

Article 8 continued

M.C. v Bulgaria
4 December 2003, ECtHR
Application No. 39272/98

Articles 3 and 8 provide a positive obligation to enact criminal legislation to effectively punish rape and sexual abuse and to apply this through effective investigation and prosecution. Bulgaria held in breach, viewed in light of relevant modern standards in comparative and international law, including expert opinions concerning the identification of 'frozen fright' as the most common response to rape.

R (on the application of Kent Pharmaceuticals Ltd) v Director of the Serious Fraud Office
17 December 2003, Divisional Court
[2003] EWHC 3002 (Admin)

In the course of investigations into price-fixing, the SFO disclosed to the Department of Health documents seized during searches of the suspect companies' premises. Held that the SFO's searches had been lawful and that its decision to disclose was 'in accordance with the law' under article 8(2) notwithstanding the width of its discretion. However, the failure to warn the claimant of the disclosure when there was no risk of detriment in doing so was unfair, and the failure to inform them of it after the event was in breach of article 6.

Article 10

Pay v Lancashire Probation Service
29 October 2003, Employment Appeal Tribunal
[2003] All ER (D) 468 (Oct)

Probation officer dismissed for S&M activities/merchandising. Held, in context of unfair dismissal by public authority employer, when determining whether employer acted 'reasonably' under s98(4) Employment Rights Act 1996, tribunals must consider applicant's Convention rights. Article 10 infringement justified to prevent damage to the service's reputation; article 8 not applicable as activities were in public domain.

R (on the application of A) v Secretary of State for the Home Department
27 November 2003, Administrative Court
EWHC [2003] 2846 (Admin)

The monitoring of journalists' interviews with asylum seekers detained as Category A prisoners under the provisions of ATCSA 2001 did not amount to a breach of article 10. Maintenance of good order and discipline in prisons requires a degree of monitoring when prisoners are interviewed, and the additional dimension of national security was justification for the extra measures imposed.

In re: A Local Authority
27 November 2003, High Court Family Division
[2003] EWHC 2746 (Fam)

Injunctions prohibiting publication by local authority of report on conditions in a foster

home upheld as necessary to protect the article 8 rights of children and disabled adults who had resided at the home. In reaching its conclusion the court balanced the residents' privacy against the article 10 right of free expression.

R (on the application of Nilsen) v Governor of HMP Full Sutton and another
19 December 2003, Administrative Court
[2003] EWHC 3160 (Admin)

Challenge to rule that a prisoner's correspondence may not contain material intended for publication if it refers to the inmate's past offences (unless it consists of serious representations on conviction/comments about crime etc). Held that this rule (a) was consistent with article 10 as it was proportionate in the interests of preventing disorder or crime and protecting the morals and rights and freedoms of others, and (b) could lawfully apply to autobiographical material.

Article 14

R (on the application of Erskine) v Lambeth Borough Council
14 October 2003, Administrative Court
[2003] EWHC 2479 (Admin)

To come 'within the ambit' of a Convention right for article 14 purposes, the purpose of legislation must be to further rights protected by the ECHR. However, it did not need to be enacted to promote Convention rights as such.

Data Protection Act

R (on the application of Alan Lord) v Secretary of State for the Home Department
1 September 2003, Administrative Court
[2003] EWHC 2073 (Admin)

Successful application under the DPA for disclosure of full reports regarding a prisoner's suitability for downgrading from Category A status. The practice of providing 'gists' heavily criticised, and the current blanket non-disclosure policy held not to be justified under s29(1), s7(4) or s8(2) of the DPA. Targeted non-disclosure based on individual facts required.

Durant (Michael John) v Financial Services Authority
8 December 2003, Court of Appeal
[2003] EWCA Civ 1746

Section 7 of the DPA is to be used to check unlawful infringement of privacy, not as a proxy for discovery with a view to litigation. "Personal data" has a narrow meaning of information that affects privacy in personal and family life, or in a business or professional capacity and must have the data subject as its focus. Guidance also given on meaning of "relevant filing system".

