent illegal entry.

Judgment in ND

The Chamber found that in favour of the applicants for three key reasons:

1. The Court did not need to decide whether the area between the fences constituted Spanish territory. The Spanish authorities were exercising *de jure* control over the area by sending them back to Morocco and as per the rule in *Al-Skeini v UK*,[8] the Spanish government's obligations under Article 1 applied;
2. Both *Hirsi* and *Sharifi* had established that a group of asylum seekers could constitute a 'collective group';
3. The fact that the applicants were not subject to any identity checks before they were subject to 'pushback' was in breach of their rights under Article 13, the right to an effective remedy. They should have been processed by the Spanish authorities to see whether they had a claim to asylum.

The applicants were each awarded 5000 euros in damages.

The future of Article 4 Protocol 4

ND reaffirmed that it is the control which a state is establishing over a person or location, not where they are, which dictates whether or not a breach has occurred. It was of no relevance whether or not the Spanish border police were on Moroccan or Spanish soil: they were exercising jurisdiction, and therefore an 'expulsion' as per A4P4 could take place.

This use of A4P4 could seriously alter the way in which European countries must deal with migrants. If Spain and Italy, amongst others, cannot actively move illegal migrants

[8] Application no. 55721/07 (ECHR, 7 July 2011).

whom they have not offered a hearing and identity check without committing a breach of A4P4, they may be forced to create a more comprehensive system of process. A vital reassessment of strategy by ECHR Contracting Parties could have the effect of ensuring refugees are more quickly identified and do not have to go through the trauma of 'pushback' and/or immigration detention process.

It is possible, however, that this precedent may increase tensions between individual European countries and international organisations. Many European countries have not reacted well to international bodies telling them how they should be dealing with the migrant crisis. This is hinted at in *ND* by the Spanish government's non-Convention based submission concerning their right to defend their borders and sovereignty, perhaps a reminder to the ECtHR not to encroach on this any further. A broad assessment of the general political situation within Europe quickly demonstrates this sentiment across other countries. Hungarian politicians, for example, have poured scorn on the EU for their involvement in the crisis, and rejected CJEU judgments on their actions.[9] The Italian government closed their ports to NGO boats carrying migrants on 30th June 2018,[10] and the more populist and anti-immigration government formed in Italy at the most recent election looks likely to continue to clamp down on migrant crossings. Article 4 Protocol 4, therefore, may be simply ignored, or, worse, make the Council of Europe lose some influence within the political arena.

In addition, some may argue that by insisting on a hearing and the delay of expulsion, the ECtHR is offering an incentive for migrants to make the long and dangerous voyage across the Mediterranean. Not surprisingly, therefore, the Spanish government has subsequently chosen to request a referral to the Grand Chamber which the Court has granted. Whilst many scholars[11] think the conclusion is unlikely to change, and thus the only effect will be further judicial weight thrown behind the Chamber's decision, it will nevertheless be a fascinating hearing. The stakes have never been higher.

Imogen Sadler

[9] Nick Thorpe, 'Europe migrant crisis: Hungary rages at EU asylum verdict', (BBC News, 6 September 2017), https://www.bbc.co.uk/news/world-europe-41177420, accessed 1 July 2018.
[10] BBC New Team, 'Migrant crisis: Italy minister Salvini closes ports to NGO boats', (BBC News, 30 June 2018), https://www.bbc.co.uk/news/world-europe-44668062, accessed 1 July 2018.
[11] *Annick Pijnenburg*, 'Is N.D. and N.T. v. Spain the new Hirsi?', (Blog of the European Journal for International Law, 17 October 2017), https://www.ejiltalk.org/is-n-d-and-n-t-v-spain-the-new-hirsi/ accessed 2 July 2018.

Case comment: ***Lungowe v Vedanta Resources Plc [2017] EWCA Civ 1528 and Okpabi v Royal Dutch Shell Plc*** **[2018] EWCA Civ 191**

Background

In two recent decisions of the Court of Appeal, English parent companies with subsidiaries in Africa were sued for alleged human rights breaches occasioned by their subsidiaries. While the cases highlight a number of crucial principles pertaining to jurisdiction and liability of parent companies to third parties, this review assesses the role of access to justice as a basis for deciding that England and Wales is the appropriate forum in which to bring such claims.

