

“In this case, the Court has, for the first time in its history, found a violation of the guarantee against racist discrimination contained in Article 14, together with Article 2, which protects the right to life... I greet it as a giant step forward that does the Court proud\*”

Article 14 of the European Convention on Human Rights provides:

“The enjoyment of the rights and freedoms set forth in the Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political, or other opinion, national or social origin, association with a national minority, property, birth or other status.”

This Article is not a freestanding prohibition against discrimination and is perhaps more accurately described as a ‘parasitic’ right. It does not prohibit all discrimination by the state but merely prevents states from being discriminatory in the way in which they guarantee the rights set out in the Convention. In practice, where a breach of a substantive Convention right has been established, the Court has often found it unnecessary (or perhaps been reluctant) to address the separate question of a breach of Article 14. Unfortunately, this has resulted in a lack of development and analysis of Article 14 issues. For example in *Dudgeon v United Kingdom* (1981) 4 EHRR 140, in which the criminalisation of homosexual acts was found to be a breach of the right to respect for private life guaranteed by Article 8, the Court declined to deal with the Article 14 issue on the grounds that it comprised the same complaint from a different angle. The Court also took this view in *Lustig-Prean v United Kingdom* (1999) 6 BHRC 65 and *Smith and Grady v United Kingdom* (1999) IRIR 747.

It is therefore surprising and refreshing that the Court, when recently passing judgment in the case of *Nachova & others v Bulgaria* (Application No. 43577/98, 26 February 2004), gave further guidance on and developed the principles underpinning Article 14 in the context of Article 2.

The case related to the killing of two individuals in 1996 by the Bulgarian military police. The applicants were both of Roma origin, and both were conscripts in the Bulgarian army. They were arrested for repeated absences without leave and escaped from detention shortly afterwards. In an operation to effect their arrest they were shot and fatally wounded by the military police while fleeing, despite being unarmed. Although an investigation took place no attention appeared to have been paid to the possibility of a racist motive and the fact that racist verbal abuse was alleged to have been used by the police.

The applicants’ families complained that the applicants had been deprived of their lives in violation of Articles 2 (the right to life) and 14 of the Convention. The Court for the first time held that there had been a violation of both Article 14 and Article 2.

The Court in this case developed the procedural aspects of Article 14. It was emphasised that where there is a suspicion that racial attitudes induced a violent act, it is particularly important that the official investigation is pursued with vigour and impartiality. Importantly, the Court went on to state that “when investigating violent incidents, and, in particular, deaths at the hands of State agents, State authorities have the additional duty to take all reasonable steps to unmask any racist motive and to establish whether or not ethnic hatred or prejudice may have played a role in the events”.

The Court also considered the issue of proving racial motivation and the burden of proof in such cases. It accepted that obtaining proof may be difficult, adding

that “the respondent State’s obligation to investigate possible racist overtones to a violent act is an obligation to use best endeavours and not absolute...The authorities must do what is reasonable in the circumstances to collect and secure the evidence, explore all practical means of discovering the truth and deliver fully reasoned, impartial and objective decisions, without omitting suspicious facts that may be indicative of a racially induced violence”. Significantly, the Court took the view that in cases where the authorities have not pursued such lines of enquiry in these circumstances, the Court may draw negative inferences and shift the burden of proof from the applicant to the respondent Government. On the facts in *Nachova*, the Court concluded that the investigator and prosecutor had ignored important facts, failed to collect evidence and omitted reference in their decision to troubling issues. No attempt was made to investigate whether discriminatory practices played a role. In these circumstances the burden shifted to the State which could offer no convincing explanation.

Practitioners may find *Nachova* useful in cases involving deaths where there is suspicion that the action causing death may have been racially motivated. In particular, this decision could impact on cases of deaths in custody, by requiring state authorities to use their best endeavours to uncover whether or not discrimination played a role. The Court, in its robust judgment, emphasised the need for such action to ensure that public confidence in law enforcement machinery was maintained.

\*taken from the concurring opinion of Judge Bonello

## Specialist Support Pilot

# News

## Human Rights and Public Law Line

Spring 2004

### Abuses of power, delays and barmy decision making – an advisers tool kit.

This article aims to be both an introduction to public law and a reminder to those familiar to it. It alludes to the contents of the public law tool kit<sup>1</sup> that is available to deal with the problems which may arise between an individual and a public authority, and explains the role of the Public Law Project in advising on its use.