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News

Human Rights and Public Law Line
Winter 2003/2004

Between a rock and a hard place – ADR after Anufrijeva Louise Whitfield of PLP

One of the big decisions in human rights and public law towards the end of last year was R (on the application of Anufrijeva) v London Borough of Southwark [2003] EWCA Civ 1406. This was the Court of Appeal's decision on three cases involving claims for damages under the Human Rights Act arising largely from the failure of public bodies to do their jobs properly. The first case concerned housing and community care issues, the second (N) was an asylum-seeker whose badly handled application led to him suffering from depression and the third was a refugee (M) whose attempts to be reunited with his family were frustrated by delay and poor service on the part of the Home Office.

The main focus of the decision was on the entitlement to HRA damages. However, the judgment also included Cowl¹ – type guidance concerning ADR – including a number of very specific points to consider in terms of ADR before embarking on a claim for damages under the HRA. These points should also be considered in terms of applying for public funding; see the December 2003 edition of Focus, page 4.

However, these points come with a proviso, as they only apply to a claim for damages for breaches arising from maladministration. This is why it is worth being familiar with the facts of the three cases in question as they were presumably all considered to be examples of maladministration, and thus the guidance in the judgment on ADR is confined to such claims. Clearly the Anufrijeva family's situation was different to that of N or M. The latter two cases revolved around bureaucratic errors and delay, whereas the former was a dispute (as in Bernard²) as to whether accommodation was suitable or not. Whilst the cases of N and M are clearly maladministration in the traditional sense of the concept (see the Crossman catalogue³), a failure to provide suitable accommodation is not so easy to fit into this category, unless the Court of Appeal was saying that the specific cause of complaint was the delay in assessing the family and providing suitable alternatives.

It is therefore worth considering whether a case can be characterised as one of maladministration.

Turning to the substantive points about ADR at paragraph 81 of the judgment, the most significant are those at subparagraphs (iii) and (iv) which read as follows:

- "(iii) Before giving permission to apply for judicial review the Administrative Court judge should require the claimant to explain why it would not be more appropriate to use any available internal complaint procedure or proceed by making a claim to the PCA or LGO at least in the first instance.
- (iv) If there is a legitimate claim for other relief, permission should if appropriate be limited to that relief and consideration given to deferring permission for the damages claim, adjourning or staying that claim until use has been made of ADR, whether by a reference to a mediator or an ombudsman or otherwise, or remitting that claim to a district judge or master if it cannot be dismissed summarily on grounds that in any event an award of damages is not required to achieve just satisfaction."

Thus, following (iii) above, it may now be wise to include very specifically in the claim form or grounds an explanation as to why it is not more appropriate to use a complaints procedure or Ombudsman - or that this has been tried already and failed. Similarly, any arguments as to why permission on the damages part of the claim should be granted at the same time as permission for other relief should be included to meet the requirements of (iv) as appropriate.

The Court of Appeal were clearly seeking a pragmatic solution to what they perceived to be a problem (scant judicial resources, disproportionate legal costs and so on). The quantum of damages in such cases should be assessed by reference to Ombudsman cases, so why not go the whole hog and have the entire damages claim decided by him?

However, it is questionable whether this approach can fully vindicate an individual's rights. There is no duty upon an Ombudsman to investigate any case referred to him, he has no jurisdiction to investigate questions of law such as whether there has been a breach of a Convention article (he is confined to investigating maladministration) and his recommendations are not enforceable. There is also very limited CLS funding available to advise clients on Ombudsman complaints or other ADR options.

Claimants may therefore find themselves caught between a rock and a hard place – the Ombudsman says he can't deal with human rights violations, but the Court says if it's a breach caused by maladministration, you should go to the Ombudsman first.

PLP understands that leave to appeal to the House of Lords is being sought in one of the cases.

¹ Frank Cowl v Plymouth City Council [2001] EWCA Civ 1935

² Bernard v London Borough of Enfield [2002] EWHC 2282 Admin; £10,000 awarded.

³ The list of examples of maladministration given to Parliament during the passage of the first bill to create an Ombudsman, including delay, bias, neglect etc.