The two judgments

In *Lungowe v Vedanta Resources Plc*[1] ('*Vedanta*'), a 2017 Court of Appeal decision, 1,826 Zambian claimants sued Vedanta, a company incorporated in the United Kingdom and Konkola Copper Mines Plc (KCM), Vedanta's Zambian subsidiary. The claimants alleged loss of income, damage to property and personal injury due to pollution and environmental damage caused by discharges from KCM's mine.[2] The issues before the Court of Appeal were, inter alia, whether England was the appropriate forum to bring the claims and alternatively whether the claimants would get access to justice in Zambia.[3] To determine whether England was the appropriate forum the Court had to establish, inter alia, whether the claimants had a properly arguable case against Vedanta.[4] The Court of Appeal upheld the first instance court's finding that there was a properly arguable case that Vedanta owed the claimants a duty of care[5] and alternatively that the claimants 'would almost certainly not obtain justice in Zambia.'[6]

In the 2018 case of *Okpabi v Royal Dutch Shell Plc*[7] ('*Okpabi*'), the Court held that 42,500 Nigerian citizens had failed to establish a properly arguable case that Royal Dutch Shell Plc (RDS), a company incorporated in the United Kingdom, owed them a duty of care. RDS has a subsidiary in Nigeria called Shell Petroleum Development Company of Nigeria (SPDC) which operates oil pipelines in the Niger Delta. The claimants, all residents of the Niger Delta, were seeking damages due to 'serious, and ongoing, pollution and environmental damage' caused by oil leaks from pipelines operated by SPDC.[8] The Court found that the claimants failed to establish that RDS owed them a duty of care and rejected the claimants' argument that it would be fair, just and reasonable to impose a duty of care in the UK.[9]

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[1] [2017] EWCA Civ 1528.
[2] ibid. [1] and [2] (Simon LJ).
[3] ibid. [40], [103].
[4] ibid. [41]-[43].
[5] ibid. [90].
[6] ibid. [105], [131].
[7] [2018] EWCA Civ 191.
[8] ibid. [1] (Simon LJ).
[9] ibid. [130], [132] (Simon LJ); [205] (Lord Vos, Chancellor of the High Court).

Significance of the role of UK courts

Apart from the important principles on duty of care set out in the two cases, they raise serious questions about the potential role of English courts in providing remedies to breaches of human rights brought about by UK companies operating abroad. This was touched on by Sales LJ in his dissenting speech in *Okpabi* when he highlighted the importance of having 'two persons legally liable for the same damage' as a way of protecting claimants from liable subsidiaries that become insolvent.[10] A further significant consideration is the likelihood of claimants accessing justice in the jurisdictions where the breaches occur. In illustrating the difficulties faced by claimants bringing claims against English parent companies, the Court in *Vedanta* considered: the fact that previous environmental litigation in Zambia had failed; the claimants' lack of resources and the fact that they would be unable to afford legal representation; the absence of conditional fee agreements in Zambia; the absence of specialist environmental lawyers willing to represent the claimants and KCM's obdurate approach to litigation. The Court concluded that the judge below had not erred in his findings that the claimants would almost certainly not obtain justice in Zambia.[11]

While some of the factors relating to access to justice considered in *Vedanta* were to some extent also present in *Okpabi* (for example the financial position of the claimants and the limited enforcement of environmental regulations in Nigeria), the Court did not regard them to be determinative of the matter at issue.[12] Despite the gravity of the public health situation facing the claimants and the fact that clean-up operations in the Niger Delta were incomplete, [13] the Court in *Okpabi* based its reasoning primarily on the proximity between the claimants and RDS and whether it was fair, just and reasonable to impose a duty of care.[14]

Another recent case where claimants are seeking redress in UK courts for torts allegedly committed by a subsidiary is *Kalma v African Minerals (UK) Limited and other*.[15] The claimants allege that they 'were shot, beaten, arbitrarily arrested, subject to sexual violence and tortured'[16] by Sierra Leonean police working on the instructions of Tonkolili Iron Ore, the subsidiary of a UK company. In a significant move for access to justice, the High Court decided to conduct part of the trial in Sierra Leone to enable those claimants who could not travel to London, to give evidence in person.