Many of us who have had to rely upon a public authority properly administering a particular scheme may by now have lost the will to live. Applying for social security benefits (such as housing benefit or tax credit) can involve weeks or even months of waiting, interspersed by unsatisfactory and increasingly fraught telephone conversations and one sided correspondence. When a decision is finally made it may already be too late to prevent eviction, or it may be couched in terms which are incomprehensible even to the most seasoned of advisers. To add insult to injury, some of these decisions will not even fall within the jurisdiction of tribunals set up to deal with disputes about the application of those schemes. And those that do then proceed through the tribunal system at a pace of the public body’s own choosing, rather than in relation to the urgency of any individual case.

Such a model may be replicated in many other areas of administrative decision making such as in the provision of health care, community care, or education. It is also not unknown within the provision of legal aid by the Legal Services Commission. However, all of these various bodies have one thing in common – they are public authorities. Because they are public authorities they must act in accordance with public law principles – they must have decision making processes which are fair, they must make decisions, and those decisions and processes must be based on a correct interpretation of the law.

Furthermore, section 6 of the Human Rights Act 1998 requires public authorities to act compatibly with human rights (unless an Act of Parliament requires otherwise). Equally, public bodies must conduct themselves free of any maladministration.

In our experience, it is very often the case that it is only when a problem is taken out of the ‘hot house’ atmosphere that pervades the authority’s first tier decision making, that the problem will receive the individual consideration that it truly merits. Thus, the activities of all public authorities can be subjected to scrutiny by both internal and external bodies. They are not and cannot be beyond the rule of law. But which is the most effective scrutinising body for the particular circumstances of the case?

There can be understandable cynicism over internal mechanisms of scrutiny such as local authority complaints procedures, but how often has the authority’s Monitoring Officer been asked to consider exercising his powers in relation to such matters?<sup>2</sup> Or the Independent Adjudicator?<sup>3</sup> How many advisers know about the role and remit of such bodies?

So far as external bodies go, what do the various Ombudsmen have to offer?<sup>4</sup> Perhaps judicial review is the best option. What are the pros and cons of each potential remedy? It is now abundantly clear that, irrespective of any cynicism that might exist on the part of advisers, the trend on the part of both the judiciary and on the part of funders such as the Legal Services Commission, is to encourage the use of non-litigious dispute resolution mechanisms in preference to resorting to court based methods such as judicial review. This is not without its pitfalls – recourse to such alternative methods does not of itself affect the time limits for bringing legal proceedings (which in the case of judicial review must be brought ‘promptly and in any event not later than 3 months after the grounds to make

the claim first arose<sup>5</sup>). But the Commission and the Administrative Court will generally need to be satisfied that the case before them is an appropriate one and can refuse funding or relief respectively where they are not.

Our advice is simple:

- take a step back (and a deep breath)
- look at the problem – what does the client want? What is achievable?
- form a diagnosis – what is preventing the client from achieving their goal?
- open up your public law remedies tool box – look inside!
- select the appropriate remedy (and there may be more than one).

If you need help, then contact PLP or, if your query involves human rights issues, Liberty. Both our organisations offer a free service to you by providing telephone advice. If we cannot advise you there and then on account of the complexity or because of the novel nature of the problem, we will research it and come back to you. You can send us the documents in the case to look at and we can offer written advice. In some cases, we can also take a direct referral from you and act directly for your client.

We receive calls on a freephone number, 0808 808 4546, on Monday and Wednesday between 2 and 5, and on Tuesday and Thursday between 10 and 1.

<sup>1</sup> Thanks to Richard Stein at Leigh Day & Co for coining this phrase.

<sup>2</sup> He is created by the Local Government and Housing Act 1989 and is himself subject to scrutiny by the Administrative Court.

<sup>3</sup> The independent adjudicator investigates allegations of maladministration within the Inland Revenue and Customs & Excise.

<sup>4</sup> These are public bodies and are also subject to scrutiny by the Administrative Court as any other

<sup>5</sup> Part 54.5 CPR

### Specialist support for human rights and public law cases

Liberty and the Public Law Project are funded by the Legal Services Commission to provide specialist support on human rights and public law cases.

- You can call our phone line to access help and advice with human rights and public law issues raised by your cases.