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Human Rights Caselist up to December 2003

Article 2

R (Khan) v Secretary of State for Health
10 October 2003, Court of Appeal
[2003] EWCA Civ 1129

Article 2 creates a duty for a state to investigate the death of a person where agents of that state bear potential responsibility for the loss of a human life. In this case there was evidence that health care professionals may have acted with gross negligence, contributing to the death of a three-year old girl. The state must provide a procedural mechanism to investigate the cause of death, and responsibility for the death should be ascertained through a public investigation (in which families of the deceased should be involved to the extent necessary to safeguard their interests).

R (Amin) v Secretary of State for the Home Department
16 October 2003, House of Lords
[2003] UKHL 51

Article 2 creates a duty for a state to investigate the murder of a person held in custody where negligence by state agents may have led to a death or allowed it to happen (no weaker than where it appears the state agent may have caused the death). This duty was breached when the state neglected to conduct an adequate public inquiry after a 19-year old inmate was killed by his cellmate who was known to be disturbed. The few investigations that did occur were conducted in private and restricted participation by the victim's family.

Article 3

R (on the application of S, D & T) v Secretary of State for the Home Department

31 July 2003, Administrative Court
[2003] EWHC 1941 (Admin)

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

25 September 2003, Court of Appeal
[2003] EWCA Civ 1285

Three applicants challenged their denial of NASS support under s55 of the Nationality, Immigration & Asylum Act 2002 due to their failure to claim asylum 'as soon as reasonably practicable'. Despite alteration of immigration and asylum support practice since the criticism in the 'Q' decision ([2003] EWCA Civ 364), all three applicants successful in showing that the denial of support, leaving them destitute, constituted a breach of article 3.

The Secretary of State for the Home Department appealed against S, D & T in the T case. A harsher interpretation of the article 3 threshold led to the decision to reinstate T's NASS support being overturned.

R (on the application of PS) v Responsible Medical Officer and another
10 October 2003, Administrative Court
[2003] EWHC 2335 (Admin)

Administering medically necessary anti-psychotic drugs against the will of a patient detained under

Mental Health legislation despite it being against his religion and his having capacity to consent did not reach the minimum level of severity required to engage article 3 – in light of the medical benefit and the relatively minor adverse consequences. Infringement of article 8 justified 'for the protection of health'.

Namazzi v Secretary of State for the Home Department

16 October 2003, Court of Appeal
[2003] EWCA Civ 1369

A Ugandan woman suffering from AIDS was refused leave to remain in the UK by the IAT, despite evidence that inferior medical care in Uganda would cause her life expectancy to decrease from several decades to less than 2 years. A majority of the Court of Appeal upheld the decision, holding that the applicant's circumstances did not raise humanitarian considerations so compelling as to engage article 3 (*D v UK* (App No. 30240/96) distinguished on its facts – "an extension of an extension to the article 3 obligation").

R (on the application of Bagdanavicius and another) v Secretary of State for the Home Department

11 November 2003, Court of Appeal
[2003] EWCA Civ 1605

There is no breach of article 3 where a person is deported to a state where they are at risk of ill-treatment at the hands of non-state actors if that state provides a reasonable level of protection against the risk (i.e. the same principles apply as where well founded fear of persecution is claimed). The protection available from that state does not have to obviate the risk entirely in order to avoid a breach of article 3. The same applies whether or not the receiving state is a signatory to the Convention.

Henaf v France

27 November 2003, ECtHR
Application No. 65436/01

A 75 year-old prisoner was chained to his hospital bed throughout the night before he was due to undergo an operation. Taking into account his age and poor health, that he was not shown to be a particular security risk, and that two policemen were on duty outside his room, the treatment was held to be disproportionate to the security risk. Violation of article 3 found.

Article 5

R v Parchment and others

5 September 2003, Court of Appeal
[2003] EWCA Crim 2428

Following the House of Lords' decision in *R v Lichniak and Pyrah* [2002] UKHL 47, the Court dismissed the appellants' argument that the sentence of detention during her Majesty's pleasure imposed on them for murder breached articles 3 and 5.