In conclusion, *Vedanta* and *Okpabi* are significant examples of the challenges facing claimants in claims against English companies operating through their subsidiaries. Such

[10] *Okpabi,* n7 [150] (Sales LJ); see also *Vedanta,* n1 [96] (Simon LJ).
[11] *Vedanta,* n1 [131]-[134] (Simon LJ).
[12] *Okpabi* n7, [130] and [131] (Simon LJ).
[13] ibid. [175] (Sir Geoffrey Vos, Chancellor of the High Court).
[14] ibid. [132], [193], [205], [206].
[15] [2018] EWHC 120 (QB); see also [2017] EWHC 1471 (QB) involving the same parties but relating to costs budgets.
[16] Martyn Day and Liberty Bridge, 'How Sierra Leonean farmers got their day in Court' (Leigh Day, 31 January 2018) https://www.leighday.co.uk/Blog/January-2018/How-Sierra-Leonean-farmers-got-their-time-in-Court, accessed 1 July 2018.

difficulties are often compounded by the complex corporate structures of multinational companies and the absence of internationally agreed mechanisms for holding such companies to account. The above cases set out the framework for gauging the duties owed by parent companies to citizens of other countries and more importantly embolden the courts to take into account access to justice factors in considering the appropriate forum for such claims. However, while access to justice featured strongly in *Vedanta*, it had a limited role in *Okpabi* due to the claimants' failure to show a properly arguable case against RDS. With the Supreme Court due to hear the appeal in *Vedanta* in January 2019,[17] it remains to be seen whether the difficulties with access to justice faced by claimants in their home jurisdictions would support their argument that England and Wales is the appropriate forum to bring such claims.

Walker Syachalinga

[17] Permission to Appeal results – March and April 2018 https://www.supremecourt.uk/docs/permission-to-appeal-2018-0304.pdf, accessed 23 October 2018.

Whose Mugshot is it anyway?

Background

On 22 June 2012, Lord Justice Richards and Mr Justice Kenneth Parker in the Divisional Court ruled in *RMC and FJ v Commissioner of Police of the Metropolis and Others*[1] that a policy on the retention of custody images for a minimum of six years[2] was unlawful.[3] The Divisional Court's ruling was based upon Article 8 of the European Convention on Human Rights (ECHR) which protects, amongst other things, private life.[4] The retention of custody images triggered Article 8's application and subsequently led to its violation.

The Divisional Court were unconvinced that a fair balance had been struck – justifying any interference with Article 8[5] - for the following reasons:

> (1) There was no adequate distinction drawn between those convicted of offences and those who are either not charged or are charged but acquitted. This posed the risk of stigmatisation of those entitled to the presumption of innocence or the perception of not being treated as innocent.
> (2) Retention of the photographs was on any view for a long period (a minimum of 6 years), and would likely in practice to be much longer and was potentially indefinite.
> (3) The retention of unconvicted persons' data may be especially harmful in the case of minors.[6]

The Divisional Court then gave the defendants months and not years to revise the policy.[7]

Years, not months later

On February 2017, the Home Office published a review (the Review) of the use and retention of custody images.[8] The Review proposed that those who had not been convicted[9] of recordable or non-recordable offences to which a custody image had been taken could apply to the chief officers of police forces to have their custody image deleted.[10] The Home Office referred to other European jurisdictions having similar

[1] [2012] EWHC 1681.
[2] ibid., [12].
[3] ibid., [58] and [64].
[4] ibid., [33-41].
[5] ibid., [55].
[6] ibid., [54].
[7] ibid., [58].
[8] Home Office, 'Review of the Use and Retention of Custody Images' (February 2017) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/594463/2017-02-23_Custody_Image_Review.pdf> accessed 30 June 2018.
[9] The terminology of conviction is broader than criminal convictions as it includes for example, cautions.
[10] ibid., para 1.7.

practices in which there is a presumption of deletion in most cases.[11] The Home Office felt that this complied with the UK's obligations under Article 8.[12] The Home Office preferred this to manual deletion as this would 'cost a considerable amount of money to achieve which we believe would be a poor use of taxpayer's money'[13] and 'unnecessarily take funding away from other areas of policing, potentially weakening the police's ability to protect the public.'[14]

Several months later, Paul Wiles, the Biometrics Commissioner (the Commissioner) published the annual report on the retention and use of biometrical data.[15] On the subject of facial images, the Commissioner noted that the legality of the proposals made in the Review may depend on the extent to 'which individuals without convictions successfully make an application for deletion of their police held custody images.'[16] The Commissioner noted that evidence from a similar application process was not encouraging.[17] This was in reference to a previous annual report where it was noted that requests for deletion were granted in very limited circumstances.[18] The Commissioner concluded that '[i]t is now almost five years since the Court held that the police retention of facial images was unlawful, yet we still do not have a clear policy in operation to correct that situation.'[19]

On 25 May 2018, the House of Commons Science and Technology Committee (the Committee) published their biometrics strategy and forensic services report.[20] The Committee noted that Baroness Williams of Trafford had acknowledged that, although there was a presumption of deletion, the police had the right to retain an image if the person posed an ongoing risk to the public.[21] The Committee also noted that Home Office witnesses told them that automatic deletion was not possible in the current systems[22] and