- Alternatively, for human rights enquiries, you can submit your enquiry through Liberty’s website [www.liberty-human-rights.org.uk](http://www.liberty-human-rights.org.uk)
- We can work with you, on your terms, to provide on-going support through the life of a case.
- You can ask us to take over human rights and public law cases which you feel unable to deal with.
- We can provide you with training tailored to the particular needs of your organisation.

To access the service you need to be a Legal Services Commission contract holder – civil or criminal – or have a CLS Specialist Help Quality Mark. The service is also available to General Help with Casework organisations in the West Midlands.

**Human Rights and Public Law Line**  
0808 808 4546  
Monday and Wednesday 2-5pm  
Tuesday and Thursday 10am-1pm

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Direct access to expert guidance on public law and human rights for lawyers and advisers

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Advice on human rights issues can also be accessed by e-mail through Liberty’s website [www.liberty-human-rights.org.uk](http://www.liberty-human-rights.org.uk)

# Human Rights Caselist

## up to the end of April 2004

### Article 2

**R (on the application of Middleton) v HM Coroner for West Somerset**

**R (on the application of Sacker) v HM Coroner for West Yorkshire**

**11 March 2004, House of Lords**  
[2004] UKHL 10 and 11

To meet the procedural requirements of Article 2 an inquest must include in its culmination an explicit statement of the fact finder's conclusion on the case's central issues, particularly where the inquest's finding is effectively unchallengeable. While the current 'fact-finding' regime for investigating deaths occasionally fails to meet the requirements of the Convention, the only change needed was for s11(5)(b)(ii) of the Coroners Act 1988 to be read more broadly (in light of s3 of the HRA) so that setting out "how" an individual died means "by what means and in what circumstances".

**Al Fayed v Lord Advocate**

**12 March 2004, Court of Session**  
2004 SC (D) 23/3

Mohammed Al Fayed's attempt to judicially review the Lord Advocate's refusal to open a public inquiry into his son's death was rejected. Held, *inter alia*, that as Article 2 rights of next of kin are enforceable only in the jurisdiction where the death occurred, it was primarily France that had obligations under the Convention in respect of Dodi Fayed's death. Complaints about the French investigation should be made to the ECtHR.

### Article 3

**Rivas v France**

**1 April 2004, ECtHR**

**Application No. 59584/00**

The applicant complained that he was assaulted whilst in police custody, suffering injuries which required emergency surgery. Despite the French Court of Appeal acquitting the officer on the grounds of self-defence, the Court considered it had not been shown that the use of force against the applicant was necessary. Unanimously held that there had been a violation of Article 3.

### Article 5

**R (on the application of Laporte) v Chief Constable of Gloucestershire**

**19 February 2004, Administrative Court**  
[2004] EWHC 253 (Admin)

The police's decision to force anti-war protesters to remain on coaches for two and half hours whilst being escorted back to London from RAF Fairford violated Article 5. However, the decision to prevent the protest taking place was deemed to be proportionate and thus in accordance with Articles 10 and 11.

**R (on the application of Henry) v Parole Board**

**25 March 2004, Administrative Court**  
[2004] EWHC 784 (Admin)

While the application was dismissed on the facts, stated obiter that Article 5 is not violated by the fact that, under s28 of the Crime (Sentences) Act 1997, a life prisoner who has served the tariff part of his sentence must show the Parole Board that he is of a low enough risk to be released.

### Article 6

**R v Mirza; R v Conner and another**

**22 January 2004, House of Lords**  
[2004] UKHL 2

Held (by majority) that the common law rule that after a verdict has been given evidence relating to the impartiality of a jury's deliberations is inadmissible is not incompatible with Article 6(1). This is so even where a juror's statement provides *prima facie* evidence of partiality. However, nothing in the Contempt of Court Act 1981 prevents the court from considering or investigating allegations of jury impropriety causing an unfair trial.

**Perkins v Director of Public Prosecutions**

**6 February 2004, Administrative Court**  
[2004] EWHC 255 (Admin)

The applicant was charged with refusing to provide a sample under the Road Traffic Act 1988 after his offer to provide a blood sample, as opposed to a specimen of breath, was rejected. The Article 6(3)(b) right to have adequate time and facilities for the preparation of one's defence was not engaged. There was no right to give a blood sample and neither the provision of such a sample, nor the level of excess alcohol recorded in the body, would provide a defence.