R (on the application of Gillan & another) v Metropolitan Police Commissioner & another
31 October 2003, Divisional Court
[2003] EWHC 2545 (Admin)

Challenge to the grant of an authorisation under

s44 of the Terrorism Act giving police powers to stop & search without need for reasonable suspicion, and their use against peaceful protesters (including a journalist). The Court stated that its supervision of the decision was limited due to the national security context (i.e. legitimate concerns over terrorism) and found that the authorisation was lawfully made. The police's use of stop & search powers caused the court concern, but did not afford the claimants a remedy in public law. Alleged violations of articles 5, 8, 9, 10 and 11 also rejected.

R (Cawser) v Secretary of State for the Home Department

5 November 2003, Court of Appeal
[2003] EWCA Civ 1522

The claimant was serving an automatic life sentence for rape under section 109 Powers of the Criminal Courts (Sentencing) Act 2000. The Parole Board determined that he needed to attend an extended sex offenders treatment programme before he could be considered for release. The fact that he would have to wait up to two years for a place did not give rise to a breach of article 5(4).

R (on the application of IH) v Secretary of State for the Home Department and another

13 November 2003, House of Lords
[2003] UKHL 59

There was no breach of article 5(1) where the Mental Health Tribunal ordered the conditional discharge of a patient but he continued to be detained because the conditions could not be fulfilled. However, the failure to reconsider the legality of his detention when the conditions had still not been met a few months later was a breach of article 5(4).

R (on the application of Sim) v Parole Board and another

19 December 2003, Court of Appeal
[2003] EWCA Civ 1845

When it is decided to revoke a licence in the course of an extended sentence given under s85 Powers of Criminal Courts (Sentencing) Act 2000, such detention must be subject to review by a judicial body in line with the requirement in article 5(4). Further, the presumption that detention is justified after recall during the extension period needed to be reinterpreted under s3 of the HRA to be compatible with article 5.

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

29 December 2003, QBD
[2003] EWHC 2953 (Admin)

The SSHD's refusal to refer the case of a discretionary life prisoner compulsorily detained in hospital to the Parole Board convened concurrently with a mental health review tribunal was not considered unlawful. Article 5(4) does not require that the lawfulness of detention of such a prisoner be reviewed by a single tribunal. Member states might sensibly create different courts to determine the lawfulness of detention under different heads of Article 5(1).

Article 6

R v Knight

29 July 2003, Court of Appeal
[2003] EWCA Crim 1977

The purpose of section 34 Criminal Justice and Public Order Act 1994 is not to subject a suspect to cross-examination by the police on his or her defence. It is only to ensure early disclosure of the defence. The trial judge was wrong to allow a jury to draw an adverse inference where the defendant had set out his defence in a statement read out by his solicitor at the start of his police interview and thereafter made no comment.

Jones v UK

9 September 2003, ECtHR (Admissibility)
Application No. 30900/02

Given the uncertainty in domestic law before the House of Lords' judgment in his case (*R v Jones* [2002] UKHL 5) the applicant could not be taken to have unequivocally and intentionally waived his right to a fair trial by failing to attend his trial. However, the powers of the Court of Appeal to admit new evidence were sufficient to avoid a breach of article 6. Application declared inadmissible.

S.C. v UK

30 September 2003, ECtHR (Admissibility)
Application No. 60958/00

The applicant, an 11 year old boy with learning difficulties, was tried in the Crown Court for attempted robbery. He complained to the ECtHR that his trial had not been fair because, by virtue of his age and intellect, he was unable to participate effectively. Despite the trial complying with the appropriate Practice Direction, the application was declared admissible.

Cannan v Governor of HMP Sutton & another
9 October 2003, Court of Appeal
[2003] EWCA Civ 1480

It is recognised that in a high security prison the rules governing transmission of legal documents must balance the rights of the individual against the interests of society. Held that the prison policy allowing documents to be handed over without prior clearance only in 'exceptional circumstances' was a disproportionate and unjustifiable restriction on the article 6 right to communicate with a lawyer.

Ezeh & Connors v UK

9 October 2003, ECtHR (GC)

Applications Nos. 39665/98 and 40086/98

Grand Chamber upheld Commission's decision that prison disciplinary proceedings with the power to impose 'additional days' as punishment 'determine a criminal charge' for the purposes of article 6, as the imposition of extra days of detention is a fresh deprivation of liberty in response to a finding of culpability. Consequential decision that the denial of legal representation to those subject to such procedures breaches article 6(3)(c) also upheld.