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[11] ibid.
[12] ibid., para 1.13.
[13] ibid., para 3.8.
[14] ibid.
[15] Paul Wiles, 'Commissioner for the Retention and Use of Biometrics, Annual Report 2016' (September 2017) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/644755/CCS207_CCS0917991760-1_Biometrics_Commissioner_ARA_Accessible.pdf, accessed 30 June 2018.
[16] ibid., para 300.
[17] ibid.
[18] Alastair R MacGregor, 'Commissioner for the Retention and Use of Biometrics, Annual Report 2015' (December 2016) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/507104/54496_Biometrics_Commissioners_Report_Print_Ready__3_.pdf, accessed 30 June 2018, para 255.
[19] Paul Wiles, n15, para 306.
[20] Science and Technology Committee, *Biometrics strategy and forensic services; (fifth Report)* (2017-19 HC 800).
[21] ibid., para 38.
[22] ibid., para 39.

that Baroness Williams repeated the stance of the Review that it would be too expensive to do so.[23]

Although the Committee acknowledged that new IT is planned for the future with regards to automatic deletion, they found the Government's approach 'unacceptable because unconvicted individuals may not know that they can apply for their images to be deleted' and would be given less protection than those whose DNA or fingerprints have been taken.[24] The Committee recommended that, without delay, an automatic image deletion system should be put in place, and if there is a delay in introducing such a system, deletion should be done manually as a matter of urgency.[25] They also recommended the Home Office set out the lawfulness of its delete-on-application response.[26]

Lawfulness of delete-on-application and Review proposals

Considering that the Commissioner highlighted that there has not been a clear policy to rectify the unlawful retention finding in *RMC*,[27] this would result in what is called a 'continuing violation.' The 'doctrine of "continuing violation" implies a beginning, i.e., a critical event constituting the original breach, and its continuation.'[28] This, essentially means that if a violation has not been rectified, it is considered continuous.

Additionally, for a measure to be 'in accordance with the law' it must:

> [A]fford adequate legal protection against arbitrariness and accordingly indicate with sufficient clarity the scope of discretion conferred on the competent authorities and the manner of its exercise.[29]

The rules must be clear, detailed[30] and binding.[31] The Home Office admitted in 2017 that the regime for custody image retention does not have specific guidance.[32] In *Malone*, the European Court of Human Rights (ECtHR) held that interception law in England and Wales, (which has the same principles as data retention)[33] despite having detailed procedures (as the Divisional Court found the custody image retention guidance did)[34] and public awareness[35] was still not 'in accordance with the law' due to:

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[23] ibid., para 41.
[24] ibid., para 44.
[25] ibid., para 55.
[26] ibid.
[27] Paul Wiles, n15, para 306.
[28] *Loizidou v Turkey* App no. 15318/89 (ECHR, 28 July 1998), Dissenting Opinion of Judge Jambrek, [5].
[29] *S and Marper v UK* App nos. 30562/04 and 30566/04 (ECHR, 4 December 2008), [95].
[30] ibid., [99].
[31] *Valenzuela Contreras v Spain* App no. 27671/95 (ECHR, 30 July 1998), [60].
[32] Home Office, n8, para 1.2.
[33] *S and Marper*, n29, [99].
[34] *RMC and FJ*, n1, [45].
[35] *Malone v UK* App no. 8691/79 (ECHR, 2 August 1984), [79].

- Not being legally binding[36] and lacking reasonable clarity regarding the scope and manner of discretion exercised.[37]
- The guidance not being specific to custody images, which would be 'too general to satisfy the requirement of foreseeability.'[38]
- The nature of offences for retention (particularly Group 3 offences in the College of Policing's 'Retention, review and disposal' guidance)[39] not being defined. '[40]

Moreover, the arbitrariness of the delete-on-application proposal is highlighted by the Commissioner, who noted that it is**:**

> [C]omplex, and will require a great deal of individual decision making resulting in high compliance costs and, in spite of guidance, may lead to forces exercising their discretion differently, thereby resulting in a postcode lottery.[41]

Furthermore, the fact that every arrest results in the retention of a custody image can be said to be an 'unfettered power.'[42] All these considerations establish that currently, the laws on custody image retention are not 'in accordance with the law.' Given that the policy and the Review proposals had no lawful basis before, the enabling power in s.64A of the Police and Criminal Evidence Act 1984 would not be 'in accordance with the law' because it is too broad and imprecise.[43]