**R (on the application of Howe) v South Durham Justices**

**13 February 2004, Divisional Court**  
[2004] EWHC 362 (Admin)

The defendants granted two witness summonses requiring the applicant's solicitor to provide evidence as to the applicant's identity for the purposes of establishing whether he was disqualified from driving. Held that this breached neither the presumption of innocence under Article 6 (the proposition that a solicitor effectively speaks for his client being rejected) nor legal professional privilege.

**Kehoe v Secretary of State for Work & Pensions**

**5 March 2004, Court of Appeal**  
[2004] EWCA Civ 225

Allowing an appeal, held that provisions of the Child Support Act 1991, which denied parents access to the courts to enforce payments of child maintenance, did not violate Article 6. Held (by majority) that the claimant parent had no "civil right" under Article 6(1) to entitle her to access a court, as her rights had been redefined specifically by the 1991 Act.

**R (on the application of M) v Secretary of State for Constitutional Affairs and others**

**18 March 2004, Court of Appeal**  
[2004] EWCA Civ 312

The claimant appealed against the dismissal of his application for judicial review of the decision to make an Interim Anti-Social Behaviour Order ("ASBO") against him. Held that allowing interim ASBOs to be made without notice to the defendant was not incompatible with Article 6, as an interim ASBO does not 'determine civil rights and obligations'. There was also no breach of natural justice.

**Amis v Metropolitan Police Commissioner and others**

**31 March 2004, Queen's Bench Division**  
[2004] EWHC 683 (QB)

The serving of a 'Regulation 9 Notice' on a police officer, informing him that he is being investigated for alleged misconduct, does not constitute a "criminal charge" within the meaning of Article 6(1). In consequence an investigation conducted in accordance with Part IV of the Police Act 1996 does not engage Article 6.

**R (on the application of S) v Waltham Forest Youth Court**

**31 March 2004, Divisional Court**  
[2004] EWHC 715 (Admin)

Section 16 of the Youth Justice and Criminal Evidence Act 1999 does not allow a special measures direction to be made permitting a defendant to provide evidence via video link, nor does the trial judge have any common law discretion to do so. Held despite the defendant being a vulnerable 13 year old who refused to give live evidence in her own defence due to threats from co-defendants. No breach of Article 6 – the fairness of the trial can only be judged as a whole.

### Article 8

**Haas v Netherlands**

**13 January 2004, ECtHR**  
Application No. 36983/97

There is no right under Article 8 to be recognised for inheritance purposes as the heir of a deceased. Where the applicant had only had sporadic contact with his father, and where he was not attempting to confirm his personal or family identity, neither the right to family life nor to private life were engaged.

**R (on the application of T) v Secretary of State for the Home Department**

**20 January 2004, Administrative Court**  
[2004] EWHC 13 (Admin)

The detention of a 16 year-old girl in a YOI within an adult prison was not unlawful and was a justified and proportionate interference with Article 8. Furthermore, it was permitted by the UK's reservation to art 37(c) of the UN Convention on the Rights of the Child. The question of whether a 16 year old can be sent to prison is for Parliament, not the courts.

**X v Chief Constable of West Midlands Police**

**23 January 2004, Administrative Court**  
[2004] EWHC 61 (Admin)

The exercise of a Chief Constable's s115(7) Police Act 1997 discretion to provide non-conviction information in an enhanced criminal record certificate must comply with Article 8(2). There must be a "pressing need" to disclose information which has not been the subject of judicial adjudication, is highly contentious and is likely to render the claimant unemployable. Also, procedural fairness requires the claimant to have an opportunity to make representations pre-disclosure, as the decision to disclose may effectively be a finding that he has committed serious criminal offences.

**Re G (a child)**

**27 January 2004, Court of Appeal**  
[2004] EWCA Civ 24

An application for directions under s38(6) Children's Act 1989 may engage Articles 6 and 8, as it may be the parents' only realistic prospect of averting a care order and a freeing order. On the facts, held that the trial judge should have accepted jurisdiction under s38(6) and should not have refused to extend the applicant parents' residential assessment. Also, failure to provide witnesses for cross-examination on the issue of the assessment's cost violated the parents' Article 6 rights.

**F (Claire) v Secretary of State for the Home Department & Another**

**30 January 2004, High Court Family Division**  
[2004] EWHC 111 (Fam)

A decision that the applicant (who was serving a six year prison sentence) ought to have her 9mth old baby separated from her, was quashed. The Home Secretary's current policy, whereby the child's best interests were the primary consideration, was lawful and met all the requirements of Article 8. However, in this case the child's interests were not properly represented in the decision making process and her Article 8 rights had been breached.