R v H & C

16 October 2003, Court of Appeal
[2003] EWCA Crim 2847

Despite the ECtHR's judgement in *Edwards and Lewis v UK* (Applications no. 39647/98 and 40461/98, 22 July 2003) it is not necessary for special counsel to be appointed to represent a defendant's interests at a PII hearing. Only in rare cases would this be appropriate. (N.B. the Chamber judgment in *Edwards and Lewis* has been referred for re-consideration to the Court's Grand Chamber.)

Attorney General's Reference (No.2 of 2001)
11 December 2003, House of Lords

[2003] UKHL 68

The majority of the House of Lords held that ordering a stay of proceedings is not the appropriate remedy for a violation of the reasonable time requirement in article 6 unless a fair trial is not possible or it is unfair to try the defendant at all. Also held that, for criminal proceedings, the 'reasonable time' period should generally be calculated from when the defendant was charged or summonsed.

Article 7

R v R; R v Goldstein

28 November 2003, Court of Appeal
[2002] EWCA Crim 3450

The vagueness of the offence of causing a public nuisance does not violate article 7. It provides the necessary reasonable degree of foreseeability of the consequences which action or conduct may entail. The level of imprecision inherent in the offence is necessary for its flexible application. Also in accordance with the law for the purposes of articles 8 and 10.

Article 8

Akrich v Secretary of State for the Home Department

23 September 2003, European Court of Justice
Case C-109/01 (Preliminary Reference)

Moroccan entered UK secretly, married UK national, and was deported to Ireland where his spouse was working. Sought to re-enter UK with her. ECJ held, *inter alia*, if member state national in this situation returns to original member state as worker, but spouse does not enjoy benefit of EC law rights, then, provided marriage was genuine, authorities of member state must have regard to article 8 in assessing the spouse's application to enter.

Evans v Amicus Healthcare Ltd & others; Hadley v Midland Fertility Services Ltd & others

1 October 2003, High Court Family Division
[2003] EWHC 2161 (Fam)

The legislative scheme governing the use of frozen embryos did not engage article 2 as an embryo

was not considered a human life; however it did engage the article 8 right to respect for the private lives of all the parties. The scheme requiring consent from both parties interfered with article 8 but was proportionate and necessary to balance and protect the rights of all four gamete providers. Therefore there was no breach.

Anufrijeva and another v Southwark London Borough Council

16 October 2003, Court of Appeal
[2003] EWCA (Civ) 1406

While article 8 is capable of imposing on the state a positive duty to provide support, it is unlikely that this duty will arise unless the predicament of an individual is such as to raise article 3 issues or if there is a severe impact on family life. Inaction would only breach article 8 if there's an element of culpability. Guidance also given on claiming damages under the HRA and ADR (see article on page 1).

Wainwright & another v Home Office

16 October 2003, House of Lords
[2003] UKHL 53

A mother and son were subjected to an humiliating strip-search when visiting a relative at a Leeds prison. The county court had found that the law of tort should give a remedy for any kind of distress caused by an infringement of the right of privacy protected by article 8, and therefore 'created' a tort of invasion of privacy. The Court of Appeal rejection of these arguments was upheld, the House of Lords stating that such an extension should not be decided by common law.

R (on the application of A) v National Probation Service

18 November 2003, Administrative Court
[2003] EWHC 2910 (Admin)

Where a life prisoner was released on life licence it was not necessarily a breach of article 8 to disclose the nature of his conviction to the manager of his sheltered accommodation. However, there should not be a presumption of disclosure and any such disclosure should be necessary and proportionate in the circumstances.

Marcic v Thames Water Utilities Limited

4 December 2003, House of Lords
[2003] UKHL 66

Reversing decision that a public authority had acted incompatibly with the claimant's rights under article 8 and article 1 of protocol 1 in carrying out flood alleviation works under the Water Industry Act 1991. In considering whether general policy is Convention compliant, a fair balance must be struck between the interests of the individual and those of the wider community. In principle the statutory scheme struck a reasonable balance between those interests, and its malfunction on one occasion did not cast doubt on its overall fairness.

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