On proportionality, with regards to the cost of implementing an automatic deletion system, the ECtHR has previously rejected the argument that the cost of a measure being a justification to continue with the violation.[44] The case of *Bouamar v Belgium* concerned the unavailability of an approved educational centre. The ECtHR ruled that Belgium would be in violation of the ECHR if an approved educational centre was not built, and that the cost was no justification to continue with the violation. This approach by the ECtHR would be consistent with the principle of a least restrictive measure which permits 'means that are both effective and less intrusive but which are very costly or problematic for practical reasons.'[45]

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[36] ibid., [77].
[37] ibid., [79].
[38] *Amann v. Switzerland* App no. 27798/95 (ECHR, 16 February 2000), [76].
[39] College of Policing, 'Information management Retention, review and disposal' https://www.app.college.police.uk/app-content/information-management/management-of-police-information/retention-review-and-disposal-of-police-information/#group-3-all-other-offences, accessed 1 July 2018.
[40] *Kruslin v France* App no. 11801/85 (ECHR, 24 April 1990), [35].
[41] Paul Wiles, n15, para 300.
[42] *Roman Zakharov v Russia* App no. 47143/06 (ECHR, 4 December 2015), [230].
[43] *RMC and FJ*, n1, [45].
[44] *Bouamar v Belgium* App no. 9106/80 (ECHR, 29 February 1988).
[45] Janneke Gerards, 'How to improve the necessity test of the European Court of Human Rights' (2013) I•CON 11:2 466, 489.

Continuing with proportionality, based on *S and Marper*, custody image retention is not proportionate [46] because custody image retention is blanket and indiscriminate, irrespective of the nature or gravity of offences (such as minor non-imprisonable offences), irrespective of the age of the persons concerned, not time-limited irrespective of the seriousness of the offence, the possibility for deletion is limited and there is no independent review of justifications of retention.[47]

Although there is a time-limit, of six years *minimum*[48]the Divisional Court already ruled this to be unlawful and the ECtHR have ruled that, where the chances of deletion are hypothetical (48 custody images deleted[49] out of 19 million) [50] at best, this is tantamount to indefinite retention and is unjustified under Article 8. [51] This disproportionality intensifies when retention of an image could be justified on the ground that a minor, many years ago, accepted a caution.[52] The stigmatisation of not being presumed innocent still persists and treats convicts and those who are not (especially minors) the same.[53] This does not strike a fair balance and would violate Article 8.[54]

The ECtHR noted that weighty reasons would have to be put forward to justify treating differently, those who are unconvicted.[55] This raises anti-discrimination issues, in light of Article 14, which ensures:

> [T]he right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification *fail to treat differently persons whose situations are significantly different*.[56]

No such objective reasonable justification has ever been established and would thus lead to a violation of Article 8 in conjunction with Article 14.[57]

Conclusions

The current laws and policy on the retention of custody images are neither lawful or proportionate with regards to Article 8, nor are they compatible with Article 8 in conjunction with Article 14. This is despite the Government having six years to rectify this

[46] *S and Marper*, n29, [125-6].
[47] ibid., [119].
[48] Home Office, n8, para 5.4.
[49] Science and Technology Committee, n20, para 43.
[50] Paul Wiles, n15, para 301.
[51] *M.K v France* App no. 19522/09 (ECHR, 18 April 2013), [45-7].
[52] Alastair R MacGregor, n21, para 255.
[53] *S and Marper*, n29, [122-4].
[54] ibid., [125-6].
[55] ibid., [123].
[56] *Thlimmenos v Greece* App no. 34369/97 (ECHR, 6 April 2000), [44].
[57] ibid., [55].

issue. The issue of custody image retention becomes more poignant amidst challenges[58] to facial recognition technology and its use on custody images.[59] As the ECtHR noted:

> A person's image constitutes one of the chief attributes of his or her personality, as it reveals the person's unique characteristics and distinguishes the person from his or her peers. The right to the protection of one's image is thus one of the essential components of personal development and presupposes the right to control the use of that image.[60]

Matthew White

[58] Liberty, 'Cardiff resident launches first UK legal challenge to police use of facial recognition technology in public spaces' (13 June 2018). https://www.libertyhumanrights.org.uk/news/press-releases-and-statements/cardiff-resident-launches-first-uk-legal-challenge-police-use, accessed 1 July 2018; Big Brother Watch, 'Stop the Met Police using authoritarian facial recognition cameras' (June 2018). https://www.crowdjustice.com/case/face-off/, accessed 1 July 2018.

[59] Paul Wiles, n15, para 301.

[60] *Reklos v Greece* App no. 1234/05 (ECHR, 15 January 2009), [40].

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