**Glass v United Kingdom**

**9 March 2004, ECtHR**  
Application No. 61827/00

The first applicant, a severely disabled boy, was treated with diamorphine by doctors against the express wishes of his mother. Held that while the action taken by the hospital staff pursued a legitimate purpose (and was not taken to deliberately hasten death), the authorities' decision to override the mother's objection to the proposed treatment without court authorisation had interfered with the child's Article 8 right to respect for his physical integrity.

**R (on the application of M) v Islington Borough Council**

**2 April 2004, Court of Appeal**  
[2004] EWCA Civ 235

Islington sought to fulfil its duty to safeguard child welfare under s17 of the Children Act 1989 by issuing one way tickets to Guyana to a mother unlawfully in the UK and her British citizen child. Held that to do so it would first need to a) be satisfied that the child would no longer be 'in need' in Guyana; b) take into account the child (and her father's) Convention rights – including Article 8; and c) establish the implications of British citizenship on the child's immigration status. Also held that Islington did have the power to provide accommodation until the mother was issued with removal directions, and that a consideration of Convention rights might mean that this power must be exercised.

### Article 10

**Re Roddy (a child)**

**2 December 2003, High Court Family Division**  
[2003] EWHC 2927 (Fam)

A mother who was aged 12 at the time of her pregnancy, and the similarly aged father, had obtained injunctions to protect their identities in the face of media interest. The mother now wanted to publicise her story. The case required a balancing of rights under Articles 8 and 10. It was the court's duty to defend the right of a child of appropriate age and maturity (the mother in the instant case) to tell her story. However, the infant's anonymity should remain protected. The balance of rights required the father's continued anonymity but would not prevent his story being told.

### Article 1 of the First Protocol

**Pennycook v Shaws (EAL) Ltd**

**12 February 2004, Court of Appeal**  
[2004] EWCA Civ 100

A tenant responded to his landlord's notice to terminate a business lease with a counter notice accepting termination, but later served a negative counter notice stating that he did not wish to terminate. Held that the original counter notice was irrevocable. While no violation was found, the statutory right to renew a business tenancy is a "possession" for the purposes of Article 1 of Protocol 1, and the right was engaged in this case as the irrevocability rule concerned the deprivation rather than the delimitation of that right.

**Secretary of State for Defence v Hopkins**

**20 February 2004, Administrative Court**  
[2004] EWHC 299

Held that the claimant should not have been granted an additional allowance on top of his

Naval Pension for an unmarried dependant who had not lived as his spouse for the required 6 months prior to his entering into service. Article 8 did not apply as it does not give rise to the right to receive financial assistance to support family life, and Article 1 of Protocol 1 was not engaged as the payment arose out of need, not entitlement. There had also been no discrimination under Article 14 as length of time living together does not come within 'other status'.

### Article 2 of the First Protocol

**Ali v Head Teacher & Governors of the Lord Grey School**

**29 March 2004, Court of Appeal**  
[2004] EWCA Civ 382

A pupil was excluded from school without the correct procedures being followed, making the exclusion unlawful, and the exclusion was then maintained beyond the legal time limit. Held that there was no breach of his right to education in relation to the technically unlawful exclusion because he had been supplied with substitute homework and therefore the essence of the right was not breached. However, the exclusion beyond the legal time limit did breach the essence of the right. The LEA's duty to provide education to those excluded did not absolve the defendants of their responsibility.

### Article 3 of the First Protocol

**Hirst v United Kingdom (No. 2)**

**30 March 2004, ECtHR**  
Application No. 74025/01

The disenfranchisement of UK prisoners was held to be a violation of Article 3 of Protocol 1. Held that although the national legislature is allowed a margin of appreciation regarding the extent to which it restricts prisoners' right to vote, an automatic and blanket restriction on convicted persons was disproportionate and indiscriminate.

### Anti-social Behaviour

**R v Parkin**

**3 February 2004, Court of Appeal**  
[2004] EWCA Crim 287

In light of the fact that the defendant would be released from custody at the age of 18, and would remain on licence for a further year after that, it was unnecessary to add to his sentence an anti-social behaviour order ('ASBO') applicable on his release. It is not possible for a court to determine that an order is necessary to protect members of the public at some future date, particularly after potentially effective custody. Further guidance on ASBOs given.

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